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

Rules and Regulations

Federal Register

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FARM CREDIT SYSTEM INSURANCE CORPORATION

12 CFR Part 1411

RIN 3055–AA22

Rules of Practice and Procedure; Adjusting Civil Money Penalties for Inflation

Correction

In rule document 2024–339 appearing on page 1445 in the issue of Wednesday, January 10, 2024, make the following correction:

In the first column, in the third line, the Regulatory Index Number (RIN) should read as set forth above.

[FR Doc. C1–2024–00339 Filed 1–12–24; 8:45 am]

BILLING CODE 0099–10–D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2024–0052; Airspace Docket No. 24–ASO–01]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; San Juan, PR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action makes the editorial changes, updating the geographic coordinates of Luis Munoz Marin International Airport and Fernando Luis Ribas Dominicci Airport and replacing the term Notice to Airmen with Notice to Air Missions and Airport/Facility Directory with Chart Supplement in Class D description. This action also corrects the airspace header for the San Juan Class D airspace. This action does not change the airspace boundaries or operating requirements.

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

ADDRESSES: This final rule may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours a day, 365 days a year.

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it updates each airport's geographic coordinates and airspace descriptions. This update is an administrative change and does not change the airspace boundaries or operating requirements.

Incorporation by Reference

Class D and Class E airspace are published in paragraphs 5000 and 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, incorporated by reference in 14 CFR 71.1 annually. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next FAA Order JO 7400.11 update. FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to 14 CFR part 71 amends the Class D airspace and the Class E airspace extending upward from 700 feet above the surface for Luis Munoz Marin International Airport and Fernando Luis Ribas Dominicci Airport, San Juan, PR by updating each airport's geographic coordinates, as well as updating the descriptions by making editorial changes, replacing the term Notice to Airmen with Notice to Air Missions and replacing the term Airport/Facility Directory with Chart Supplement in the appropriate description. In addition, the San Juan Class D airspace header is corrected to read PR (previously RP). This action is an administrative change and does not affect the airspace boundaries or operating requirements; therefore, notice and public procedure under 5 U.S.C. 553(b) is unnecessary.

Regulatory Notices and Analyses

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

Environmental Review

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.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 5000 Class D Airspace.

* * * * *

ASO PR D San Juan, PR [Amended]

Fernando Luis Ribas Dominicci Airport
(Lat. 18°27′24″ N, long. 66°05′55″ W)
Luis Munoz Marin International Airport
(Lat. 18°26′22″ N, long. 66°00′08″ W)

That airspace extending upward from the surface, to but not including 1,200 feet MSL, within a 3.9-mile radius of San Juan Fernando Luis Ribas Dominicci Airport and 1 mile each side of the 275° bearing from the Fernando Luis Ribas Dominicci Airport, extending from the 3.9-mile radius to 5.3 miles west of the airport; excluding that portion within the San Juan Luis Munoz Marin International Airport, PR, Class C airspace area. This Class D airspace area is effective during the dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

* * * * *

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

* * * * *

ASO PR E5 San Juan, PR [Amended]

Luis Munoz Marin International Airport
(Lat. 18°26′22″ N, long. 66°00′08″ W)
Fernando Luis Ribas Dominicci Airport
(Lat. 18°27′24″ N, long. 66°05′55″ W)

That airspace extending upward from 700 feet or more above the surface south of Lat. 18°23′00″ N, within a 17-mile radius of Luis Munoz International Airport and that airspace north of Lat. 18°23′00″ N, within a 13-mile radius of Luis Munoz Marin International Airport and 1 mile each side of the 275° bearing from the Fernando Luis Ribas Dominicci Airport, extending 2.5 miles west from the 13-mile radius point.

* * * * *

Issued in College Park, Georgia, on January 9, 2024.

Andreese C. Davis,

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

[FR Doc. 2024–00562 Filed 1–12–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2051; Airspace Docket No. 23–ASO–38]

RIN 2120–AA66

Amendment of Class E Airspace; Statesboro, GA; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting a final rule published in the **Federal Register** on December 27, 2023. The final rule amended Class E airspace extending upward from 700 feet above the surface for Statesboro-Bulloch County Airport, Statesboro, GA. This action corrects an error in the Class E legal description.

DATES: Effective 0901 UTC, March 21, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

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

SUPPLEMENTARY INFORMATION:

History

The FAA published a final rule in the **Federal Register** on December 27, 2023 (88 FR 89292), for Docket No. FAA 2023–2051, amending Class E airspace extending upward from 700 feet above the surface for Statesboro-Bulloch County Airport, Statesboro, GA. After publication, the FAA found the Class E description listed the airport name incorrectly. This action corrects this error.

Correction to the Final Rule

In FR Doc 2023–28312 at 89293, published in the **Federal Register** on December 27, 2023, The FAA makes the following correction:

■ 1. On page 89293, in the second column, correct the ASO GA E5 description for Statesboro, GA, to read as follows:

ASO GA E5 Statesboro, GA [Corrected]

Statesboro-Bulloch County Airport, GA
(Lat. 32°28′58″ N, long 81°44′13″ W)

That airspace extending upward from 700 feet above the surface within a 7.2-mile radius of Statesboro-Bulloch County Airport.

Issued in College Park, Georgia, on January 9, 2024

Andreese C. Davis,

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

[FR Doc. 2024–00573 Filed 1–12–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Part 12

[CBP Dec. 24–02]

RIN 1515–AE88

Extension and Amendment of Import Restrictions on Archaeological and Ecclesiastical Ethnological Materials of Bulgaria

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect the extension and modification of import

restrictions on certain archaeological and ecclesiastical ethnological material of Bulgaria. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for extending and modifying the import restrictions originally imposed by CBP Dec. 14–01, and amended by CBP Decision 19–01. The restrictions are being extended through January 14, 2029. The CBP regulations are being amended to reflect these changes. The Designated List of materials to which the restrictions apply is published below.

DATES: Effective January 14, 2024.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ot-otrrculturalproperty@cbp.dhs.gov.* For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (the Convention), allows for the conclusion of an agreement between the United States and another party to the Convention to impose import restrictions on eligible archaeological and ethnological materials. Under the CPIA and applicable U.S. Customs and Border Protection (CBP) regulations, found in section 12.104 of title 19 of the Code of Federal Regulations (19 CFR 12.104), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)). This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); 19 CFR 12.104g(a)).

On January 14, 2014, the United States entered into a memorandum of understanding (2014 MOU) with the Republic of Bulgaria (Bulgaria), concerning the imposition of import restrictions on certain categories of archaeological and ecclesiastical ethnological material of Bulgaria. On January 16, 2014, CBP published a final rule, CBP Dec. 14–01, in the **Federal Register** (79 FR 2781) to reflect the imposition of restrictions on this material, including a list designating the types of archaeological and ecclesiastical ethnological materials covered by the restrictions. Consistent with the requirements of 19 U.S.C. 2602(b) and 19 CFR 12.104g, these restrictions were effective for a period of five years, through January 14, 2019.

The import restrictions were subsequently extended in accordance with 19 U.S.C. 2602(e) and 19 CFR 12.104g(a). On January 8, 2019, the United States entered into a superseding memorandum of understanding (2019 MOU) with Bulgaria to extend the import restrictions. Accordingly, CBP published a final rule, CBP Dec. 19–01, in the **Federal Register** (84 FR 112) amending 19 CFR 12.104g(b) to extend the import restrictions and correct an inconsistency in the 2014 MOU listing the ecclesiastical ethnological material as ranging in date from A.D. 681 rather than as listed in the Designated List as from the beginning of the 4th century A.D.

On May 19, 2023, the United States Department of State published a proposal to extend and amend the 2019 MOU, in the **Federal Register** (88 FR 32265). On November 7, 2023, after considering the views and recommendations of the Cultural Property Advisory Committee, the Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, made the determinations necessary to extend and amend the 2019 MOU. Following an exchange of diplomatic notes, the United States Department of State and the Ministry of Foreign Affairs of the Republic of Bulgaria have agreed to amend the 2019 MOU, and extend the restrictions for an additional five-year period, through January 14, 2029.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions and amendment of the Designated List of cultural property described in CBP Dec. 14–01 and revised by CBP Dec. 19–01. The amendments include the expansion of dates for archaeological and ecclesiastical ethnological material, corrections to minor inconsistencies in the Designated List in CBP Dec. 19–01, and explicit clarification that wood is covered by import restrictions on archaeological organic materials. The restrictions on the importation of archaeological and ecclesiastical ethnological material will be in effect through January 14, 2029. Importation of such material of Bulgaria, as described in the Designated List below, will be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List includes archaeological and ecclesiastical ethnological material. Archaeological material ranges in date from approximately 1.6 million years ago through approximately A.D. 1750. Ecclesiastical ethnological material ranges in date from the beginning of the 4th century A.D. through approximately A.D. 1900. For the reader's convenience, CBP is reproducing the Designated List contained in CBP Dec. 14–01 and last revised by CBP Dec. 19–01 in its entirety, with the changes discussed herein.

The list is divided into the following categories of objects:

I. Archaeological Material
  A. Stone
  B. Metal
  C. Ceramic
  D. Bone, Ivory, Horn, Wood, and other Organics
  E. Glass and Faience
  F. Paintings
  G. Mosaics
II. Ecclesiastical Ethnological Material
  A. Stone
  B. Metal
  C. Ceramic
  D. Bone and Ivory Objects
  E. Wood
  F. Glass
  G. Textile
  H. Parchment
  I. Painting
  J. Mosaics

The Designated List and additional information may also be found at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions* by selecting the material for ''Bulgaria.''

Designated List of Archeological and Ecclesiastical Ethnological Material of Bulgaria

The bilateral agreement between the United States and Bulgaria includes, but is not limited to, the categories of objects described in the designated list set forth below. These categories of objects are subject to the import restrictions set forth above, in accordance with the above explained applicable law and the regulation amended in this document (19 CFR 12.104g(a)).

The import restrictions cover complete examples of objects and fragments thereof.

The archaeological materials represent the following periods and cultures: Paleolithic, Neolithic, Chalcolithic, Bronze Age, Iron Age, Thracian, Hellenistic, Roman, Middle Ages, First Bulgarian Empire, Byzantine, Second Bulgarian Empire, and Ottoman. The ecclesiastical ethnological materials represent the following periods and cultures: Middle Ages, First Bulgarian Empire, Byzantine, Second Bulgarian Empire, Ottoman, and Third Bulgarian State. Ancient place names associated with the region of Bulgaria include Odrysian Kingdom, Thrace, Thracia, Moesia Inferior, Moesia Superior, Coastal Dacia, Inner Dacia, Rhodope, Haemimontus, Europa, Bulgaria, and Eyalet of Rumeli.

I. Archaeological Material

The categories of Bulgarian archaeological objects on which import restrictions are imposed were made from approximately 1.6 million years ago through approximately A.D. 1750.

A. Stone

1. Sculpture

a. Architectural Elements—In marble, limestone, gypsum, and other kinds of stone. Types include acroterion, antefix, architrave, base, capital, caryatid, coffer, column, crowning, fountain, frieze, pediment, pilaster, mask, metope, mosaic and inlay, jamb, tile, triglyph, tympanum, basin, and wellhead.

Approximate date: First millennium B.C. to A.D. 1750.

b. Monuments—In marble, limestone, granite, sandstone, and other kinds of stone. Types include, but are not limited to, votive statues, funerary, documentary, votive stelae, military columns, herms, stone blocks, bases, and base revetments. These may be painted, carved with borders, carry relief sculpture, and/or carry dedicatory, documentary, official, or funerary inscriptions, written in various languages including Thracian, Proto-Bulgarian, Greek, Latin, Hebrew, Turkish, and Bulgarian.

Approximate date: First millennium B.C. through A.D. 1750.

c. Sarcophagi and Ossuaries—In marble, limestone, and other kinds of stone. Some have figural scenes painted on them, others have figural scenes carved in relief, and some are plain or just have decorative moldings.

Approximate date: Third millennium B.C. through A.D. 1750.

d. Large Statuary—Primarily in marble, also in limestone and sandstone. Subject matter includes human and animal figures and groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 1 m to 2.5 m in height and life-size busts (head and shoulders of an individual).

Approximate date: Third millennium B.C. through A.D. 1750.

e. Small Statuary and Figurines—In marble and other stone. Subject matter includes human and animal figures and groups of figures in the round. These range from approximately 10 cm to 1 m in height.

Approximate date: Paleolithic through A.D. 1750.

f. Reliefs—In marble and other stone. Types include carved relief vases and slabs carved with subject matter such as a horseman, vegetative, floral, or decorative motifs, sometimes inscribed. Used for architectural decoration, funerary, votive, or commemorative monuments.

Approximate date: Third millennium B.C. through A.D. 1750.

g. Furniture—In marble and other stone. Types include tables, thrones, and beds.

Approximate date: Third millennium B.C. through A.D. 1750.

2. Vessels—In marble, steatite, rock crystal, and other stone. These may belong to conventional shapes such as bowls, cups, jars, jugs, and lamps, or may occur in the shape of a human or animal, or part of a human or animal.

Approximate date: Neolithic through A.D. 1750.

3. Tools, Instruments, and Weapons—In flint, quartz, obsidian, and other hard stones. Types of stone tools include large and small blades, borers, scrapers, sickles, awls, harpoons, cores, loom weights, and arrow heads. Ground stone types include grinders (*e.g.,* mortars, pestles, millstones, whetstones), choppers, axes, hammers, moulds, and mace heads.

Approximate date: Paleolithic through A.D. 1750.

4. Seals and Beads—In marble, limestone, and various semiprecious stones including rock crystal, amethyst, jasper, agate, steatite, and carnelian. May be incised or cut as gems or cameos.

Approximate date: Paleolithic through A.D. 1750.

B. Metal

1. Sculpture

a. Large Statuary—Primarily in bronze, including fragments of statues. Subject matter includes human and animal figures, and groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 1 m to 2.5 m in height and life-size busts (head and shoulders of an individual).

Approximate date: Fifth millennium B.C. through A.D. 1750.

b. Small Statuary and Figurines—Subject matter includes human and animal figures, groups of figures in the round, masks, plaques, and bronze hands of Sabazios. These range from approximately 10 cm to 1 m in height.

Approximate date: First millennium B.C. through Roman.

c. Reliefs—In gold, bronze, or lead. Types include burial masks, leaves, and appliqué with images of gods, mythical creatures, etc.

Approximate date: First millennium B.C. through Roman.

d. Inscribed or Decorated Sheet Metal—In bronze or lead. Engraved inscriptions, ''military diplomas,'' and thin metal sheets with engraved or impressed designs often used as attachments to furniture.

Approximate date: First millennium B.C. through A.D. 1750.

2. Vessels—In bronze, gold, and silver. Bronze may be gilded or silver-plated. These may belong to conventional shapes such as bowls, cups, jars, jugs, strainers, cauldrons, candelabras, and lamps, or may occur in the shape of a human or animal or part of a human or animal.

Approximate date: Fifth millennium B.C. through A.D. 1750.

3. Personal Ornaments—In copper, bronze, gold, and silver. Bronze may be gilded or silver-plated. Types include torques, rings, beads, pendants, belts, belt buckles, belt ends/appliqués, earrings, ear caps, diadems, spangles, straight and safety pins, necklaces, mirrors, wreaths, cuffs, pectoral crosses, and beads.

Approximate date: Fifth millennium B.C. through A.D. 1750.

4. Tools—In copper, bronze, and iron. Types include knives, hooks, weights, axes, scrapers (strigils), trowels, keys, dies for making coins, and the tools of physicians and artisans such as carpenters, masons, and metal smiths.

Approximate date: Fifth millennium B.C. through A.D. 1750.

5. Weapons and Armor—In copper, bronze, and iron. Types include both launching weapons (harpoons, spears, and javelins) and weapons for hand-to-hand combat (swords, daggers, battle axes, rapiers, maces etc.). Armor includes body armor, such as helmets, cuirasses, shin guards, and shields, and horse armor/chariot decorations often decorated with elaborate engraved, embossed, or perforated designs.

Approximate date: Fifth millennium B.C. through A.D. 1750.

6. Seals—In lead, tin, copper, bronze, silver, and gold. Types include rings, amulets, stamps, and seals with shank. They pertain to individuals, kings, emperors, patriarchs, and other spiritual leaders.

Approximate date: Bronze Age through A.D.1750.

7. Coins—In copper, bronze, silver, and gold. Many of the listed coins with inscriptions in Greek can be found in B. Head, *Historia Numorum: A Manual of Greek Numismatics* (London, 1911) and C.M. Kraay, *Archaic and Classical Greek Coins* (London, 1976). Many of the Roman provincial mints in modern Bulgaria are covered in I. Varbanov, *Greek Imperial Coins I: Dacia, Moesia Superior, Moesia Inferior* (Bourgas, 2005), id., *Greek Imperial Coins II: Thrace (from Abdera to Pautalia)* (Bourgas, 2005), id., *Greek Imperial Coins III: Thrace (from Perinthus to Trajanopolis), Chersonesos Thraciae, Insula Thraciae, Macedonia* (Bourgas 2007). A non-exclusive list of pre-Roman and Roman mints includes Mesembria (modern Nesembar), Dionysopolis (Balchik), Marcianopolis (Devnya), Nicopolis ad Istrum (near Veliko Tarnovo), Odessus (Varna), Anchialus (Pomorie), Apollonia Pontica (Sozopol), Cabyle (Kabile), Deultum (Debelt), Nicopolis ad Nestum (Garmen), Pautalia (Kyustendil), Philippopolis (Plovdiv), Serdica (Sofia), and Augusta Traiana (Stara Zagora). Later coins may be found in A. Radushev and G. Zhekov, *Catalogue of Bulgarian Medieval Coins IX–XV c.* (Sofia 1999) and J. Youroukova and V. Penchev, *Bulgarian Medieval Coins and Seals* (Sofia 1990).

a. Pre-monetary media of exchange including ''arrow money,'' bells, and bracelets.

Approximate date: 13th century B.C. through 6th century B.C.

b. Thracian and Hellenistic coins struck in gold, silver, and bronze by city-states and kingdoms that operated in the territory of the modern Bulgarian state. This designation includes official coinages of Greek-using city-states and kingdoms, Scythian and Celtic coinage, and local imitations of official issues. Also included are Greek coins from nearby regions that are found in Bulgaria.

Approximate date: 6th century B.C. through 1st century B.C.

c. Roman provincial coins—Locally produced coins usually struck in bronze or copper at mints in the territory of the modern state of Bulgaria. May also be silver, silver plate, or gold.

Approximate date: 1st century B.C. through 4th century A.D.

d. Coinage of the First and Second Bulgarian Empires and Byzantine Empire—Struck in gold, silver, and bronze by Bulgarian and Byzantine emperors at mints within the modern state of Bulgaria.

Approximate date: 4th century A.D. through A.D. 1396.

e. Ottoman coins—Struck at mints within the modern state of Bulgaria.

Approximate date: A.D. 1396 through A.D. 1750.

C. Ceramic

1. Sculpture

a. Architectural Elements—Baked clay (terracotta) elements used to decorate buildings. Elements include tiles, acroteria, antefixes, painted and relief plaques, metopes, cornices, roof tiles, pipes, and revetments. May be painted as icons. Also included are wall and floor plaster decorations.

Approximate date: First millennium B.C. through A.D. 1750.

b. Large Statuary—Subject matter includes human and animal figures and groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 1 m to 2.5 m in height and life-size busts (head and shoulders of an individual).

Approximate date: Neolithic through 6th century A.D.

c. Small Statuary—Subject matter is varied and includes human and animal figures, human body parts, groups of figures in the round, shrines, houses, and chariots. These range from approximately 10 cm to 1 m in height.

Approximate date: Neolithic through 6th century A.D.

2. Vessels

a. Neolithic and Chalcolithic Pottery—Handmade, decorated with appliqué and/or incision, sometimes decorated with a lustrous burnish or added paint. These come in a variety of shapes from simple bowls and vases with three or four legs, anthropomorphic and zoomorphic vessels, to handled scoops and large storage jars.

b. Bronze Age through Thracian Pottery—Handmade and wheel-made pottery in shapes for tableware, serving, storing, and processing, with lustrous burnished, matte, appliqué, incised, and painted decoration.

c. Black Figure and Red Figure Pottery—These are made in a specific set of shapes (*e.g.,* amphorae, kraters, hydriae, oinochoi, kylikes) decorated with black painted figures on a clear clay ground (Black Figure), decorative elements in reserve with background fired black (Red Figure), and multi-colored figures painted on a white ground (White Ground).

Approximate date: First millennium B.C.

d. Terra Sigillata—Is a high-quality tableware made of red to reddish brown clay and covered with a glossy slip.

Approximate date: Roman.

e. Middle Ages Pottery—Includes undecorated plain wares, utilitarian wares, tableware, serving and storage jars, and special containers such as pilgrim flasks. These can be matte painted or glazed, including incised as ''sgraffito,'' stamped, and with elaborate polychrome decorations using floral, geometric, human, and animal motifs.

3. Seals—On the handles and necks of bottles (amphorae).

Approximate date: First millennium B.C. through Middle Ages.

D. Bone, Ivory, Horn, Wood, and other Organics

1. Small Statuary and Figurines—Subject matter includes human and animal figures and groups of figures in the round. These range from approximately 10 cm to 1 m in height.

Approximate date: Paleolithic through Middle Ages.

2. Personal Ornaments—In bone, ivory, wood, and spondylus shell. Types include amulets, combs, pins, spoons, small containers, bracelets, buckles, and beads.

Approximate date: Paleolithic through Middle Ages.

3. Seals and Stamps—Small devices with at least one side engraved with a design for stamping or sealing; they can be discoid, cuboid, conoid, or in the shape of animals or fantastic creatures (*e.g.,* a scarab).

Approximate date: Neolithic through Middle Ages.

4. Tools and Weapons—In bone, horn, and wood. Needles, awls, chisels, axes, hoes, picks, and harpoons.

Approximate date: Paleolithic through Middle Ages.

E. Glass and Faience

1. Vessels—Shapes include small jars, bowls, animal shaped, goblet, spherical, candle holders, and perfume jars (unguentaria).

Approximate date: First millennium B.C. through A.D. 1750.

2. Beads—Globular and relief beads.

Approximate date: Bronze Age through Middle Ages.

F. Paintings

1. Domestic and Public Wall Painting—These are painted on mud plaster, lime plaster (wet—buon fresco—and dry—secco fresco); types include simple applied color, bands and borders, landscapes, scenes of people and/or animals in natural or built settings.

Approximate date: First millennium B.C. through A.D. 1750.

2. Tomb Paintings—Paintings on plaster or stone, sometimes geometric or floral but usually depicting gods, goddesses, or funerary scenes.

Approximate date: First millennium B.C. through 6th century A.D.

G. Mosaics—Floor mosaics including landscapes, scenes of humans or gods, and activities such as hunting and fishing. There may also be vegetative, floral, or decorative motifs.

Approximate date: First millennium B.C. through A.D. 1750.

II. Ecclesiastical Ethnological Material

The categories of Bulgarian ecclesiastical ethnological objects on which import restrictions are imposed were made from the beginning of the 4th century A.D. through approximately A.D. 1900.

A. Stone

1. Architectural Elements—In marble and other stone, including thrones, upright ''closure'' slabs, circular marking slabs (*omphalion*), altar partitions, and altar tables which may be decorated with crosses, human, or animal figures.

2. Monuments—In marble and other stone; types such as ritual crosses, funerary inscriptions.

3. Vessels—Containers for holy water.

4. Reliefs—In steatite or other stones, carved as icons in which religious figures predominate in the figural decoration.

B. Metal

1. Reliefs—Cast as icons in which religious figures predominate in the figural decoration.

2. Boxes—Containers of gold and silver, used as reliquaries for sacred human remains.

3. Vessels—Containers of lead, which carried aromatic oils and are called ''pilgrim flasks.''

4. Ceremonial Paraphernalia—In bronze, silver, and gold including censers (incense burners), book covers, processional crosses, liturgical crosses, archbishop's crowns, buckles, and chests. These are often decorated with molded or incised geometric motifs or scenes from the Bible, and encrusted with semi-precious or precious stones. The gems themselves may be engraved with religious figures or inscriptions. Ecclesiastical treasure may include all of the above, as well as rings, earrings, and necklaces (some decorated with ecclesiastical themes) and other implements (*e.g.,* spoons, baptism vessels, chalices).

C. Ceramic—Vessels which carried aromatic oils and are called ''pilgrim flasks.''

D. Bone and Ivory Objects—Ceremonial paraphernalia including boxes, reliquaries (and their contents), plaques, pendants, candelabra, stamp rings, crosses. Carved and engraved decoration includes religious figures, scenes from the Bible, and floral and geometric designs.

E. Wood—Wooden objects include architectural elements such as painted wood screens (iconostases), carved doors, crosses, painted wooden beams from churches or monasteries, furniture such as thrones, chests, and other objects, including musical instruments. Religious figures predominate in the painted and carved figural decoration. Ecclesiastical furniture and architectural elements may also be decorated with geometric or floral designs.

F. Glass—Vessels of glass include lamps and candle sticks.

G. Textile—Robes, vestments and altar cloths are often of a fine fabric and richly embroidered in silver and gold. Embroidered designs include religious motifs and floral and geometric designs.

H. Parchment—Documents such as illuminated ritual manuscripts occur in single leaves or bound as a book or ''codex'' and are written or painted on animal skins (cattle, sheep/goat, camel) known as parchment.

I. Painting

1. Wall Paintings—On various kinds of plaster and which generally portray religious images and scenes of Biblical events. Surrounding paintings may contain animal, floral, or geometric designs, including borders and bands.

2. Panel Paintings (Icons)—Smaller versions of the scenes on wall paintings, and may be partially covered with gold or silver, sometimes encrusted with semi-precious or precious stones, and are usually painted on a wooden panel, often for inclusion in a wooden screen (iconostasis). May also be painted on ceramic.

J. Mosaics—Wall mosaics generally portray religious images and scenes of Biblical events. Surrounding panels may contain animal, floral, or geometric designs. They are made from stone and glass cut into small bits (*tesserae*) and laid into a plaster matrix.

Inapplicability of Notice and Delayed Effective Date

This rule involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure under 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Executive Orders 12866 and 13563

Executive Orders 12866 (as amended by Executive Order 14994) 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 (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Orders 12866 and 13563 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866 and, by extension, Executive Order 13563.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of the Secretary's delegate) to approve regulations related to customs revenue functions.

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise, and Reporting and recordkeeping requirements.

Amendment to the CBP Regulations

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12), is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

■ 2. In § 12.104g, the table in paragraph (a) is amended by revising the entry for Bulgaria to read as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) * * *

State party	Cultural property	Decision No.
*	* * * * *	*
Bulgaria	Archaeological material from Bulgaria ranging from approximately 1.6 million years ago through approximately A.D. 1750, and ecclesiastical ethnological material of Bulgaria ranging in date from the beginning of the 4th century A.D. through approximately A.D. 1900.	CBP Dec. 24–02.
*	* * * * *	*

* * * * *

Robert F. Altneu,

Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade U.S. Customs and Border Protection.

Thomas C. West, Jr.,

Deputy Assistant Secretary of the Treasury for Tax Policy.

[FR Doc. 2024–00689 Filed 1–12–24; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2024–0070]

RIN 1625–AA00

Safety Zone; Little Potato Slough, Stockton, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters within a 100-yard radius of the vessels and machinery conducting operations at the site of the tug MAZAPETA in Little Potato Slough near Stockton, CA. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by salvage and pollution removal operations. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port, Sector San Francisco.

DATES: This rule is effective without actual notice from January 16, 2024 through January 17, 2024. For the purposes of enforcement, actual notice will be used from 5 a.m. on January 10, 2024, until January 16, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2024–0070 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email LT William Harris, U.S. Coast Guard Sector San Francisco, Waterways Management Division; telephone 415–399–7443, email *SFWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the vessel MAZAPETA is partially submerged within Little Potato Slough and the Coast Guard must oversee salvage and pollution removal operations and did not receive final details of the plan until January 8, 2024. It is impracticable to publish an NPRM because we must establish this safety zone by January 10, 2024.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with the salvage and pollution removal operations to begin on January 10, 2024.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port (COTP) San Francisco has determined that potential hazards associated with the salvage and pollution removal operations of the vessel MAZAPETA beginning January 10, 2024, will be a safety concern for anyone within a 100-yard radius of the barges and vessels in Little Potato Slough. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during salvage and pollution removal operations.

IV. Discussion of the Rule

This rule establishes a safety zone from 5 a.m. on January 10, 2024, until 11 p.m. on January 17, 2024. The safety zone will cover all navigable waters within 100 yards of vessels and machinery being used in the salvage and pollution removal operations of the tug MAZAPETA. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the vessel is being raised and pollution is being removed. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking.

Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on size, location, and duration of the safety zone. The amount of vessel traffic through Little Potato Slough during the duration of the zone is not anticipated to interfere with salvage and pollution removal operations. The Coast Guard will issue a Broadcast Notice to Mariners about the safety zone to inform the public.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that will prohibit entry within 100 yards of vessels and barges being used in the salvage and pollution removal operations of the vessel MAZAPETA. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T11–154 to read as follows:

§ 165.T11–150 Safety Zone; Little Potato Slough, Stockton, CA.

(a) *Location.* The following area is a safety zone: All waters of Little Potato Slough, from surface to bottom, within 100 yards of the vessels involved in the salvage and pollution removal operations of the vessel MAZAPETA at coordinates 38°3′29″ N, 121°30′3″ W.

(b) *Definitions.* As used in the section, ''designated representative'' means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel, or a Federal, State, or local officer designated by or assisting the Captain of the Port (COTP) San Francisco in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or the COTP's designated representative to obtain permission to do so. Vessel operators given permission to enter in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative. Persons and vessels may request to enter the safety zone through the 24-hour Command Center at telephone (415) 399–3547.

(d) *Enforcement period.* This section will be enforced from 5 a.m. on January 10, 2024, through 11 p.m. on January 17, 2024.

Dated: January 9, 2024.

Taylor Q. Lam,

Captain, U.S. Coast Guard, Captain of the Port Sector San Francisco.

[FR Doc. 2024–00694 Filed 1–12–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Part 685

[Docket ID ED–2023–OPE–0004]

RIN 1840–AD81

Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Announcement of early implementation date.

SUMMARY: The U.S. Department of Education (Department) designates a regulatory provision in its final rule related to income-driven repayment for early implementation.

DATES: January 16, 2024. For the implementation date of the regulatory provision, see **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Bruce Honer, U.S. Department of Education, 400 Maryland Avenue SW, 5th Floor, Washington, DC 20202. Telephone: (202) 987–0750. Email: *Bruce.Honer@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION: Section 482(c)(1) of the Higher Education Act of 1965, as amended (HEA), requires that regulations affecting programs under title IV of the HEA be published in final form by November 1 prior to the start of the award year (July 1) to which they apply. Section 482(c)(2) of the HEA also permits the Secretary to designate any regulatory provision as one that an entity subject to the provision may choose to implement earlier and to outline the conditions for early implementation.

On July 10, 2023, the Department published in the **Federal Register** a final rule amending regulations related to income-driven repayment (88 FR 43820). In that final rule we designated certain provisions for early implementation. In addition, on October 23, 2023, the Department published in the **Federal Register** a document announcing early implementation of provisions related to income-driven repayment (88 FR 72685).

The Secretary is exercising his authority under section 482(c) of the HEA to designate an additional regulatory change made in that final rule for early implementation beginning on January 21, 2024.

Under § 685.209(k)(3), a borrower receives forgiveness if the borrower's total original principal balance on all loans that are being paid under the Revised Pay as You Earn (REPAYE) plan was less than or equal to $12,000, after the borrower has satisfied 120 monthly payments or the equivalent, plus an additional 12 monthly payments or the equivalent over a period of at least 1 year for every $1,000 if the total original principal balance is above $12,000. *See* 88 FR 43820, 4390*3*. Under the regulations, the REPAYE plan is also known as the Saving on a Valuable Education (SAVE) plan. The Department will implement this provision on January 21, 2024.

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 Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Miguel A. Cardona,

Secretary of Education.

[FR Doc. 2024–00204 Filed 1–12–24; 8:45 am]

BILLING CODE 4000–01–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 220, 222, and 226

[Docket No. 2021–8]

Copyright Claims Board: Active Proceedings and Evidence—Smaller Claims Procedures

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: Pursuant to the Copyright Alternative in Small-Claims Enforcement Act, the U.S. Copyright Office is adopting a final rule amending the procedures for "smaller claims" proceedings before the Copyright Claims Board.

DATES: Effective February 15, 2024.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at *meft@copyright.gov* or telephone at (202) 707–8350.

SUPPLEMENTARY INFORMATION: Pursuant to the Copyright Alternative in Small-Claims Enforcement Act of 2020 (the "CASE Act"), the Copyright Office created the Copyright Claims Board (the "CCB"), an alternative and voluntary forum for parties seeking to resolve certain copyright-related disputes.[1] The CASE Act directed the Register of Copyrights to "establish regulations to provide for the consideration and determination, by not fewer than 1

[1] Sec. 212, Public Law 116–260, 134 Stat. 1182, 2176 (2020).

Copyright Claims Officer, of any claim under this chapter in which total damages sought do not exceed $5,000 (exclusive of attorneys' fees and costs).'' [2] The Office has engaged in several rulemakings to establish the procedures necessary to implement the CASE Act.

On December 8, 2021, the Office published a notice of proposed rulemaking (''NPRM'') that, among other topics, addressed procedures for ''smaller claims'' proceedings.[3] Under the proposed rule, smaller claims proceedings would be heard by one Copyright Claims Officer and discovery would be limited to that available in standard CCB proceedings.[4] Additional discovery, including requests for expert testimony, would be prohibited, and the Officer would issue a determination based solely on the parties' written testimony without holding a hearing.[5] In response to public comments, the Office decided to implement a ''more expedited and less formal process'' for smaller claims than the NPRM proposed.[6] On May 17, 2022, the Office published a final rule (the ''May 2022 Rule'') that reflected those changes.[7]

The May 2022 Rule provided that the smaller claims process would rely on ''written submissions and informal conferences to minimize party burdens'' and ''allow[ ] the presiding Officer to take a more active role in case management.'' [8] Smaller claims proceedings would no longer use the same discovery rules as standard CCB proceedings. Instead, discovery would be ''significantly limited, if allowed at all,'' and the scope of any permitted discovery would be discussed during an initial conference.[9] The May 2022 Rule ''allow[ed] for a party position statement, a merits conference to discuss the evidence and the issues presented, a tentative finding of facts by the presiding Officer, the opportunity for parties to respond to those findings, and a final determination.'' [10] The May 2022 Rule also included several clarifications, including specifying when claimants must choose whether they want smaller claims proceedings, how counterclaims impact this choice, and the content of initial and second notices for smaller claims proceedings.[11] The Office explained that this ''updated, streamlined procedure for smaller claims substantially addresses commenters' concerns, will provide a clear alternative to both the CCB's standard proceeding and to Federal litigation, and will ultimately incentivize claimants to use the CCB's smaller claims procedures where appropriate.'' [12]

Concurrent with the publication of the May 2022 Rule, the Office sought further comment regarding the smaller claims process.[13] This second opportunity to comment was intended to help determine whether the updated regulations struck ''the proper balance between streamlining the smaller claims process and providing sufficient procedural protections to all parties.'' [14]

The Office received two further comments, from the Copyright Alliance and the New York Intellectual Property Law Association (''NYIPLA'').[15] These comments are addressed in detail below.

The Copyright Alliance's Comment

The May 2022 Rule provided that a claimant may request that the smaller claims procedures apply when filing its claim, and also that ''[t]he claimant may change its choice as to whether to have its claim considered under the smaller claim[s] procedures at any time before service of the initial notice.'' [16] The Copyright Alliance noted that this language ''seems to suggest that a claimant who initially chooses to have the proceeding considered under the smaller claims procedures may be able to change their choice and have the proceeding considered under standard small claims procedures, but that a claimant who initially opts to have the proceeding considered under the standard small claims procedures may not have that same opportunity.'' [17] The Copyright Alliance recommended that the Office clarify this provision and ''also include reference to the opportunity for claimants to change their choice in another section of the regulations.'' [18]

The Office intended for the current regulations to allow a claimant to change its election of which procedures to use before service of the initial notice, regardless of its original election. Considering the Copyright Alliance's comments, however, the Office has modified the regulatory language to clarify that rule.[19] The Office declines to take the Copyright Alliance's suggestion to duplicate this language in other sections of the regulations. The Office notes that several chapters of the CCB Handbook, a plain language resource for CCB parties, also reference claimants' ability to change their election of small or smaller claims procedures.[20]

The regulations also allow a claimant to change its election after service, so long as the other parties and the CCB consent.[21] The Copyright Alliance suggested there should be no opportunity for a claimant to change its election after service of the initial notice, even if the respondent agrees to the change. The Copyright Alliance argued for this restriction on the grounds that a claimant who wishes to change their choice after service ''has the ability to withdraw their claim and file it again to reflect the new choice.'' [22]

The Office disagrees that a strict deadline is advisable and believes that a more flexible approach is preferable in a forum that is intended to be accessible to *pro se* parties. Requiring consent from the other parties and the CCB should be sufficient to protect against abuse of the election process.

In its comment, the Copyright Alliance also noted that the regulations give the Officer presiding over a smaller claims proceeding the authority to ''issue additional scheduling orders or amend the scheduling order,'' indicating that there may be a difference between an additional scheduling order and an amended scheduling order.[23] The

[2] 17 U.S.C. 1506(z).

[3] 86 FR 69890 (Dec. 8, 2021).

[4] *Id.* at 69912–13.

[5] *Id.*

[6] 87 FR 30060, 30074 (May 17, 2023) (''May 2022 Rule'').

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 30074–75.

[12] *Id.* at 30075.

[13] *Id.*

[14] *Id.* On June 15, 2022, the Office published a correction to the May 2022 Rule, which included one technical correction related to the smaller claims provision. 87 FR 36060 (June 15, 2022).

[15] Comments received in response to this rulemaking are available at *https://www.regulations.gov/docket/COLC-2021-0007/comments.* References to public comments responding to the Office's May 2022 Rule are by party name (abbreviated where appropriate), followed by ''Final Rule Comments.''

[16] 37 CFR 226.2 (emphasis omitted).

[17] Copyright Alliance Final Rule Comments at 2.

[18] *Id.*

[19] The Office is also revising its regulations to reflect that a claimant's request to change their election should be submitted as a ''tier one'' request, *e.g.,* a request found in 37 CFR 220.5(a)(1) that is filed through a fillable form on the CCB's electronic filing and case management system and is limited to 4,000 characters.

[20] *See* 37 CFR 226.2; U.S. Copyright Office, *CCB Handbook* at ch. 4, Smaller Claims (2022) *https://ccb.gov/handbook/;* id. at ch. 3(a), Starting an Infringement Claim; *id.* at ch. 3(b), Starting a Noninfringement Claim; *id.* at ch. 3(c), Starting a Misrepresentation Claim.

[21] 37 CFR 226.2.

[22] Copyright Alliance Final Rule Comments at 2–3. Although it acknowledged that the CCB Handbook is not binding authority, the Copyright Alliance also pointed to language in the CCB Handbook that suggests that a claimant may not be able to change their selection after service.

[23] *Id.* at 3.

Copyright Alliance sought clarification on this point.[24]

Under the regulations, the initial scheduling order in a smaller claims proceeding includes ''the dates or deadlines for filing of a response to the claim and any counterclaims by the respondent and an initial conference with the Officer presiding over the proceeding.'' [25] That Officer may issue an additional scheduling order that includes dates or deadlines beyond those in the initial scheduling order, such as dates of other conferences or deadlines for discovery. An amended scheduling order is used to change the dates in a preexisting scheduling order, such as rescheduling the deadline for filing a response set forth in the initial scheduling order. In light of this explanation, the Office does not believe a regulatory change is necessary.

The Copyright Alliance also sought clarification on regulatory language that provides that ''[i]f a party fails to submit evidence in accordance with the presiding Officer's request, or submits evidence that was not served on the other parties or provided by the other side, the presiding Officer may discuss such failure with the parties during the merits conference.'' [26] The Copyright Alliance observed that ''the phrase 'such failure' can only be read to refer back to the first clause (referencing the party's failure to submit evidence) and not the second clause (referencing a party's submission of evidence that was not served on the other parties) since the latter is not phrased as a 'failure.' '' [27] The Copyright Alliance further noted that the regulations permit the Officer to draw an adverse inference as a remedy for the failure to submit evidence but does not mention remedies for the submission of evidence that was not served on or provided by other parties.[28]

The Copyright Alliance is correct that the Office's intent was that both issues—the failure to submit evidence and the submission of evidence that was not served on or provided by the other parties—could be addressed during conferences and that the presiding Officer was empowered to impose remedies for either issue. The Office has revised the corresponding regulatory text to make clear that the Officer may discuss with the parties and impose appropriate remedies to address either issue. The Office notes, and the regulatory text provides, that although imposition of an adverse inference is one remedy that is available to an Officer, there may be other appropriate remedies, such as excluding evidence that was not properly served or providing the other parties an opportunity to respond to such evidence.[29]

The NYIPLA's Comment

Current CCB regulations allow parties in a smaller claim proceeding to submit a written statement setting forth their positions on the issues prior to the merits conference, but do not permit any written responses to these statements.[30] The NYIPLA recommended that parties be allowed to submit written responses, arguing that ''it is important that parties before the CCB be afforded the right to respond to the statements and evidence initially submitted by their opponents'' and ''to permit some form of rebuttal submission in advance of the merits conference.'' [31] The NYIPLA argued that written responses would also ''provide the *other* side with fuller notice of what its opponent's rebuttal case will consist of at the merit conference'' and ''are generally an effective means of responding to another party's argument.'' [32]

The Office declines to make the requested changes at this time. The smaller claims procedures are intended to provide a streamlined and less formal process than standard CCB procedures. Consequently, the Office's regulations sought to minimize the filings in smaller claims proceedings to reduce the burdens on the parties, ensure that the timeline is not protracted, and distinguish the smaller claims procedures from standard CCB procedures. The Office believes that providing parties with a single opportunity to submit an optional written statement ensures fairness, especially with respect to both parties represented by counsel and those appearing *pro se,* while recognizing that some parties will be more comfortable communicating their positions in writing than orally. As the NYIPLA recognizes, parties will have an opportunity to respond to any written statements during the merits conference.[33] At the merits conference, the presiding Officer will be able to ask questions and develop the parties' positions further.

Under the CCB's current regulations, if a claimant has selected a smaller claims proceeding, a respondent may bring a counterclaim that seeks only $5,000 or less in damages, exclusive of attorneys' fees and costs.[34] As the May 2022 Rule explains, ''[a] respondent who is not content with a counterclaim limited to $5,000 may decline to use the smaller claims track and either use the standard proceeding by bringing a separate claim against the original claimant or bring the claim to Federal court.'' [35] The NYIPLA disagreed with this approach and recommended that the regulations ''provide for reassignment from the smaller claim track for any proceeding in which a respondent wishes to assert within the CCB a counterclaim that would be eligible only for the non-smaller claim track.'' [36] The NYIPLA argued that the benefits of the smaller claims proceeding ''are lost, and the complexity compounded, if two concurrent proceedings are running simultaneously, under different procedures, particularly where both may, in some cases, involve similar questions of fact and law.'' [37] The NYIPLA expressed concern about the logistics of consolidating a smaller claims proceeding with a standard CCB proceeding and the possibility of inconsistent determinations in the event that they are not consolidated.[38]

The Office declines to implement this proposed change. One of the key features of the CCB is its voluntary nature—including the parties' ability to choose whether to participate, given the matters at issue and the scope of the proceeding. This feature could be frustrated were a respondent able to unilaterally move a claim from the relatively streamlined smaller claims process the claimant had selected to the standard CCB process.

The Office appreciates the NYIPLA's concerns regarding the current process for consolidating proceedings before the CCB and the possibility of inconsistent determinations if two claims addressing similar facts are not heard together. To address these concerns, the Office is revising its regulations pertaining to consolidation. The revised rule addresses circumstances in which two proceedings—a smaller claims proceeding and a standard CCB

[24] *Id.*

[25] 37 CFR 226.4(b).

[26] Copyright Alliance Final Rule Comments at 3 (quoting 37 CFR 226.4(d)(3)).

[27] *Id.*

[28] *Id.* at 4.

[29] The Copyright Alliance also identified a nonsubstantive typographical error in the regulatory text, *id.* at 3 n.3, which has been corrected. The Office has made several additional nonsubstantive corrections.

[30] 37 CFR 226.4(d)(2)(ii).

[31] NYIPLA Final Rule Comments at 1–2.

[32] *Id.*

[33] *Id.* at 2.

[34] 37 CFR 226.3.

[35] 87 FR 30060, 30074.

[36] NYIPLA Final Rule Comments at 3.

[37] *Id.*

[38] *Id.*

proceeding—involve the same or substantially similar parties and arise out of the same facts and circumstances. This includes instances in which a claimant selects the smaller claims procedures, and the respondent files a separate claim, rather than asserting a counterclaim subject to the $5,000 cap on damages. The amended regulations state that, in such a situation, the Officers may hold a conference to determine whether the parties would be willing to consolidate their dispute into a single proceeding using either the standard CCB or smaller claims procedures. If the parties do not agree to consolidate their claims, the proceedings will continue on separate tracks.

The Office does not intend to add additional rules governing the possibility of inconsistent determinations related to smaller claims proceedings, as it concludes that the risk of inconsistent determinations is low and the CCB's regulations should be as straightforward and streamlined as possible. Moreover, while the Officers make smaller claims determinations independently, they are aware of all determinations issued by the CCB, and the Officer presiding over a smaller claims proceeding and any standard proceeding that involves similar parties or issues would be able to identify and avoid any potential inconsistency in the separate determinations.

The NYIPLA also commented on witness appearances in smaller claims proceedings.[39] The regulations permit a party to request that a witness appear at the merits conference for questioning if an opposing party has submitted that witness's statement beforehand.[40] Under the regulations, if the witness does not appear, the presiding Officer may still accept the witness's statement, but they may consider the inability to question when determining how much weight to give the witness's testimony.[41] The NYIPLA suggested that ''the rule should more clearly set forth the Officer's discretion to *exclude* altogether the statement of a witness who fails to appear following an opponent's request,'' arguing that this change may encourage parties to make their witnesses available for cross-examination at the merits conference.[42]

The Office finds this recommendation is unnecessary, and not sufficiently responsive to the practical challenges related to witnesses' appearances. The CCB is already empowered to determine what weight, if any, should be given to the evidence.[43] Since it does not have the authority to subpoena witnesses, witnesses appear at merits conferences on a voluntary basis. The regulations are drafted with the understanding that a witness may agree to submit a statement but may not wish to appear at the merits conference for any reason, including reasons that have nothing to do with the value of the statement. For example, a witness may not be able to take time off from work or have a personal conflict making an appearance burdensome. Even if potential evidentiary consequences might influence the behavior of the parties, they are unlikely to affect the witness' decision to give live testimony. The current regulations, which give the presiding Officer the authority to give any (or no) weight to witnesses' testimony, better reflect the balance of interests at stake in CCB proceedings.

Conclusion

The Office appreciates these comments and will be monitoring how the regulations are functioning to determine if any future changes are needed. Apart from the modifications described above, the smaller claims regulations remain unchanged from the May 2022 Rule.

List of Subjects in 37 CFR Parts 220, 222, and 226

Claims, copyright.

Final Regulations

For the reasons stated in the preamble, the U.S. Copyright Office amends 37 CFR parts 220, 222, and 226 as follows:

PART 220—GENERAL PROVISIONS

■ 1. The authority citation for part 220 continues to read as follows:

Authority: 17 U.S.C. 702, 1510.

■ 2. Section 220.5 is amended by revising paragraphs (a)(1)(xix) and (a)(1)(xx) and adding paragraph (a)(1)(xxi) to read as follows:

§ 220.5 Requests, responses, and written submissions.

(a) * * *

(1) * * *

(xix) Requests to withdraw representation under § 232.5 of this subchapter;

(xx) Requests by a claimant under § 226.2 of this subchapter to change its choice as to whether to have its claim considered under the smaller claims procedures or the standard Board procedures; and

(xxi) Requests not otherwise covered under § 220.5(d).

* * * * *

PART 222—PROCEEDINGS

■ 3. The authority citation for part 222 continues to read as follows:

Authority: 17 U.S.C. 702, 1510.

■ 4. Section 222.13 is amended by revising paragraph (a) and adding paragraph (e) to read as follows:

§ 222.13 Consolidation.

(a) *Consolidation.* Except as provided in paragraph (e) of this section, if a claimant has multiple *active proceedings* against the same respondent or multiple active proceedings 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.

* * * * *

(e) *Smaller claims proceedings.* Where the Board becomes aware that a standard proceeding and a smaller claims proceeding involve the same or substantially similar parties and arise out of the same transaction or occurrence, one or more Officers may hold a conference to determine whether the parties are willing to voluntarily consolidate the separate proceedings into a single proceeding using either the smaller claims procedures or the standard Board procedures. The Board will consolidate proceedings only where the parties agree, doing so would be in the interests of justice, and the proceedings involve the same or substantially similar parties and arise out of the same transaction or occurrence. If the proceedings involve the same or substantially similar parties and arise out of the same transaction or occurrence, but the parties do not agree to voluntarily consolidate the separate proceedings into a single proceeding, then each proceeding shall be considered separately.

PART 226—SMALLER CLAIMS

■ 5. The authority citation for part 226 continues to read as follows:

Authority: 17 U.S.C. 702, 1510.

■ 6. Section 226.2 is amended to read as follows:

[39] *Id.* at 3–4.

[40] 37 CFR 226.4(d)(2)(iii).

[41] *Id.*

[42] NYIPLA Final Rule Comments at 3.

[43] *See* 17 U.S.C. 1503(a)(1)(C)–(D); *see also* U.S. Copyright Office, *Copyright Small Claims* 126 (2013) (The Officers ''should have the discretion to consider evidentiary submissions according to their worth.''), *https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.*

§ 226.2 Requesting a smaller claims proceeding.

A claimant may request consideration of a claim under the smaller claims procedures in this part at the time of filing a claim. The claimant may change its choice as to whether to have its claim considered under the smaller claims procedures or the standard Board procedures at any time before service of the *initial notice.* If the claimant changes its choice, but the *initial notice* has already been issued, the claimant shall request reissuance of the *initial notice* indicating the updated choice. Once the claimant has served the *initial notice* on any respondent, the claimant may not amend its choice without consent of the other parties and leave of the Board. A claimant's request to change its choice as to whether to have its claim considered under the smaller claims procedures or the standard Board procedures shall follow the procedures set forth in § 220.5(a)(1) of this subchapter. If the request is made following service of the *initial notice* on any respondent, the claimant's request shall indicate whether the other parties consent to the request.

■ 7. Section 226.4 is amended by revising paragraphs (a), (d)(2)(iii), and (d)(3) to read as follows:

§ 226.4 Nature of a smaller claims proceeding.

(a) *Proceeding before a Copyright Claims Officer.* Except as provided in § 222.13(e), a smaller claims proceeding shall be heard by not fewer than one Copyright Claims Officer (Officer). The Officers shall hear smaller claims proceedings on a rotating basis at the Board's discretion.

* * * * *

(d) * * *

(2) * * *

(iii) May submit witness statements that comply with § 222.15(b)(2) of this subchapter. No later than seven days before the merits conference, an opposing party may request that the witness whose statement was submitted appear at the merits conference so that the party may ask the witness questions relating to the witness's testimony. The failure of a witness to appear in response to such a request shall not preclude the presiding Officer from accepting the statement, but the presiding Officer may take the inability to question the witness into account when considering the weight of the witness's testimony.

(3) *Failure to submit evidence.* If a party fails to submit evidence in accordance with the presiding Officer's request or submits evidence that was not served on the other parties or provided by the other side, the presiding Officer may discuss this with the parties during the merits conference or may schedule a separate conference to discuss the missing evidence with the parties. The presiding Officer shall determine an appropriate remedy, if any, including but not limited to drawing an adverse inference with respect to disputed facts, pursuant to 17 U.S.C. 1506(n)(3), if it would be in the interests of justice.

* * * * *

Dated: January 2, 2024.

Shira Perlmutter,

Register of Copyrights and Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,

Librarian of Congress.

[FR Doc. 2024–00596 Filed 1–12–24; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AR56

85/15 Rule Calculations, Waiver Criteria, and Reports

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its educational assistance regulations by eliminating the four 85/15 rule calculation exemptions for students in receipt of certain types of institutional aid. Currently, VA regulations provide exceptions that allow certain categories of students to be considered ''non-supported'' for purposes of the 85/15 rule notwithstanding their receipt of institutional aid. In this final rule, VA is eliminating these exceptions, thus clarifying the types of scholarships that educational institutions must include in their calculations of ''supported'' students. Also, VA is revising the criteria that shall be considered by the Director of Education Service when granting an 85/15 rule compliance waiver. Lastly, VA is amending the timeline for certain educational institutions' submission of 85/15 compliance reports.

DATES: This rule is effective February 15, 2024. The provisions of this final rule shall apply to all terms that begin on or after January 16, 2025, to include all 85/15 waivers pending before VA on that date.

FOR FURTHER INFORMATION CONTACT: Thomas Alphonso, Assistant Director, Policy and Procedures Education Service, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–9800. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The 85/15 rule (38 U.S.C. 3680A(d); 38 CFR 21.4201(a)) prohibits the Department of Veterans Affairs (VA) from paying educational assistance benefits to any new students once ''more than 85 percent of the students enrolled in the [program of education] are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs.'' 38 U.S.C. 3680A(d)(1). ''Institutional aid'' refers to the financial assistance that is provided by the educational institution to the student that includes any scholarship, aid, waiver, or assistance, *but does not include loans and funds provided under section 401(b) of the Higher Education Act of 1965* or financial assistance from a third-party. ''VA aid'' refers to financial benefits paid under Chapters 30, 31, 33, 35 and 36 of Title 38 and Chapter 1606 of Title 10. VA refers to students who receive such institutional or VA aid as ''supported students.'' Conversely, no less than 15 percent of the students enrolled in the program must be attending without having any of their tuition, fees, or other charges paid to or for them by the educational institution or VA (referred to as ''non-supported students''). The 85/15 rule is a market validation tool designed to prevent schools from inflating tuition charges for VA education beneficiaries. The rule functions by requiring a school to enroll no less than 15 percent of its students paying the full tuition charge without institutional or VA aid. If a school fails to enroll enough non-supported students, the cost of the program is presumed to be out of step with the competitive market and thus too expensive for VA to continue to support due to the burden on taxpayers.

Currently, in accordance with 38 CFR 21.4201, educational institutions are required to track the percentage of supported and non-supported students enrolled in each of their approved programs and to confirm their compliance with the required 85/15 percent ratio (38 CFR 21.4201(e)–(f)). During the time that the ratio of supported to non-supported students exceeds 85 percent, no new students can be certified to receive VA education benefits for that program (38 CFR 21.4201(g)(2)). ''New students'' include students returning after a break in enrollment unless the break is wholly due to circumstances beyond the student's control (38 CFR 21.4201(g)(6)). The 85/15 rule does allow VA to continue to pay benefits for students already enrolled in the program and receiving benefits prior to the ratio of supported students exceeding 85 percent of the total population enrolled in the program (38 CFR 21.4201(g)(2)). Further, although students receiving Veteran Readiness and Employment (38 U.S.C. chapter 31) or Survivors' and Dependents' Educational Assistance (38 U.S.C. chapter 35) benefits must be counted as supported students when calculating 85/15 rule compliance, VA notes that the rule does not prohibit the enrollment of new chapter 31 and chapter 35 students while the 85 percent ratio is exceeded. The rules regarding reporting requirements and how individual students must be assessed based on their program of education and campus location are detailed in 38 CFR 21.4201. Specifically, paragraph (e) details the rules regarding how to compute the 85/15 percent ratio, and paragraph (e)(2) provides special rules by which some students, even though they are in receipt of institutional aid, are nonetheless counted as ''non-supported students.''

VA is amending 38 CFR 21.4201(e)(2) to define ''non-supported students'' and ''supported students'' and remove paragraphs (e)(2)(i) through (e)(2)(iv), which diminish the effectiveness of the market validation mechanism of the rule. Although 38 U.S.C. 3680A(d)(1) explicitly states that the 85 percent side of the ratio (*i.e.,* the supported student count) should include all students ''having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs,'' current VA regulations at 38 CFR 21.4201(e)(2) create tension with this essential goal of the 85/15 rule by providing four categories of students who are considered ''non-supported'' students notwithstanding their receipt of institutional aid. Currently, the four categories of such ''non-supported'' students are as follows: (1) non-Veteran students not in receipt of institutional aid; (2) all graduate students receiving institutional aid; (3) students in receipt of any Federal aid (other than VA benefits); and (4) undergraduate and non-college degree students receiving any assistance provided by the educational institution, if the institutional policy for granting this aid is the same for Veterans and non-Veterans alike. VA is removing all four categories.

Removal of the first and third categories will have no impact because these students are already considered ''non-supported,'' as they are not receiving institutional or VA aid. Regarding whether Federal aid (other than VA benefits), such as student loans and grants, is considered ''institutional aid,'' VA has never considered it to be institutional aid and will continue to not consider it institutional aid. Through this final rule (as further detailed below in the section titled REMOVAL OF INSTITUTIONAL AID EXEMPTION), VA is adding a regulatory definition that clarifies why it is not appropriate to classify Federal, state, or municipal grant funding as ''institutional aid.'' Therefore, recipients of these funds are to be counted as ''non-supported,'' barring receipt of other prohibited funding. Consequently, the removal of these ''exclusions,'' which are not included to begin with, amounts to a clarification of current practice since their numbers would remain on the 15 percent side of the ratio calculation.

The practical impact is in the removal of the second and fourth categories, which provide that students can be in receipt of institutional aid and still be considered non-supported. These two categories (and particularly the fourth category) have created loopholes that educational institutions have exploited since the inception of the Post-9/11 GI Bill (PGIB). The problem stems from the fact that the PGIB pays up to the full amount of tuition and fees directly to educational institutions. This is unlike prior VA educational benefits implemented since 1952, from the Korean War GI Bill through the Montgomery GI Bill, for which VA pays a one-size-fits-all stipend amount directly to the beneficiary, and the beneficiary then pays tuition, fees, or other approved education-related expenses to the school using the stipend and/or other means. Under the prior model, if the tuition and fees exceed the stipend amount, then the beneficiary incurs out-of-pocket costs. By the same token, if the tuition and fees are less than the stipend amount, then the beneficiary may apply the funds towards other education costs. When beneficiary payments are structured this way, there is no incentive for an educational institution to inflate costs, as such a tactic might drive VA beneficiaries away in a competitive free market. Conversely, since under the PGIB, VA pays the net charges for tuition and fees (subject to benefit level and statutory caps for certain types of educational institutions) directly to the educational institution, the same competitive market forces do not apply. Consequently, the only students who can serve to validate the cost effectiveness of the program are those non-supported students who are counted on the 15 percent side of the 85/15 rule. However, given that the provisions in sections 21.4201(e)(2)(ii) and (iv) stipulate that certain scholarship recipients are to be considered ''non-supported,'' a school can meet its 15 percent non-supported requirement while providing scholarships to some number of students so long as the students are graduate level, or the terms of the scholarship are such that Veterans and non-Veterans alike may qualify. These students are likewise not motivated by competitive free market forces because their actual charges for tuition and fees are reduced. Because these students are allowed, through sections 21.4201(e)(2)(ii) and (iv), to be considered ''non-supported,'' they serve as a false-positive market validation for the tuition and fee charges levied on VA. This undermines the operative mechanism of the 85/15 rule by allowing schools to inflate their tuition and fees since there is no longer an effective counterweight.

The original GI Bill (for Veterans of World War II, in effect from 1944 to 1948) also paid tuition and fees directly to schools and was fraught with abuses and overcharges by schools. After investigating the abuses of the original GI Bill, Congress, when designing the successor Korean War GI Bill, took steps to eliminate such abuses by making payments directly to students and by instituting the 85/15 rule. Now that PGIB once again pays tuition and fees directly to schools, and having witnessed the same abuses seen under the original GI Bill, VA needs to restructure its implementation of the 85/15 rule to give the rule the force it was originally intended to have when payments are being made directly to schools. As this presents an immediate exploitation of taxpayers' investment in Veterans' education and training, VA must emphasize the fundamental objective of the rule and strictly adhere to the requirement that students counted on the 15 percent side of the 85/15 rule are not ''having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs.'' VA is accomplishing this by removing all exceptions listed in section 21.4201(e)(2), thus ensuring that every student who receives institutional or VA aid will be counted as a ''supported student.''

These changes also clarify requirements for schools, thereby making it easier for schools operating in good faith to remain in compliance. The current various classifications of students are difficult for the School Certifying Officials (SCO) at educational institutions to follow, which can lead to improper payments and overpayments. Currently, when school officials have questions about making accurate student count calculations, they must individually reach out to their state Education Liaison Representative or VA staff in Washington, DC. As a result, the guidance they receive may be delayed or vary slightly depending upon the source. Further, some schools may opt not to seek VA guidance and instead rely on their own interpretations of the 85/15 rule. All of these scenarios have resulted in non-supported calculations by schools which do not reflect the intent of the regulation's underlying statute. The removal of all four current exceptions to the ''non-supported'' side of the 85/15 ratio will simplify the calculation of the 85/15 ratio—meaning, any student receiving any funding from either VA, or the school will be considered ''supported.'' Further, these amendments will resolve related compliance process issues by removing ambiguity about the appropriate classification of students in receipt of aid. These regulatory amendments will both simplify and promote consistency in calculating and reporting 85/15 counts and will better align the regulation with its underlying statute.

There may be instances where certain schools have a large percentage of their students (both Veteran and non-Veteran alike) in receipt of institutional aid, even if the amount of the aid is insignificant. In these situations, it is unlikely that the school's institutional aid program is a subterfuge to disguise tuition inflation while complying with the 85/15 rule. In response to any concerns that such schools would be unfairly placed in noncompliance with the 85/15 rule by operation of this rule, VA notes that whenever an educational institution exceeds the 85 percent limit, it may apply for a waiver of the 85/15 rule under 38 CFR 21.4201(h). Accordingly, VA is amending section 21.4201(h) to allow an education institution to demonstrate that although its program is in violation of 85/15, its non-VA scholarship recipients are effectively serving as market validation, and, therefore, continued enrollment of new VA education beneficiaries is nonetheless in the best interest of the students and the Federal government. Consequently, the elimination of section 21.4201(e)(2) does not mean that all generous schools will be eliminated from the GI Bill. It merely means that, on a case-by-case basis, a well-intentioned generous school could be granted a waiver while simultaneously limiting the potential for miscalculations and misapplication of scholarship information, whether intentional or unintentional.

Regarding the current 85/15 waiver criteria, VA further amends the criteria found at 38 CFR 21.4201(h) by removing paragraphs (2) and (3) while leaving paragraph (1) in place and modifying paragraph (4). This is necessary because, while current regulations list four criteria to be considered, only paragraphs (1) and (4) (the availability of comparable education facilities effectively open to Veterans in the vicinity of the school requesting a waiver; and the general effectiveness of the school's program in providing educational and employment opportunities to the Veteran population it serves) are cogent indicators of a program's qualifications to obtain a waiver.

Paragraph (2) only applies to schools in receipt of a Strengthening Institutions Program grant or a Special Needs Program grant administered by the Department of Education (ED). The Strengthening Institutions Program grant is only available to accredited institutions of higher learning. However, many GI Bill-approved institutions are non-degree granting and thus ineligible for these programs. Specifically, data from a February 2023 study showed that 56% of institutions then approved for receipt of GI Bill institutions, were non-degree granting. Therefore, this criterion is irrelevant when considering waiver requests for such programs. Furthermore, the ''Special Needs Program'' grants referenced in paragraph (2) as being located in title 34, parts 624–626, of the Code of Federal Regulations no longer exist at that reference. VA rarely receives waiver requests from schools in receipt of either of these grants, so the criterion in paragraph (2) rarely is satisfied. This absence of qualifying schools therefore is not dispositive in the adjudication of waiver requests. Paragraph (3)—previous compliance history of the school—is of no independent value to VA's decision-making because if a school has failed to satisfy the criterion in paragraph (3), then the program's approval would be suspended or withdrawn by the State Approving Agency (SAA). Consequently, by default, the Director of Education Service bases decisions on waiver requests almost exclusively on a school's performance relative to the criteria in paragraphs (1) and (4). However, because paragraphs (2) and (3) are included in this regulation, schools must expend resources to address these criteria in their requests. Likewise, the Director must expend resources to respond to these criteria in his or her decision. Therefore, VA is removing paragraphs (2) and (3) to conserve both school and VA resources. It is important to note that because these criteria have been functionally irrelevant in the adjudication of waiver requests, such a removal will have no substantive effect on the likely outcome of any future waiver request decisions.

Additionally, VA is amending the list of factors to be considered in paragraph (4) because the current list is not particularly helpful to the decision maker. The list contains only two criteria, and one of them—ratio of educational and general expenditures to full-time equivalency enrollment—is difficult to ascertain and verify while also being of questionable utility. Therefore, there is only one practical and pertinent factor—the percentage of Veteran-students completing the entire course—generally left to consider. Accordingly, VA is amending the list to provide a broad range of factors that may be considered (although the list will not be all inclusive). VA is maintaining the current graduation rate factor but adding other factors of graduate employment statistics, graduate salary statistics, satisfaction of Department of Education (ED) rules regarding gainful employment (where applicable), other ED metrics (such as student loan default rate), student complaints, industry endorsements, and participation in and compliance with the Principles of Excellence program, which was established by Executive Order 13607 on April 27, 2012 (published in the **Federal Register** on May 2, 2012), to ensure that student Veterans, Service members, and family members have information, support, and protections while using Federal education benefits (where applicable), etc. This list is not exhaustive. The Director could, on a case-by-case basis, consider other factors not listed, which provide an indication of the program's general effectiveness. In addition, the Director may consider whether the educational institution's aid program appears to be consistent with or appears to undermine the 85/15 rule's tuition and fee costs market validation mechanism.

Lastly, for educational institutions organized on a term, quarter, or semester basis, the 85/15 calculations currently must be submitted to VA no later than 30 days after the beginning of each regular school term (excluding summer sessions) or before the beginning of the following term, whichever occurs first (38 CFR 21.4201(f)(2)(i)). Educational institutions *not* organized on a standard term, quarter, or semester basis also must submit their 85/15 calculations to VA, however, no later than 30 days after the beginning of each calendar quarter to which the waiver applies (38 CFR 21.4201(f)(2)(ii)). Consequently, educational institutions with short, non-standard terms that begin and end more frequently than once per calendar quarter may have several terms that begin before VA is notified of failure to comply with the 85/15 rule. To remedy this shortcoming, VA is amending 38 CFR 21.4201(f)(1) and (f)(2)(ii) to require that educational institutions with non-standard terms submit their exemption justification reports and 85/15 percent calculations to VA no later than 30 days after the beginning of each non-standard term. This will provide VA with the opportunity to review compliance reports submitted by educational institutions before approving additional enrollments that impact compliance with the 85/15 rule. This amendment will promote accurate and up-to-date 85/15 calculations, ensure that reporting is done on a fair and consistent basis, and enable VA to base consideration of 85/15 waiver requests on relevant criteria.

In summary, the 85/15 rule was created to prevent training institutions from developing courses solely for GI Bill students and then inflating tuition charges. The 85/15 rule serves as a market validation tool by which the cost of the program is validated by demonstrating that a sufficient number of students (15 percent of the total program enrollment) are willing to pay the full cost of tuition out of pocket. These changes will strengthen the existing 85/15 rule by addressing the regulatory provisions that, over time, have been shown to be ineffective with regard to the rule's intent.

Public Comments

56 comments were received in response to VA's NPRM ''85/15 Rule Calculations, Waiver Criteria, and Reports.'' Several commenters expressed support for the rule, while several others expressed concerns. VA believes that many of the concerns are best answered via further clarification both in the responses to the substantive comments below and in changes VA is making to the proposed language from the NPRM, also discussed below.

Ensuring the Best Schools for Veterans Act of 2022

Some commenters requested that VA address Public Law 117–174, the ''Ensuring the Best Schools for Veterans Act of 2022,'' in the preamble to this rulemaking. VA acknowledges that there has been some confusion as to the content of this rulemaking due to the proximity of its NPRM's publication with the enactment of Public Law 117–174, which was signed into law on August 26, 2022. VA's NPRM ''85/15 Rule Calculations, Waiver Criteria, and Reports'' was published in the **Federal Register** (Vol. 87, No. 196) on October 12, 2022. This did not afford VA enough time to address the law in the NPRM or this final rule. While VA has effectively implemented the law and provided guidance to schools on its impacts, VA plans to address it specifically in a future rulemaking. However, VA also will address the law here, as its enactment does have major implications on the impact this rulemaking will have on schools.

Public Law 117–174 clarifies Congressional intent regarding the statutory requirements of the 35 percent exemption to the 85/15 rule. The law provides that an institution that (1) has a Veteran population less than 35 percent of its total student enrollment and (2) has most of its programs approved under section 3672 or 3675 of title 38, U.S.C., is statutorily exempt from all 85/15 requirements including reporting, computing, monitoring, and complying with 85/15 ratios. As one commenter noted, ''virtually all public and non-profit colleges and universities qualify for this exemption: they have veteran populations below 35 percent—typically well below that threshold and often in the single digits—and the majority of their programs are typically approved under section 3672 or 3675.'' VA agrees with this commenter. Due to the changes made by Public Law 117–174, presumably a large percentage of GI Bill schools will be exempt from the 85/15 rule because they are accredited schools with less than 35 percent of their student population being Veterans. The changes made by this final rule will therefore have no functional impact on these exempt schools, as the 85/15 rule is irrelevant to them. Therefore, while this rulemaking does not implement Public Law 117–174, any review, analysis, and evaluation of the 56 public comments must keep in mind the inapplicability of the changes made in this final rulemaking to a large percentage of GI Bill-approved schools that are exempt from the 85/15 requirements due to the law. As of May 25, 2023, 57 percent of all GI Bill-approved schools are exempt from 85/15 under Public Law 117–174 and therefore are unaffected by the rules contained herein (out of the 9,247 education training institutions approved for GI Bill benefits, there are 5,257 schools with 35 percent exemptions on record with the VA and more are being added each day). Thus, this rulemaking does take Public Law 117–174 into account while not attempting to implement that law.

VA makes no changes to the rule based on these comments.

Implementation of Revised 85/15 Rule

One commentor expressed concern regarding the lack of information provided to schools about the ''timeline'' of the implementation of the proposed rulemaking.

VA disagrees that insufficient notice of a potential change has been provided. VA has provided ample information concerning the implementation process of the proposed rule to the public, which includes schools, via the rulemaking process. Further, a VA communications plan was executed following the NPRM's publication to encourage its primary stakeholders, schools, to both acquaint themselves with and comment on the rulemaking.

The notification of the implementation of a proposed rulemaking was conducted pursuant to the Administrative Procedure Act's notice and comment process for agency rulemaking, found in 5 U.S.C. 553. This ''notice and comment'' process requires Government agencies to notify the public through the **Federal Register** of a proposed new or revised rule, and to accept and consider public comments. VA's proposal to revise its educational assistance regulations in the rulemaking titled ''AR56—85/15 Rule Calculations, Waiver Criteria, and Reports'' was submitted to the **Federal Register** and published on October 12, 2022. This published ''notice of proposed rulemaking'' announced the proposed regulation to the public, provided a detailed description of the planned regulation and its legal basis, and allowed the public the opportunity to submit written comments concerning the proposed regulation.

However, as a prudential matter, VA believes it is in the best interest of the students, schools, and the Federal government to provide schools with an extended amount of time after publication of the final rule to prepare for and mitigate any impacts these new rules may have. Therefore, VA will delay the applicability date to one year after the publication of this final rule to ensure both that VA will have adequate time to train schools as much as needed about the regulatory provisions herein and that schools will have enough time to implement any necessary changes in their policies to comply with these provisions.

Definition of ''Institutional Aid''

One commentor requested that VA revise the definition of ''institutional aid'' in 38 CFR 21.4201(e)(2) by narrowing it to the receipt of tuition and mandatory fees only.

In response, VA notes that 38 U.S.C. 3680A(d)(1) explicitly states that ''other charges paid to or for [students] by the educational institution'' are to be included in the 15 percent calculation; therefore, VA is required by law to include charges other than tuition and mandatory fees in its definition of institutional aid. Excluding ''other charges'' would require Congressional action to amend the statutory language.

As such, VA makes no changes to the rule based on this comment.

Definition of ''Supported Students''

Some commenters opposed VA making any changes to the definition of ''supported students,'' concerned that classifying students in receipt of any type of institutional aid, regardless of monetary amount, as ''supported'' will significantly increase the amount of supported students.

In contrast, one commentor noted how the existing language ''seems to favor schools'' by letting them claim students in receipt of institutional aid as non-supported, which helps them reach the required 15 percent, and how it ''creates space for institutions looking to raise tuition prices by disguising supported students'' as non-supported.

VA agrees that by categorizing students in receipt of any institutional aid, regardless of monetary amount, as ''supported,'' the number of supported students, as counted for the 85/15 rule, will increase, and in some cases, this could result in a significant increase of supported students for individual institutions and programs. However, VA makes no changes based on these comments, as this is the unavoidable impact of these changes to more closely align to the statutory language.

As stated in the preamble to the NPRM, VA is aligning this regulation more directly with the language of 38 U.S.C. 3680A(d)(1), which explicitly states that the 85 percent side of the ratio (*i.e.,* the supported student count) should include all students ''having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs.'' The original language for the exemptions was introduced in 1979 with changes through the current language, which was last updated in 1990. The Secretary has the authority to make these exceptions under 38 U.S.C. 3680A(d)(2) if they are ''in the interest of the eligible veteran and the Federal Government.'' Recent enforcement actions by the Department of Justice (DOJ) show that the loopholes created by the existing language are no longer in the interest of beneficiaries or the Federal Government.[1]

Additionally, VA believes the impact on institutions will be significantly less than commenters opposing the proposed definition of ''supported'' may believe. VA agrees that the proposed definition could be more problematic for institutions if it were applicable to a large portion of institutions. However, a large portion of training facilities are exempt from the 85/15 rule because they qualify for the 35 percent exemption. Furthermore, as discussed in the Ensuring the Best Schools for Veterans Act of 2022 section of this preamble, Public Law 117–174 clarifies Congressional intent regarding the statutory requirements of the 35 percent exemption to the 85/15 rule and broadens the exemption. Moreover, any educational institution exceeding the 85/15 threshold has the option to apply for a waiver, as provided in 38 U.S.C. 3680A(d)(2) and 38 CFR 21.4201(h).

VA makes no changes to the rule based on these comments.

85/15 Calculation/Exception Categories

A few commentors disagreed with the calculation of the 85/15 percent ratio. Specifically, commentors were opposed to the removal of the exception category found in 38 CFR 21.4201(e)(2)(iv), which allows students receiving certain institutional scholarships to be counted as ''non-supported,'' resulting in these students being included on the 15 percent (non-supported) side of the ratio calculation. One commentor stated that the elimination of this exception category would ''artificially inflate the number of students counted on the 85 percent [supported] side of the equation.''

VA disagrees with these comments. The exemption in section 21.4201(e)(2)(iv) has been causing supported students to be undercounted in 85/15 calculation; therefore, its removal will result in a more accurate count. Students receiving institutional aid always should have been counted as ''supported.'' This has been the case since the creation of the 85/15 rule. The 85 percent rule, which can be found at 38 U.S.C. 3680A, was enacted in 1952 to combat predatory school abuses following implementation of the Servicemen's Readjustment Act of 1944. The removal of this exception category returns the 85/15 rule to its original intent of serving as a market validation tool to prevent schools from inflating tuition charges for Veterans using VA educational assistance. VA finds that the exception category in 38 CFR 21.4201(e)(2)(iv) created loopholes which have been exploited by some schools—exploitation that has been exacerbated under the Post-9/11 GI Bill. Closing this loophole is one of the primary purposes of this rulemaking.

Furthermore, removal of the exception in 38 CFR 21.4201(e)(2)(iv) likely will not significantly increase the ratio of ''supported'' students enrolled in a program because Veterans statistically make up a small percentage of most schools' overall student populations. According to data from the Postsecondary National Policy Institute (PNPI), as of academic year (AY) 2015–16, only 4.9 percent of undergraduate students were Veterans—a small portion of the population attending schools.[2] Also, though some schools with a significant population of disadvantaged students who are receiving institutional aid may result in the educational institution exceeding the 85/15 threshold, the educational institution has the option to apply for an 85/15 waiver, as provided in 38 U.S.C. 3680A(d) and 38 CFR 21.4201.

VA makes no changes to the rule based on these comments.

35 Percent Exemption

Some commenters requested for VA to clarify in the final rule that the changes proposed by the rulemaking do not apply to institutions that qualify for the 35 percent exemption, in order to

[1] See, *e.g.,* Florida Academy Agrees To Pay $512,000 To Resolve Misrepresentation Claims Impacting Veterans' Post-9/11 Tuition Subsidy Program (Jan. 27, 2020), *https://www.justice.gov/usao-mdfl/pr/florida-academy-agrees-pay-512000-resolve-misrepresentation-claims-impacting-veterans;* Universal Helicopters Inc. and Dodge City Community College Agree to Pay $7.5 Million to Settle False Claims Act Allegations Related to Post-9/11 GI Bill Funding (Aug. 15, 2022), *https://www.justice.gov/opa/pr/universal-helicopters-inc-and-dodge-city-community-college-agree-pay-75-million-settle-false;* Justice Department Announces Enforcement Action Involving Over $100 Million in Losses to Department of Veterans Affairs (Sept. 16, 2022), *https://www.justice.gov/opa/pr/justice-department-announces-enforcement-action-involving-over-100-million-losses-department.*

[2] Veterans Fact Sheet, Postsecondary National Policy Institute, available at *https://pnpi.org/wp-content/uploads/2022/11/VeteransFactSheet-Nov-2022.pdf.*

provide clarity for School Certifying Officials (SCO) and Education Liaison Representatives (ELR).

VA concurs with these comments and has explained the impact of the 35 percent exemption in the preamble. For further clarification, please refer to the Ensuring the Best Schools for Veterans Act of 2022 section above. While portions of the newly enacted law and this rulemaking do overlap, as stated earlier, this rulemaking is not implementing the provisions of Public Law 117–174, Ensuring the Best Schools for Veterans Act of 2022. Additionally, VA did not address the 35 percent exemption in the NPRM because VA was not proposing any changes to the 35 percent exemption at the time of publication. However, to alleviate further confusion, VA will address comments regarding the 35 percent exemption.

Some commenters requested for VA to create an exemption that if the total Veteran student ratio is under 35 percent, then the institution would be exempt from having to track the 85/15 ratios.

The 35 percent exemption to all schools is found in statute. Public Law 117–174 modified the statutory requirements of the 35 percent exemption to the 85/15 rule. As the law clarifies, if an institution that (1) has a Veteran population less than 35 percent of its total student enrollment and (2) has most of its programs approved under section 3672 or 3675 of title 38 U.S.C., that institution is statutorily exempt from all 85/15 requirements including reporting, computing, monitoring, and complying with 85/15 ratios. Therefore, this law exempts many schools from the requirement of tracking the 85/15 ratios. VA will address the law more specifically in a future rulemaking, to include consideration of adding a blanket statement of situations in which a school is exempt from having to track 85/15 ratios in VA's regulations.

Some commenters stated concerns that VA is putting more stock in the 35 percent waiver to circumvent the 85/15 reporting and requested that VA find a better way to punish bad actors. One commenter stated that the 35 percent exemption undermines the 85/15 rule because there is no market validation price checking mechanism for campuses that enroll fewer than 35 percent Veteran students overall.

VA notes that the 85/15 ratio and the 35 percent exemption are statutorily mandated. Further, VA did not intend this rule as an enforcement action to ''punish bad actors'' but rather is revising the 85/15 ratio criteria to better leverage the 85/15 rule as a market validation tool and to better serve the interests of benefit recipients and the Federal government.

Some commenters also requested VA add new language to 38 CFR 21.4201 for further clarification of the 35 percent exemption.

VA will not be adding new language regarding the 35 percent exemption at this time, as the language for the exemption already exists at 38 CFR 21.4201(c)(4). VA did not address the 35 percent exemption in this rulemaking because this rulemaking does not modify said language. However, with the enactment of Public Law 117–174, Congress modified the language that authorizes the 35 percent exemption. VA will address these changes in a future rulemaking.

VA makes no changes to the rule based on these comments.

Lack of Student Choice

Several commentors expressed concern that proposed changes to the 85/15 rule could limit choices of undergraduate and graduate Veteran and non-Veteran students. The commenters stated that removing the four exceptions to the 85/15 rule—most notably the fourth exception category in 38 CFR 21.4201(e)(2)(iv), ''undergraduate and non-college degree students receiving any assistance provided by the educational institution''—and classifying all students in receipt of any type of institutional aid as ''supported'' will significantly increase the ratio of ''supported'' students enrolled in a program. This increase of students counted as supported would, according to these commentors, lead to program suspension due to violation of the 85/15 rule, which would bar new students from enrolling in programs that align with their interests.

VA does not disagree with these commenters' assertions that this rulemaking could produce new violations of the 85/15 rule and possibly new suspensions. However, Congress intentionally chose to enact a statute that limits choices for GI Bill students when ''more than 85 percent of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs.'' 38 U.S.C. 3680A(d)(1). As previously stated in this preamble and the preamble to the NPRM, this rulemaking is realigning VA's regulation with the existing statute to close loopholes that VA has determined are not in the interest of benefit recipients or the Federal Government.

For additional clarification, a school exceeding the 85 percent threshold will not impact any currently enrolled students because the statute explicitly states that it applies only to students ''not already enrolled.'' However, the statute explicitly functions to limit available options for students by preventing the enrollment of new GI Bill students when a school exceeds the 85 percent threshold.

Furthermore, VA will not speculate on the number of choices that will be available after these changes. Some schools with a significant population of students receiving institutional aid may end up exceeding the 85/15 threshold. In those cases, the school has the option to apply for an 85/15 waiver as provided in 38 U.S.C. 3680A(d) and 38 CFR 21.4201. In addition, a program suspended for violating the 85/15 rule retains all its current students. Only future enrollments are potentially affected. Furthermore, Public Law 117–174, discussed in the Ensuring the Best Schools for Veterans Act of 2022 section of this preamble, exempts a large portion of training facilities from the 85/15 requirements.

VA makes no changes to this rule based on these comments.

Removal of Institutional Aid Exemption

A few commentors were concerned that the removal of the fourth exception category from being considered supported (the exception for institutional aid) would negatively impact students eligible for grants provided by Federal programs, such as Federal Work Study (FWS) (34 CFR parts 673 and 675), the Federal Supplemental Educational Opportunity Grants (FSEOG) (34 CFR part 676), and the Workforce Innovation and Opportunity Act (WIOA) (Pub. L. 113–128). FWS and FSEOG are Federal grant programs that require the institution to contribute a proportion of the funds paid to the recipient, meaning that when the fourth exception category is removed, such grant recipients would be considered in receipt of institutional aid and therefore counted on the ''supported'' side of the 85/15 calculation. The commenter opined that this provision would discourage training institutions from participating in these federally funded programs, which would adversely affect both students and the training institution.

VA acknowledges the validity of these comments and recognizes the importance of other Federal programs that benefit students and schools alike; the FWS program provides a source of part-time income for undergraduate and graduate students with financial need, and the FSEOG program, a Title IV campus-based program, provides grants to eligible students who demonstrate exceptional financial need and encourages training institutions to provide grants to low-income undergraduate students.

The WIOA was enacted in July 2014 ''to bring about increased coordination among Federal workforce development and related programs . . . [and] to provide a combination of education and training services to prepare individuals for work and to help them improve their prospects in the labor market.'' Congressional Research Service, The Workforce Innovation and Opportunity Act and the One-Stop Delivery System (Sept. 26, 2022), available at *https://crsreports.congress.gov/product/pdf/R/R44252.* Titles I and III of the WIOA are administered by the Department of Labor's Employment and Training Administration (ETA), and Titles II and IV of the WIOA are administered by ED. The annual Congressional appropriation for these programs is a formulaic allotment to states administered by ETA and ED who, in turn, distribute the funding to schools per the WIOA program requirements. Importantly, no grants are awarded directly to individuals, and there are no ''matching'' requirements for the states or the recipient training institution.

Even though making changes based on these comments will not impact the scope of this rulemaking, VA understands the confusion to stakeholders resulting from the proposed removal of language previously included in the third exception category (''Students in receipt of any Federal aid (other than Department of Veterans Affairs benefits).''). VA will continue to consider Federal aid (other than VA benefits) as distinct from ''institutional aid.'' VA considers Federal aid to include state and municipal funds, as well as institutional matching funds pursuant to participation in such Federal, state, or municipal grant programs. In this final rule, VA is adding regulatory text clarifying that ''institutional aid'' does not include Federal, state, or municipal grant funding, nor does it include matching funds provided by the educational institution pursuant to participation in such Federal, state, or municipal grant programs. As such, grants to students under WIOA and other similar programs mentioned by the commentors will be counted as ''non-supported,'' barring receipt of other prohibited funding.

This categorization of other Federal funding is being informed by similar statutory language concerning institutional aid found in the Post-9/11 GI Bill and at 38 U.S.C. 3313(c)(1)(A)(II). These provisions refer to relevant financial assistance provided by the educational institution to the student as including any scholarship, aid, waiver, or assistance, but do not include loans and funds provided under section 401(b) of the Higher Education Act of 1965 or financial assistance from a third party. VA believes the additional language concerning ''institutional aid'' is consistent with the concepts embodied by Congress in section 3313.

Moreover, while students in receipt of Federal financial aid count on the ''non-supported'' side of the 85/15 ratio, VA reiterates that pursuant to Public Law 117–174, many, if not most, accredited schools are likely to be exempt from the 85/15 reporting requirements altogether.

Impact on Low-Income and Disadvantaged Students and the Schools That Serve Them

Several commenters indicated that this rulemaking would impose a hardship on low-income students who rely on financial aid to attend an educational institution. Specifically, those commenting expressed the following concerns for low-income students who need scholarships and other financial assistance or aid to pay tuition and fees: (1) institutions will be forced to decrease the amount of financial assistance provided to low-income students to comply with the 85/15 rule which is unfair to these students because their financial assistance is ''counted against them'' when enrolled at an educational institution, and (2) ''under-privileged'' and ''indigent'' students will not have access to educational programs without the use of institutional financial aid. One commentor stated that institutions will be forced to decrease the amount of financial assistance provided to low-income students to stay within the 85/15 rule calculations. Another commentor pointed out that students needing scholarships and financial aid to attend an educational institution should not have their financial assistance counted against them when seeking enrollment at an institution.

Under this rulemaking, supported students are defined as students who have all or part of their tuition, fees or other charges paid for them by the educational institution, or by VA under title 38, U.S.C., or under title 10, U.S.C. As such, only students receiving ''VA aid'' and ''institutional aid'' will be counted as supported students. Per statute, when a school chooses to grant institutional aid to a student, the student must be counted as supported, which is the exact intent of the law. Hence, if the school chooses to go over the 85 percent threshold in a specific program of education, future GI Bill students will be impacted. Those students receiving Federal financial aid other than from VA or the educational institution will remain counted as non-supported students for the 85/15 calculations. As a result, there will be no impact to students who are in receipt of non-VA Federal aid such as need-based grants, Federal direct subsidized or non-subsidized loans, or non-institutional financial aid such as third-party loans or scholarships. Those categories of students already are considered non-supported students in 85/15 calculations and will remain on the 15 percent side of the ratio calculation.

Any schools with a significant population of disadvantaged students who receive institutional aid, which might result in the educational institution violating the 85 percent limitation of ''supported students'' under this rulemaking, may apply for a waiver, which, as a result of this rulemaking, will be a more straightforward process. Specifically, under the amendments to 38 CFR 21.4201(h), VA may grant a waiver of the 85 percent limitation when favorable consideration is made on the educational institution's performance relative to the criteria of ''availability of comparable alternative educational facilities effectively open to veterans in the vicinity of the school requesting a waiver'' and ''the general effectiveness of the school's program in providing educational and employment opportunities to the veteran population it serves.'' Whereas there currently are four criteria that must be addressed in order to obtain this waiver, this final rule reduces the number of criteria that must be addressed.

Several comments expressed concern that by removing the third category (''students in receipt of any Federal Aid (other than VA benefits)'') from VA's current regulatory definition of ''non-supported'' students at section 21.4201(e)(2), this rule would negatively impact two-year institutions that serve low-income or underserved populations that need Federal financial aid to attend school. One commenter stated that this change would force schools to choose between the underprivileged and Veteran populations. Another commentor was concerned that programs such as the WIOA would now be counted on the supported side of the calculation because of the removal of the third category. The commenter stated that many programs attractive to WIOA beneficiaries would also be attractive to Veterans, and therefore may cause the schools to lose prospective students.

As stated above, students receiving Federal financial aid and/or aid from WIOA or similar Federal programs will be not considered ''supported'' for the 85/15 calculations. As previously stated, supported students are only those students who are having all or part of their tuition, fees or other charges paid for them by the educational institution, or by VA under title 38, U.S.C., or under title 10, U.S.C. According to the PNPI, in the AY 2015–16, only 5.1 percent of students enrolled at minority-serving institutions (MSI) were Veterans.[3] Additionally, in 2020, the Department of Health and Human Services published a list of MSIs that shows the majority are public institutions.[4]

Furthermore, Public Law 117–174, discussed in the Ensuring the Best Schools for Veterans Act of 2022 section of this preamble, exempts a large portion of training facilities from the 85/15 requirements.

One commenter stated that counting students receiving institutional aid as ''supported'' would discourage schools from offering funds to lower income students or risk having Veteran students locked out of the programs they are interested in.

In response, VA notes students receiving institutional aid have been classified by statute as ''supported'' since the inception of the statute creating the 85/15 rule. The 85 percent rule was enacted in 1952 to combat predatory school abuses found to occur following the implementation of the Servicemen's Readjustment Act of 1944. The statutory authority for the 85/15 rule currently resides in 38 U.S.C. 3680A, where it was added by Public Law 102–568, the ''Veterans Benefits Act of 1992.'' VA has no authority to remove ''students receiving institutional aid'' from being counted as ''supported''; only Congress does.

Some commenters expressed concerns that the changes to the 85/15 calculations would negatively impact institutional revenue by requiring extensive and possibly duplicative manhours from SCOs (in addition to VA employees) when computing the 85/15 calculations and the 35 percent exemptions.

[3] Veterans Fact Sheet, supra note 2.

[4] 2020 List of Minority Serving Institutions, U.S. Department of Health and Human Services, available at *https://www.minorityhealth.hhs.gov/assets/PDF/2020_Minority_Serving_Institutions.pdf.*

VA disagrees with this statement. To the extent the commenters' concern is having to revise calculations for prior years, VA notes that 85/15 calculations are done point forward. Calculations that have already been reported for completed or in-progress terms need not be recalculated. To the extent the commenters are concerned about duplication of effort, VA notes this rulemaking has been designed to minimize burdens on both schools and the government while still accomplishing the objective of strengthening the 85/15 rule. By removing the exceptions, the calculation process will be streamlined and more straightforward, enabling SCOs and VA employees to calculate and review easily. Finally, the NPRM did not address the 35 percent exemption, and this rulemaking does not make any changes to the portions of the regulation that address this rule.

Additionally, Public Law 117–174, discussed in the Ensuring the Best Schools for Veterans Act of 2022 section of this preamble, exempts a large portion of training facilities from the 85/15 requirements. As one commenter noted, ''virtually all public and non-profit colleges and universities qualify for this exemption: they have veteran populations below 35 percent—typically well below that threshold and often in the single digits—and the majority of their programs are typically approved under section 3672 or 3675.''

Furthermore, according to the PNPI, in 2021, only 6.4 percent of the U.S. population aged 18 or over were Veterans of the U.S. military. For the AY 2015–2016, only 4.9 percent of undergraduates were Veterans. At for-profit institutions during the same period, this figure was slightly higher at 9.2 percent; however, this percentage is still well below the 35 percent mark established by statute.[5] This means that a large portion of those schools previously reporting 85/15 ratios will not be impacted by this rulemaking, as they will be exempt from reporting.

VA makes no changes to the rule based on these comments.

Administrative Burden

Many commenters opposed VA's 85/15 rule, due to the administrative burden it poses on a school's VA Certifying Official(s). However, one commenter provided a counterpoint, stating that ''the removal of these four exemptions will provide clarity and efficiency to the certification process, reducing the workload of administrators and minimizing categorization mistakes.''

[5] Veterans Fact Sheet, supra note 2.

VA acknowledges the administrative burden placed on schools that are required to submit 85/15 calculations. However, this rulemaking is not increasing the current burden of having to report 85/15 calculations. Furthermore, the removal of all four current exceptions to the ''non-supported'' side of the 85/15 ratio simplifies the calculation of the 85/15 ratio and clarifies requirements for schools, thereby making it easier for schools to remain in compliance. In theory, this should lighten the existing administrative burden. Also, the administrative burden of having to submit 85/15 calculations will be reduced due to the implementation of ''Ensuring the Best Schools for Veterans Act of 2022,'' since this law exempts most accredited schools from 85/15 requirements if their GI Bill student enrollment is lower than 35 percent of the total student population.

VA makes no changes to the rule based on these comments.

Waiver Process

There were several comments concerning the amendments to 85/15 waiver criteria. One commenter disagreed with the retention of the criterion in 38 CFR 21.4201(h)(1) and the elimination of the waiver criterion in paragraph (3), stating that for paragraph (1), they believed that the unavailability of another similar program in the vicinity of a non-compliant program would not be an indicator of a program's quality or outcome. This commenter stated that the criterion in paragraph (3) should be retained and its language revised to refer to the ''past performance'' of an institution, rather than to past compliance. The commenter further stated that in the adjudication of waiver requests, the consideration of an institution's past performance would protect students from predatory schools.

VA disagrees with the commenter's recommendations. VA maintains that the criterion in paragraph (1) (''the availability of comparable schools open to Veterans in the vicinity of the school requesting a waiver'') is a valid and quantifiable criterion to evaluate whether an institution should be granted a waiver. The availability of comparable schools nearby also provides effective market validation of tuition costs because this factor compares the cost-effectiveness of programs at comparable schools.

As to the commenter's suggestion to keep the criterion in paragraph (3) but amend the language to state ''past performance'' instead of the past compliance of an institution, VA believes that making this distinction is not useful or logical. VA and/or SAAs often learn of past performance issues through their compliance actions. In some cases, non-compliance with VA law or policy leads to the suspension or withdrawal of program approval, giving a clear indication of a past performance issue. Further, ''performance'' compliance or lack thereof is always documented and is a clear measure of past performance. Regardless, VA concludes that retaining paragraph (3) with either the existing or suggested revision is not necessary altogether since the revision to the criterion in 38 CFR 21.4201(h)(4) (''general effectiveness of the school's program in providing educational and employment opportunities to the Veteran population it serves'') adds the factor of an educational institution's participation in and compliance with the Principles of Excellence program established by Executive Order 13607. This added factor to the paragraph (4) criterion will provide comprehensive performance indicators to evaluate an educational institution's general effectiveness and protect students from predatory schools while using Federal education benefits.

Another commenter objected to the revision of the list of factors to be considered in the ''general effectiveness of the school's program'' criterion in 38 CFR 21.4201(h)(4), stating that the current factors are required to comply with Principles of Excellence and, as such, should remain in the criteria considered in the 85/15 waiver decision process. The commenter also opposed maintaining the existing graduation rate factor in paragraph (4), stating that this factor may not accurately measure the success of student outcomes since there are instances of students attending, but not graduating from, community college because they attended the community college only to prepare for entry into a university.

VA disagrees with these comments. The current list of factors contained in 38 CFR 21.4201(h)(4), including the ''ratio of educational and general expenditures to full-time equivalency enrollment,'' largely is not useful when deciding on a waiver and should be revised. As stated in the rulemaking, the current graduation rate factor will be retained and the list expanded to include other factors such as graduate employment, graduate salary, gainful employment, student complaints, and industry endorsements, as these factors are strong and logical indicators of an educational institution's general effectiveness.

As to the commenter's opposition to retaining the existing graduation rate factor, this factor is still both relevant and applicable to most waiver request determinations. Further, this amendment expands the current list of factors that may be considered to include not only graduate employment but graduate salary, gainful employment, student complaints, and industry endorsements. Additionally, under this rulemaking, VA will have authority to weigh other unlisted factors on a case-by-case basis. Thus, there are ample metrics provided by this rulemaking to minimize the significance of the number of students who transfer to, and then graduate from, another educational institution.

Another commenter stated that a school seeking a waiver would be detrimental to Veterans due to the ''additional amount of time'' expended to seek a waiver. This commenter indicated that a student's program would be suspended pending the waiver determination and that Veterans would be unable to enroll or attend classes in the affected programs.

VA does not agree with this statement since the rulemaking simplifies the waiver application process by decreasing the number of waiver criteria. Therefore, the process of waiver application will be simplified for the educational training institute and for VA to adjudicate. Additionally, as previously stated in this preamble, with the enactment of Public Law 117–174, it is likely that fewer educational training institutes will be seeking waivers, as many are now exempt from tracking the 85/15 ratio.

VA makes no changes to the rule based on these comments.

Executive Orders 12866, 13563 and 14094

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 (Executive order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is a significant regulatory action under Executive Order 12866, Section 3(f)(1), as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). Notwithstanding data collection limitations regarding the number of schools that are classified as small entities, VA's certification is based on the fact that students will continue to provide revenue to schools regardless of whether they are classified as supported or non-supported. Should a school already at or near the statutory 85/15 ratio limit find that a reclassification of students from ''non-supported'' to ''supported'' will alter its ratio to the point where it will fall out of compliance with the 85/15 rule, the school can recruit additional non-supported students to restore that ratio. While needing to recruit more non-supported students is an effect on schools, it does not qualify as a significant economic impact. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply. Nonetheless, VA acknowledges that the provisions in this rulemaking may create some uncertainty and reactive behavior from both Veteran students and personnel within institutions of higher learning.

Unfunded Mandates

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

Paperwork Reduction Act

Although this final rule contains collections of information under the provisions of the Paperwork Reduction

Act of 1995 (44 U.S.C. 3501–3521), there are no provisions associated with this rulemaking constituting any new collection of information or any revisions to the existing collections of information. The collections of information for 38 CFR 21.4201 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control numbers 2900–0896 and 2900–0897.

Assistance Listing

The Assistance Listing numbers and titles for the programs affected by this document are 64.027, Post-9/11 Veterans Educational Assistance; 64.028, Post-9/11 Veterans Educational Assistance; 64.032, Montgomery GI Bill Selected Reserve; Reserve Educational Assistance Program; 64.117, Survivors and Dependents Educational Assistance; 64.120, Post-Vietnam Era Veterans' Educational Assistance; and 64.124, All-Volunteer Force Educational Assistance.

Congressional Review Act

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

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces claims, Colleges and universities, Education, Employment, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on January 8, 2024, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 21 as set forth below:

PART 21—VETERAN READINESS AND EMPLOYMENT AND EDUCATION

Subpart D—Administration of Educational Assistance Programs

■ 1. The authority citation for part 21, subpart D continues to read as follows:

Authority: 10 U.S.C. 2141 note, ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 33, 34, 35, 36, and as noted in specific sections.

■ 2. Amend § 21.4201 by revising paragraphs (e)(2), the introductory text of paragraph (f)(1), and paragraphs (f)(2)(ii) and (h) to read as follows:

§ 21.4201 Restrictions on enrollment; percentage of students receiving financial support.

* * * * *

(e) * * *

(2) *Assigning students to each part of the ratio.* In accordance with the provisions of paragraph (a) of this section, *non-supported students* are those students enrolled in the course who are having none of their tuition, fees or other charges paid for them by the educational institution, or by VA under title 38, U.S.C., or under title 10, U.S.C., while *supported students* are those students enrolled in the course who are in receipt of institutional aid or VA educational assistance benefits (*i.e.,* having all or part of their tuition, fees or other charges paid for them by the educational institution, or by VA under chapter 36, title 38, United States Code, or under title 10, United States Code.). *Institutional aid* does not include Federal, state, or municipal grant funding, nor does it include matching funds provided by the educational institution through participation in such Federal, state, or municipal grant programs. Recipients of these funds are to be counted as non-supported students barring receipt of other institutional aid or VA educational assistance benefits.

* * * * *

(f) * * * (1) Schools must submit to VA all calculations (those needed to support the exemption found in paragraph (c)(4) of this section as well as those made under paragraph (e)(3) of this section). If the school is organized on a term, quarter, or semester basis, it shall make that submission no later than 30 days after the beginning of the first term for which the school wants the exemption to apply. If the school is organized on a non-standard term basis, it shall make its submission no later than 30 days after the beginning of the first non-standard term for which the school wishes the exemption to apply. A school having received an exemption found in paragraph (c)(4) of this section shall not be required to certify that 85 percent or less of the total student enrollment in any course is receiving Department of Veterans Affairs assistance:

* * * * *

(2) * * *

(ii) If a school is organized on a non-standard term basis, reports must be received by the Department of Veterans Affairs no later than 30 days after the beginning of each non-standard term.

* * * * *

(h) *Waivers.* Schools which desire a waiver of the provisions of paragraph (a) of this section for a course where the number of full-time equivalent supported students receiving VA education benefits equals or exceeds 85 percent of the total full-time equivalent enrollment in the course may apply for a waiver to the Director, Education Service. When applying, a school must submit sufficient information to allow the Director, Education Service, to judge the merits of the request against the criteria shown in this paragraph. This information and any other pertinent information available to VA shall be considered in relation to these criteria:

(1) Availability of comparable alternative educational facilities effectively open to veterans in the vicinity of the school requesting a waiver.

(2) General effectiveness of the school's program in providing educational and employment opportunities to the particular veteran population it serves. Factors to be considered should include, but are not limited to: percentage of veteran-students completing the entire course, graduate employment statistics, graduate salary statistics, satisfaction of Department of Education requirements regarding gainful employment (where applicable), other Department of Education metrics (such as student loan default rate), student complaints, industry endorsements, participation in and compliance with the Principles of Excellence program, established by Executive Order 13607 (where applicable), etc.

(3) Whether the educational institution's aid program appears to be consistent with or appears to undermine the 85/15 rule's tuition and fee costs market validation mechanism.

[FR Doc. 2024–00629 Filed 1–12–24; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 4

[PS Docket Nos. 23–5, 15–80; WC Docket No. 18–336; FCC 23–57; FR ID 195997]

Ensuring the Reliability and Resiliency of the 988 Suicide & Crisis Lifeline; Rules Concerning Disruptions to Communications; Implementation of the National Suicide Hotline Improvement Act of 2018

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) requires covered 988 service providers (a new category of service provider) and cable, satellite, wireless, wireline, and interconnected voice over internet protocol (VoIP) providers (originating service providers) to report outages that potentially affect the 988 Suicide and Crisis Lifeline in the Commission's Network Outage Reporting System (NORS). The rules also require these entities to directly notify Substance Abuse and Mental Health Services Administration (SAMHSA), the Department of Veterans Affairs (VA), and the 988 Lifeline administrator about outages that potentially affect a 988 special facility, and exercise special diligence to maintain accurate, up-to-date contact information for 988 special facilities, just as the Commission's rules require for 911 special facilities. The rules also allow SAMHSA and the VA to have direct read-only access to NORS consistent with the Commission's existing NORS outage information sharing procedures. These rules are adopted with the goal of ensuring that the Commission and those parties that provide life-saving crisis intervention services to people calling the 988 Lifeline receive timely and actionable information about 988 service outages that potentially affect those services' ability to meet the immediate health needs of people in suicidal crisis and mental health distress.

DATES: Effective February 15, 2024, except for the amendments to 47 CFR 4.9 (amendatory instruction 4), which are delayed indefinitely. The Commission will publish a document in the **Federal Register** announcing the effective dates of these amendments.

FOR FURTHER INFORMATION CONTACT: Shabbir Hamid, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau, (202) 418–2328, or by email to *Shabbir.Hamid@fcc.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Nicole Ongele, Office of Managing Director, Performance and Program Management, 202–418–2991, or by email to *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, PS Docket No. 23–5; PS Docket No. 15–80; WC Docket No. 18–336; FCC 23–57, adopted July 20, 2023, and released July 21, 2023. The full text of this document is available by downloading the text from the Commission's website at: *https://docs.fcc.gov/public/attachments/FCC-23-57A1.pdf.* When the FCC Headquarters reopens to the public, the full text of this document will also be available for public inspection and copying during regular business hours in the FCC Reference Center, 45 L Street NE, Washington, DC 20554. To request this document in accessible formats for people with disabilities (*e.g.,* Braille, large print, electronica files, audio format, etc.) or to request reasonable accommodations (*e.g.,* accessible format documents, sign language interpreters, CART, etc.), send an email to *FCC504@fcc.gov* or call the FCC's Consumer and Government Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Congressional Review Act

The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that this rule is non-major under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of the Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

I. Synopsis

1. In the Report and Order, the Commission requires cable, satellite, wireless, wireline, interconnected VoIP providers (originating service providers), and a new category of ''covered 988 service providers'' to report outages that potentially affect the 988 Lifeline to the Commission's Network Outage Reporting System (NORS), similar to the Commission's existing rules that require the reporting of outages that potentially affect 911. The Report and Order defines ''outages that potentially affect a 988 special facility'' as events that result in the loss of the ability of the 988 Lifeline to receive, process, or forward calls, potentially affecting at least 900,000 user-minutes and lasting at least 30 minutes duration.

2. The Report and Order also requires that these providers provide notice to the Substance Abuse and Mental Health Services Administration (SAMHSA), the Department of Veterans Affairs (the VA), and the 988 Lifeline administrator when an outage that potentially affects a 988 special facility occurs. For outages lasting longer than 2 hours, the providers would follow-up with subsequent notifications of material information as soon as possible after discovery of the new material information, and continue providing additional material information until the outage is completely repaired and service is fully restored. These service providers would also be required to maintain up to date contact information for those individuals identified by SAMHSA, the VA, and the 988 Lifeline administrator to receive outage notifications.

A. Reporting 988 Outages in NORS

3. In the 988 Outage notice of proposed rulemaking (NPRM),[1] the Commission proposed to require entities that provide the 988 Lifeline with capabilities such as the ability to receive, process, or forward calls to report outages that potentially affect the 988 special facilities to the Commission's NORS. The Report and Order adopts this proposal, which is overwhelmingly supported by commenters. The Commission believes this outage reporting requirement will both improve the resiliency of the 988 Lifeline system, and through the Commission's NORS information sharing rules, ensure that SAMHSA, the VA, and the Lifeline administrator have timely outage information so they can provide the public with alternative ways to access the Lifeline. The Commission agrees with the Boulder Regional Emergency Telephone Service Authority that requiring the reporting of 988 outages will enable the tracking of outage trends, the identification of best practices to help preemptively address the common causes of outages, and the ability to anticipate and plan for future outages. The Commission also agrees with Mental Health America that in helping promote timely access to the 988 Lifeline, these requirements will promote equity for at-risk populations.

4. The Commission observes that a person in suicidal crisis or emotional distress who cannot successfully reach

[1] Ensuring the Reliability and Resiliency of the 988 Suicide & Crisis Lifeline; Rules Concerning Disruptions to Communications; Implementation of the National Suicide Hotline Improvement Act of 2018, 88 FR 20790 (Apr. 7, 2023).

a crisis center due to an outage continues to be at risk, regardless of whether the outage occurs before or after a call reaches the 988 Lifeline. This includes outages that prevent calls from being routed to the intended local crisis center or the Veterans Crisis Line. The Commission agrees with commenters that it is appropriate to require covered 988 service providers to report outages in NORS because the services they offer, which ensure that calls are routed to the correct destination after they reach the 988 Lifeline, are essential to the Lifeline's availability. Vibrant, the 988 Lifeline administrator, has indicated that it can use outage information to quickly update routing tables used by covered 988 service providers in order to avoid routing calls to crisis centers that are experiencing an outage. Because this outage information would be used to increase the availability and resiliency of 988 services, the Commission therefore disagrees with CX360 that it is not necessary for the Commission to adopt rules to provide the Commission and the parties responsible for operation of the 988 Lifeline with timely and actionable information about outages that occur after those communications reach the Lifeline. While CX360 argues that ''SAMHSA and the 988 Lifeline Administrator already are capable of operating the 988 Lifeline effectively'' without such reporting, the Commission notes that SAMHSA and Vibrant both support the reporting requirement. The Commission also rejects CX360's argument that reporting requirements are not necessary because SAMHSA and the VA already have visibility into outages that occur after calls reach the 988 Lifeline. Because CX360 offers no supporting details as to what information SAMHSA and the VA are receiving and whether its substance and timing is comparable to the requirements adopted in the Report and Order, the Commission is not persuaded that this visibility, if it exists, undercuts the justification for the rules adopted in the Report and Order.

5. The Report and Order defines ''covered 988 service providers'' as those providers that provide the 988 Lifeline with capabilities such as the ability to receive, process, or forward calls. *See Ensuring the Reliability and Resiliency of the 988 Suicide &Crisis Lifeline; Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications; Implementation of the National Suicide Hotline Improvement Act of 2018,* PS Docket Nos. 23–5 and 15–80, WC Docket No. 18–336, at 9, paragraph 15, Notice of Proposed Rulemaking (NPRM), FCC 23–7 (Jan. 27, 2023), 88 FR 20790 (Apr. 7, 2023) (988 Outage NPRM) (proposing to define ''covered 988 service providers'' as those providers that provide the 988 Lifeline with capabilities such as the ability to receive, process, or forward calls). The Commission responds to commenters that question the scope of the new rules by clarifying that, consistent with longstanding practice in the 911 context, the new paragraph (f) of § 4.5 does require outage reporting from those entities that provide a communications network or service that facilitates the receipt, processing, or forwarding of the call, including from the 988 Lifeline to the local 988 crisis center. *See New Part 4 of the Commission's Rules Concerning Disruptions to Communications,* Report and Order, 19 FCC Rcd 16830, 16873–76, paragraphs 76 through 81 (2004), 69 FR 70316 (Dec. 3, 2004). The Commission finds that the scope of this definition is appropriately limited in that it covers only those providers that are essential to the capabilities of the 988 Lifeline. The Commission agrees with SAMHSA that ''covered 988 service providers'' should not include 988 crisis centers themselves nor the Veterans Crisis Line. Crisis centers do not receive, process, or forward calls and lack the expertise and access to information that would be necessary to make such reports. In addition, a requirement for crisis centers to make such reports would place significant additional burdens on them during outages, which would run contrary to the goals of this proceeding. The Commission also finds that covered 988 service providers should not include originating service providers that originate 988 calls and deliver calls to the 988 Lifeline but otherwise do not provide services for the Lifeline. Commenters point out that originating service providers do not generally provide the 988 Lifeline with capabilities such as receiving, processing, or forwarding calls, while the service providers that do offer these capabilities will likely do so through direct contractual arrangements. The Commission agrees with USTelecom that ''defining 'covered service provider' in this way is consistent with the Commission's definition in the 911 context, and keeping definitions of key terms consistent across these public safety contexts will prevent confusion and facilitate regulatory certainty.'' Finally, the Commission agrees with Voice on the Net Coalition that covered 988 service providers should not include providers of capabilities that are provided directly to local crisis centers, as those are not services that are provided directly to the 988 Lifeline.

6. Although the Commission is excluding them from the definition of covered 988 service providers, the Commission also finds that originating service providers are critical in providing 988 service and thus require cable, satellite, wireless, wireline, and interconnected VoIP providers to report in NORS outages that potentially affect the 988 special facilities. The Commission agrees with Mental Health America that these originating service providers, like covered 988 service providers, ''have a role to play in ensuring that people get their responses when they need crisis counseling,'' and agree with Vibrant that ''having the same requirements for covered service providers and OSPs [originating service providers] ensures the delivery of timely, actionable information while also reducing the burden of reporting by streamlining requirements.'' The Commission also agrees with the Washington State Department of Health and Health Care Authority that reporting requirements ''should not be different for originating service providers that deliver calls to the 988 Lifeline in the first instance versus the covered 988 service provider that handles the call thereafter.'' As the Commission states in the Report and Order, a person in suicidal crisis or emotional distress who cannot successfully reach a crisis center due to an outage continues to be at risk, regardless of whether the outage occurs before or after the call reaches the 988 Lifeline. For that reason, the reporting of outages that occur in originating service providers' networks are essential to improving the resiliency of the 988 Lifeline and ensure that SAMHSA, the VA, and the Lifeline administrator have timely outage information so they can provide the public with alternative ways to access the Lifeline. The Commission also finds find, consistent with the views of the National Alliance on Mental Illness, that ''having more sources of data regarding outages will enhance the ability of the FCC and the 988 administrator to identify what is needed to create a more reliable network.''

7. The Commission disagrees with those commenters that argue that it is premature for the Commission to consider the adoption of 988 outage reporting requirements. The record reflects the serious impact of the December 2022 covered 988 service provider outage, and nothing in that record indicates that such an outage could not happen again, or that

originating service provider outages do not affect the delivery of 988 calls. The Commission also disagrees with Southern Linc, which argues that originating service providers should not be required to report 988 outages because they do not have visibility into the delivery of 988 communications after those communications leave their networks. Originating service providers nonetheless have visibility into whether 988 calls are disrupted due to outages in their own network or the networks of third parties with which they contract for service before being delivered to Lifeline. *See Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications, Improving 911 Reliability, New Part 4 of the Commission's Rules Concerning Disruptions to Communications,* PS Docket Nos. 15–80, 13–75, 04–35, Second Report and Order, FCC 22–88 at 7, paragraph 20 (Nov. 18, 2022), 88 FR 9756 (March 17, 2023) (explaining that reliance upon a third-party service provider to manage, route, or otherwise contribute to 911 call processing does not relieve a service provider of its obligations—even if the discovery is first made by the third party). The Commission therefore believes that originating service providers should be required to report those outages for the reasons explained above.

8. The record informs the Commission that originating service providers currently lack the capability to distinguish outages that prevent the completion of a 988 call from outages on their network that prevent the completion of other calls. For the purposes of the rules the Report and Order adopts, this is immaterial because outages that prevent the completion of all calls are necessarily outages that potentially affect 988 special facilities. The Commission finds that reports about service-wide outages, like reports that are specific to 988 Lifeline outages, provide insight into 988's reliability and can provide information to SAMHSA, the VA, and the Lifeline administrator that would allow them to effectively respond to outages (*e.g.,* notify the public of alternate ways to contact the 988 Lifeline). The Commission also believes that this approach acknowledges the current capabilities of existing networks, gives service providers flexibility as to how they can satisfy the requirements, and potentially reduces compliance costs by leveraging providers' existing technical capabilities and systems. The Commission notes that originating service providers are already required to report voice service outages in NORS, regardless of a call's destination. As a consequence, The Commission finds that providers complying with this existing outage reporting requirement will only need to take nominal action to report voice telephony outages that potentially affect the 988 Lifeline to the Commission. As recommended by the Alliance for Telecommunications Industry Solutions (ATIS) and NCTA—The Internet & Television Association (NCTA), the Commission will add a checkbox to NORS so that reporting providers can clearly indicate whether a reported outage potentially affects a 988 special facility. The Commission believes this field will improve the ability of the Commission and the agencies with which it shares NORS data to quickly recognize and more effectively analyze the effects of reported outages.

9. The Report and Order defines ''outages that potentially affect a 988 special facility'' as events that result in the loss of the ability of the 988 Lifeline to receive, process, or forward calls, potentially affecting at least 900,000 user-minutes and lasting at least 30 minutes duration. The Report and Order notes that ''loss of the ability of the 988 Lifeline to receive . . . calls'' includes outages in originating service providers' networks that prevent successful transmission of calls to the Lifeline. The majority of commenters support using the same outage reporting thresholds for 988 as those previously adopted for 911 outages. The Commission agrees with USTelecom that ''[s]tandardizing the threshold across [988 and 911] will facilitate efficient, timely compliance, and is consistent with the Notice's objective of imposing 'only minor changes to existing procedures' by 'closely align[ing]' them with rules for 911-related outages.'' The Commission acknowledges the concerns of the Veterans Crisis Line, which argues that outages shorter than 30 minutes in duration should be reported because, statistically, as many as three deaths by suicide may occur within 30 minutes. However, the Commission believes that the benefits of awareness and opportunities for action that arise from the reporting of outages must be balanced against the burden of reporting those outages. Based on the record before us, the Commission is unable to determine whether reducing the minimum or user-minute durations of reportable outages would improve upon that balance. At this time, it is unclear to what extent reduced thresholds would increase the number of 988 outage reports received, the extent to which additional reporting would contribute to public safety and the reliability of the 988 Lifeline, and whether those benefits would outweigh the burdens associated with increased reporting. For these reasons, the Commission believes it is sensible to adopt 988 outage reporting requirements that are consistent with existing 911 outage reporting requirements and providers' existing reporting procedures. As noted by Association of Public-Safety Communications Officials International, Inc. (APCO), the Commission has recently directed the Public Safety and Homeland Security Bureau (Bureau) to gather information on the volume of 911 outages that may go unreported under the Commission's existing outage notification thresholds and have sought additional comment on possible alternative outage reporting thresholds. The Commission directs the Bureau to add 988 Lifeline outages to its examination.

10. The Report and Order clarifies, as requested by SAMHSA, that outages that potentially affect the 988 Lifeline include partial service disruptions, as well as outages with a duration of more than 30 minutes. The Commission notes that § 4.5(a) of its rules defines an outage as ''a significant degradation in the ability of an end user to establish and maintain a channel of communications as a result of failure or degradation in the performance of a communications provider's network.'' For example, any circumstances in which the ability of the 988 Lifeline to receive, process, or forward calls is significantly degraded for at least 30 minutes and potentially affects at least 900,000 user-minutes must be reported in NORS. This includes circumstances in which the degradation lasts longer than 30 minutes and circumstances in which 988 calls are received by a call-taker despite the degradation. The Commission disagrees with USTelecom's view that partial outages and service disruptions should not be subject to 988 outage reporting and notification requirements, which it argues would complicate the outage reporting process and result in over-notification. Because the Commission's existing outage reporting and notification rules already define ''outages'' to include partial service disruptions, exempting partial service disruptions from 988 reporting and notification requirements would make our rules more complicated, not less complicated. The Commission also finds little evidence in the record supporting the conclusion that the reporting of partial outages would result in too many notifications, particularly since SAMHSA and Vibrant, which are

two of the three of the entities who would receive notifications under the rules adopted in the Report and Order, are specifically requesting notifications about partial outages.

11. The Report and Order requires 988 outage reports be filed with the Commission in NORS, consistent with the Commission's current requirements for outage report filing processes and timing. No commenter objected to the use of NORS for this purpose. The Commission agrees with ATIS that ''industry is already familiar with NORS and believes that the use of NORS will reduce implementation costs associated with 988 outage reporting and would be significantly less costly and burdensome than the implementation of a new or different reporting system.'' The Commission further agree with USTelecom that reporting in NORS ''will streamline the reporting process and allow providers to devote maximum attention to addressing the outage itself and getting service back up and running, rather than diverting time and resources to more complex or cumbersome reporting requirements.''

12. The Commission declines to allow alternatives to NORS reporting, such as reporting by email, as requested by CX360. The Commission does not agree that alternatives would reduce administrative burdens on providers. NORS is a well-established system that facilitates the filing of outage reports in a streamlined and uniform manner with all information required by our rules. NORS supports the filing of outage data through Application Program Interfaces (API), which can facilitate the automated filing of outage reports. Submission of outage reports via email would create opportunities for inconsistently styled filings with incomplete or confusing information, which would lead to Commission staff taking up providers' time with numerous calls and questions about their filings. The submission of reports by email would also greatly diminish the Commission's ability to record historic outage data, analyze outage trends, and share outage information with Federal, State, Tribal, and territorial agencies. For these reasons, both efficiency and effectiveness weigh in favor of requiring all outage reports to be filed in NORS.

13. The Report and Order allows direct read-only access to NORS data by SAMHSA and the VA, consistent with our existing NORS outage information sharing procedures. In the 988 Outage NPRM, the Commission stated its belief that improving situational awareness of significant network outage issues affecting 988 Lifeline services would not only provide the Commission with critical insight into the availability and reliability of a vital public health service, but would also provide that insight to the other Federal, State, Tribal, and territorial agencies with whom NORS data is shared. The Commission agrees with SAMHSA that having access to outage reports and related analysis on network reliability will better enable these stakeholders to prepare and respond to network disruptions and better ensure the 988 Lifeline's availability. The Commission also agrees with the Washington State Department of Health and Health Care Authority that these 988 stakeholders would benefit from having access to outage reports that indicate whether 988 calls affected by an outage are being rerouted to other crisis centers. The Commission further agrees with the Boulder Regional Emergency Telephone Service Authority (BRETSA) that improving the availability of information about 988 network reliability would empower 988 stakeholders to take additional steps to make the 988 Lifeline even more reliable. For these reasons, the Report and Order clarifies that the Commission considers the lifesaving services offered by the 988 Lifeline to be emergency management and first responder support functions. The Report and Order notes that the national suicide prevention mental health crisis hotline system operates through the National Suicide Prevention Lifeline maintained by the Assistant Secretary for Mental Health and Substance Use, section 520E–3 of the Public Health Service Act, National Suicide Prevention Lifeline Program, 42 U.S.C. 290bb–36c, and through the Veterans Crisis Line maintained by the Secretary of Veterans Affairs under the Comprehensive Program for Suicide Prevention Among Veterans and Members of the Reserve Components of the Armed Forces, 38 U.S.C. 1720F(h). See also National Suicide Hotline Designation Act of 2020 (Congress deemed ''life-saving resources'' such as crisis lines ''essential'' and recognized the need for a 3-digit phone number for such services to be readily available in emergency situations.). *See NORS/ Disaster Information Reporting System (DIRS) Information Sharing Report and Order (R&O),* 36 FCC Rcd 6136 at 6146–47, paragraphs 32 through 39 (2021), 86 FR 22796 (April 29, 2021) (describing the ''need to know'' requirement for eligibility). Accordingly, in order for SAMHSA and the VA to mitigate the impacts service outages may have on access to the 988 Lifeline and VA Crisis Line, and ensure these services remain available to support the safety of the general public seeking crisis support and to prevent suicide among veterans, the Commission finds that both SAMHSA and the VA have a ''need to know'' and are eligible to apply for direct access to the Commission's outage reports. While the 988 Lifeline administrator is not itself eligible for direct access to these reports because it is not a government agency, the Commission observes that the Commission's outage information sharing rules would allow SAMHSA and the VA to share information with them about specific outages, subject to certain confidentiality requirements and other safeguards.

B. Providing 988 Special Facilities With Notice of Outages

14. The Report and Order requires covered 988 service providers to directly notify 988 special facilities about outages that potentially affect those facilities. Commenters generally support the adoption of such a requirement. The Commission agrees with USTelecom that this requirement ''strike[s] the right balance of getting relevant, actionable information to the proposed 988 special facilities'' that will allow them to take steps to maintain the public's access to crisis intervention services ''without overloading them.'' The Commission agrees with BRETSA that 988 outage notifications can help provide information that will allow 988 special facilities to route calls to alternative crisis centers and to help those centers make necessary staffing adjustments. As Vibrant highlights, it can use information about outages in its capacity as the 988 Lifeline administrator to quickly update routing tables to avoid routing calls to crisis centers that are experiencing an outage. Notifications would also allow 988 callers to receive assistance faster, as they would help ensure that those individuals timely connect to a crisis counselor by reducing the amount of time they would have to wait for assistance as a result of having calls fail to be received by a crisis center. The 988 Lifeline administrator is also able to ''effectively and quickly inform all centers in the network of an outage that may impact service and lead to an increase in volume for centers in the areas that are not impacted by the outage. This insight allows time for those unaffected centers to quickly scale to the needed capacity in order to handle the anticipated increased volume that needs to be re-routed.'' The Commission also continues to believe that timely notice of a 988 Lifeline outage will assist SAMHSA, the VA,

and the 988 Lifeline administrator to quickly inform the public of alternative ways of contacting the Lifeline while one type of communication is unavailable, such as texting or using the online chat function if calls are not getting through. The Commission disagrees with CX360, who implies that 988 outage notifications should be handled through contracts between the 988 Lifeline administrator and its service providers rather than by rule. The Commission finds that it is more efficient and better serves the public interest to establish a single, uniform rule for 988 outage notifications that will apply to all service providers with which the Lifeline administrator may contract in the future rather than make the occurrence, frequency, and content of those notifications a repeated subject of negotiation. The Commission further believes that it will not serve the public interest to make 988 outage notifications dependent on the 988 Lifeline administrator's renegotiation of contracts that are in place today, which would have an uncertain result and likely require considerable time to complete. The notification requirements adopted in the Report and Order are similar to the notification requirements the Commission has adopted for covered 911 service providers, which the Commission has found to be effective.

15. The Commission finds that reliance upon a third-party service provider to manage, route, or otherwise contribute to 988 call processing does not relieve providers of the obligation to provide outage notification to 988 special facilities. The Commission agrees with National Emergency Number Association (NENA) that ''the fact that a third party service may specialize in supporting outage notifications, and may have a business relationship with a provider, should not change any reporting requirements for the provider.'' The Commission disagrees with CX360's view that covered 988 service providers should only be responsible for reporting outages on facilities over which they have direct control. In this regard, ''[t]he Commission has long held that licensees and other regulatees are responsible for the acts and omissions of their employees and independent contractors,'' and has recognized that ''under long established principles of common law, statutory duties are nondelegable.'' The Commission notes that this approach mirrors the requirements it has adopted for outages that potentially affect 911 special facilities, which should promote consistency in how notifications are made by service providers.

16. The Report and Order designates SAMHSA, the VA, and the 988 Lifeline administrator as the 988 special facilities that must receive notifications of 988 outages. Commenters agree that it is appropriate for these three entities to receive outage notifications. The Commission agrees with USTelecom that this requirement will ''assist these entities, which oversee and administer the 988 Lifeline, in quickly informing the public of alternative ways to contact the 988 Lifeline as needed.'' The Commission also notes, as highlighted by SAMHSA, that such an approach to outage notification will allow the 988 Lifeline administrator to identify and inform the appropriate crisis centers about outages, as it will have the most updated routing tables and patterns on any given day.

17. At this time, the Commission finds that 988 special facilities that are required to receive 988 outage notifications should not include the local crisis centers to which some 988 calls are routed. The record establishes that the 988 Lifeline's current approach of routing calls based on the area code associated with the user's device makes effective notification of this type extremely challenging. As commenters explain, many users' mobile devices have an area code that is different from the area code in which they are located, which would mean that outages limited to a specific geographic region could nonetheless potentially affect every single local crisis center across the country. The Commission agrees with those commenters that argue that notifications provided to local crisis centers under these circumstances are likely to be overbroad, too frequent, or not provide information that the local crisis center would be capable of acting on.

18. Based on the record before us, the Commission finds that regardless of the scope of an outage, SAMHSA, the VA, and the 988 Lifeline administrator are in the best position to identify what information about a specific outage may be relevant to local crisis centers (including changes in local crisis center routing) and use existing points of contact to convey that information. As Vibrant explains, crisis centers will be notified about outages by the 988 Lifeline administrator irrespective of contact by a covered 988 service provider or originating service provider. While several commenters support notification of local crisis centers in some or all situations, the record does not offer a convincing explanation of how local crisis centers would be able to effectively act upon 988 outage notifications to ensure that 988 callers receive assistance. The record also does not provide clarity on how any benefits arising from those challenges should be weighed against the challenges to providers arising from the need to maintain updated contact information for those centers. While BRETSA argues that outage notifications could assist local crisis centers in making decisions about appropriate staffing levels, the Commission believes that direct notification by service providers would not supply sufficient information for this purpose because, in addition to the geographic routing challenges discussed above, the notifications would not offer any visibility into any related routing changes made by the 988 Lifeline administrator that would ultimately affect call volume to those centers. BRETSA also argues that notifications can assist local crisis centers with making long-term network reliability decisions, but the Commission observes that outage notifications are intended to support imminent action during outages rather than long-term decision-making.

19. The Commission also requires originating service providers, that is, cable, satellite, wireless, wireline, and interconnected VoIP providers, to notify 988 special facilities about outages that potentially affect those facilities. As discussed above, a person in suicidal crisis or emotional distress that cannot successfully reach a crisis center due to an outage continues to be at risk, regardless of whether the outage occurs before or after the call reaches the 988 Lifeline. For that reason, outage notifications are essential to ensuring that SAMHSA, the VA, and the Lifeline administrator have timely outage information so they effectively respond to outages. The Commission therefore agrees with those commenters that argue that originating service providers should be required to provide notifications of 988 outages.

20. The Commission disagrees with Southern Linc's opinion that the area code-based routing of 988 makes it ''highly doubtful that OSPs would be able to provide any actionable outage information to 988 special facilities.'' As discussed above, the 988 Lifeline administrator can use outage notifications to update routing tables to avoid routing calls to crisis centers that are themselves experiencing outages, as well as inform crisis centers about increases or decreases of incoming calls so they can appropriately scale capacity. If needed, SAMHSA, the VA, and the 988 Lifeline administrator could also use information about an outage to inform the public of alternative ways of

contacting the Lifeline while a means of communication is unavailable. These actions are available regardless of whether an outage occurs within the network of a covered 988 service provider or an originating service provider. The Commission also disagrees with T-Mobile's argument that 988 special facilities should not receive notifications, but should instead obtain outage information from NORS data. NORS data is generally received two hours after the discovery of an outage and would have to be actively checked throughout the day by 988 special facilities to stay aware of outages. The Commission finds that this approach is far less likely to be effective at providing timely information than the direct notifications adopted in the Report and Order, which must be delivered within 30 minutes and are provided directly to the affected special facilities. This approach is also consistent with the existing requirement that originating service providers must notify 911 special facilities, which will help minimize costs, promote efficiency, and avoid confusion among providers.

21. The Commission acknowledges concerns that a 988 outage notification requirement for originating service providers could result in SAMHSA, the VA, and the 988 Lifeline administrator receiving ''tens of thousands'' of outage notifications annually, which could be overwhelming and could undermine effective outage response. As Verizon notes, hundreds of outages occur on originating service providers' networks every day, and notifications for those outages are split across thousands of public safety answering points (PSAPs) across the country. If every one of those outage notifications were sent to SAMHSA, the VA, and the 988 Lifeline administrator by phone and email daily, then they presumably would need significant, dedicated resources to receive and act on those notifications. However, the record supports the conclusion that 988 special facilities have such resources in place and will be able to handle the volume of notifications. SAMHSA and Vibrant state that despite the high volume, Vibrant has access to continuous monitoring tools and can develop the necessary capabilities to be able to ingest these notifications. The Commission urges service providers to collaborate with 988 special facilities to ensure that 988 notifications are provided in a format that best facilitates rapid analysis and action.

22. The Commission declines to require covered 988 service providers to notify originating service providers about 988 Lifeline outages and decline to require originating service providers to notify covered 988 service providers about 988 Lifeline outages. As some commenters note, covered 988 service providers often compete with originating service providers or provide services to their competitors. As a consequence, a notification requirement would mandate the sharing of competitively sensitive information. The Commission shares this concern, as well as the concern that the risk of sharing sensitive information directly with competitors and other individuals unnecessarily may slow down providers' notification processes or lead to the removal of information from outage reports that might otherwise be beneficial to a 988 special facility. The Commission notes that the Washington State Department of Health and Health Care Authority supports a requirement that originating service providers provide notice to covered 988 service providers of 988 outages as ''these notices would provide for increased coordination between the carriers for remedying the outage and coordinating workarounds.'' CX360 argues that originating service providers should be required to notify covered 988 service providers about outages because the latter ''lack[s] independent insight into the operations on OSPs' networks'' and notifications will allow it to ''better understand what is happening upstream so it can react quickly and ensure its service is working correctly,'' and ''troubleshoot any issues without needing to contact a provider earlier in the call path, leading to a more efficient resolution of any problems.'' The Commission disagrees, as the Commission finds it unlikely that these actions will help ensure the availability of the 988 Lifeline. If an outage occurs in an originating service provider's network, the Commission does not see how it would be beneficial for a covered 988 service provider to begin ''troubleshooting issues'' within its own separate, downstream network, nor is it clear how those actions would help resolve the originating provider's outage or otherwise help 988 callers successfully reach the Lifeline. In any event, the Commission believes the potential negative impacts on the effectiveness of outage notifications outweigh these possible benefits.

23. The Commission also declines to require that PSAPs be notified about 988 outages. While some commenters argue that 988 outage notifications would prepare PSAPs for potential call volume increases and give them the necessary situational awareness to handle those calls in an appropriate manner, our rules already require PSAPs to be notified about outages that potentially affect 911 special facilities, including general network outages. In addition, these notifications will not provide PSAPs with situational awareness about any routing decisions made by the 988 Lifeline administrator to address the outage. To the extent that an outage might occur in the network of a covered 988 service provider, it is unclear that the benefit of preparing PSAPs for potential call volume increases related to an outage would outweigh the burden of requiring the provider to maintain contact information and then notify thousands of PSAPs nationwide. Moreover, because call routing for 988 is currently based on area code of the caller, rather than geographic location, the ability to identify the appropriate PSAP for such notice may not be logistically feasible in all instances. The Commission also declines to adopt the approach supported by APCO, which would only require 988 outage notifications be made to those PSAPs that opt-in to receiving them. The Commission believes it would be too administratively burdensome for each service provider to continuously track and update the list of PSAPs across the country that have opted-in to receiving 988 outage notifications, particularly in light of the limited benefits.

24. The Report and Order requires covered 988 service providers and originating service providers to notify 988 special facilities with the same content, by the same means, with the same timing, and with the same frequency as our rules require for 911 outage notifications. Most commenters agree that harmonizing these requirements will have the effect of minimizing the cost and other impacts of the new notification requirements on service providers by allowing them to make notifications by efficiently using existing systems and processes. The Commission further notes that here, as in the 911 context, parties may mutually agree to alternate means of notification.

25. The Commission declines to require certain modifications to these requirements proposed by commenters. The Commission rejects CX360's proposal that it adopt a ''safe harbor'' or otherwise modify the content of outage notifications to allow providers to merely notify 988 facilities within 30 minutes that ''an issue has been identified and is being actively investigated, with additional information to be provided later.'' This approach would greatly reduce the amount of actionable information available to 988 special facilities and therefore would not serve as an effective

notification. The Commission also declines to require notifications to include contact information for those callers that failed to connect to the 988 Lifeline since the outage began. The Commission agrees with commenters that it is important for those individuals to receive the support they need, but believe more study is needed to determine whether it is technically feasible to require service providers to obtain and share that information as part of the outage notification process, as well as to understand any costs that might be attendant in obtaining and sharing such information. The Commission acknowledges, as CTIA—The Wireless Association (CTIA) asserts, that wireless network equipment affected by an outage often will not be able to identify devices that cannot connect to the network, which could make compliance with such a requirement challenging. While several commenters also argue that the phone numbers of individuals who try, but fail to reach 988 is not currently available to providers, the Commission suspects that it may be technically feasible for providers to develop these capabilities, so it plans to continue to explore the matter.

26. The Commission disagrees with those commenters that argue that a 30-minute timeframe to provide 988 outage notifications is too fast, as well as those that argue that it is too slow. The Commission finds, as it previously found for 911 outage notifications, that a 30-minute timeframe strikes a balance between the need for timely and actionable 988 outage information and the accuracy of that information. The Commission believes the comments of the Veterans Crisis Line, which highlights that statistically as many as three deaths by suicide occur within thirty minutes, and the comments of the Competitive Carriers Association (CCA), which argues that 30-minute notifications may result in rushed analysis and inaccurate reporting, illustrate why a balance must be struck between speed and accuracy. The Commission agrees with those commenters who argue that 30 minutes is the best way to strike that balance.

27. The Commission disagrees with CCA that a 30-minute notification timeframe would be unreasonable and unrealistic, particularly for originating service providers utilizing vendors for 988 solutions. Thirty minutes has already proven to be a realistic timeframe for covered 911 service providers to gather clear and useful information about network outages to include in a notification, even though such providers also frequently contract for services from vendors. The Commission also finds that originating service providers serving fewer customers will have to experience longer outages to reach the threshold required for notification, which effectively provides more time for those providers to investigate the outage. The Commission therefore sees no reason why it would be overly burdensome for originating service providers to provide accurate notifications within a similar timeframe for 988 outages. To the extent that service providers find that their own vendors' coordination failures are causing them to violate the Commission's outage notification requirements the Commission believes that is a matter to be resolved between those parties and does not change the service provider's obligation to comply with the Report and Order's notification requirements.

28. As an alternative to the requirement adopted in the Report and Order, CCA proposes that the Commission adopt at minimum an approach that sets 988 outage notification deadlines based on the time when actual originating service providers are notified about outages by their vendors or underlying providers. This alternative is incompatible with the goal of providing 988 special facilities with timely outage notifications because it would excuse originating service providers from reporting outages that their vendors fail to disclose to them. The Commission believes this approach would disincentivize originating service providers from learning about outages on their vendors' networks, eliminate consistency as to when 988 special facilities can expect to receive outage reports, and delay 988 special facilities' receipt of outage reports, which would in turn delay any actions they may take to ensure the 988 Lifeline's availability. Moreover, the Commission finds it does not serve the public interest to create a means for providers to ''contract away'' their obligations by allowing the use of a vendor to alleviate a regulatory obligation. As stated above, the Commission has long held that licensees and other regulatees are responsible for the acts and omissions of their contractors, and the Commission declines to adopt an approach to 988 outage notification that would disturb that holding. The findings the Commission makes in the Report and Order are limited to the 988 outage notification requirements made in the order. The Commission reserves judgment on the Petition for Reconsideration filed by CCA regarding the Commission's November 2022 Report and Order, 88 FR 9756 (March 17, 2023), harmonizing 911 existing outage notification requirements. *See CCA Petition for Reconsideration*, PS Docket Nos. 15–80 and 13–75, ET Docket No. 4–35 (filed Mar. 17, 2023), *https://www.fcc.gov/ecfs/search/search-filings/filing/1031746539270.* The Commission also rejects CX360's proposal that follow-up notifications not be due until seven to fourteen days after an initial notification is provided, as delaying critical details about an outage for an entire week, which is likely long after the outage has been resolved, clearly does not serve the goals of improving 988 special facilities' awareness and ability to address outages.

29. The Report and Order requires covered 988 service providers and originating service providers to exercise special diligence to maintain accurate, up-to-date contact information for 988 special facilities, just as our rules require for 911 special facilities. ''Special diligence'' is the diligence expected from a person practicing in a particular field of specialty. The Commission has imposed this higher level of care in circumstances where a failure to take sufficient care can lead to particularly serious public harms. In these circumstances, special diligence would require, for example, actively seeking to confirm the accuracy of contact information and not relying on the absence of a response. Once providers have a 988 special facility contact list in place, special diligence would require them to annually verify the accuracy of their contact list to ensure it is up-to-date. As it has found in the 911 context, the Commission found that for 988 outage reporting that requiring a higher level of care than reaching out to the prior contact is imperative to ensure public safety, and requiring this higher level of care will incentivize providers to ascertain and update such contact information. The Commission also finds that this requirement is significantly less burdensome than the similar requirement pertaining to 911 special facility contact information because the Report and Order only designates three 988 special facilities for which contact information must be maintained. The Commission disagrees with ATIS's view that it would be extremely difficult to apply special diligence to the maintenance of 988 contact information because ''there are no subject matter experts practicing in the field of 988 routing or 988 contact information maintenance.'' The diligence our rules

require is that of a communications provider that, through their experience in offering the services that emergency communications depend on, understands that failure to provide effective notifications about outages could result in harm to life and property. Accordingly, the Commission expects that 988 service providers and originating service providers would take the steps necessary to ensure that the contact information they maintain for 988 special facilities is accurate and effective as the failure to provide effective notice to the appropriate contact could result in harm to life and property.

30. The Commission declines at this time to require covered 988 service providers or originating service providers to file 988 reliability certifications to ensure the network supporting the 988 Lifeline remains resilient and robust. The Commission agrees with ATIS that 988 is different from 911 in structure and organization; therefore the Commission's existing 911 network reliability certification requirements could not easily be applied to 988 reliability. The Commission believes additional study of threats to the 988 Lifeline is necessary to determine what next steps should be taken, if any, to promote reliability. The Commission expects that the 988 outage reporting requirements adopted in the Report and Order will give it additional insight to 988 reliability trends and inform future action.

31. The Commission notes that some commenters made recommendations that they argue would improve the general effectiveness and reliability of the 988 Suicide & Crisis Lifeline. While these recommendations are outside of the scope of the 988 network outage reporting and notification requirements adopted in the Report and Order, the Commission will keep these issues in mind as it continues to support the 988 Lifeline.

C. Assessing the Benefits and Costs

32. The Commission determined that the rules adopted in the Report and Order concerning the reporting in NORS of outages that potentially affect 988 special facilities and the notifying of 988 special facilities about outages will result in an industry-wide one-time compliance cost of $56,000 and an annual recurring cost of $1,355,000. The Commission sought comment on cost estimates in the 988 Outage NPRM and received no persuasive objections and only one comment offering an alternative calculation in response, which is addressed in context below.

33. For the reporting of 988 outages in NORS, the Report and Order finds that outages that potentially affect 988 special facilities fall into two categories: outages experienced by the covered 988 service providers that are responsible for providing the 988 Lifeline with the capability to receive, process, or forward 988 calls, and outages experienced by originating service providers that deliver calls to the Lifeline. Consistent with the estimate stated in the 988 Outage NPRM, which no commenter challenged, the Commission assumes that one covered 988 service provider experiences a maximum of one reportable outage per month and estimates an annual compliance cost for that one covered 988 service provider of $1,000. *See 988 Outage NPRM* at 15, paragraph 37, n.80 (estimating a maximum of two hours total time to submit all required reports at a cost of $43 per hour for a total cost estimate of $1000 ~ $43/hr × 2 hrs × one reportable outage per month × 12 months). The Commission finds that originating service providers already submit outage reports to the Commission related to outages that affect voice telephony, which would be largely or entirely identical to the new reporting requirements, so initial compliance costs would be negligible.

34. With regard to the requirements to maintain updated contact information for 988 special facilities and to notify those facilities about outages that affect them, the Commission estimates that the costs of compliance will also be relatively low when compared to the benefits to the public. It estimates a one-time industry-wide cost of $56,000 to create an e-mail survey to biannually solicit 988 special facility contact information. The Commission does not expect more than incidental costs arising from the creation or updating of outage notification templates, as the 988 outage notification requirements that adopted in the Report and Order share the same content and timing as the 911 outage notification requirements with which service providers already comply. The Commission estimates maximum annually recurring costs of $1,354,000, which consist of $1,326,000 for notifying 988 special facilities of outages that potentially affect them pursuant to the requirements adopted in the Report and Order and $28,000 for soliciting appropriate contact information for outage notification from 988 special facilities. The Commission expects that no costs will be incurred related to identifying the 988 special facilities that could potentially be affected by an outage, as the Commission has required that the same three special facilities (SAMHSA, the VA, and the 988 Lifeline administrator) be notified regardless of the geographic area affected by the outage.

35. The Commission finds that the benefits of the 988 outage reporting and notification requirements adopted in the Report and Order outweigh their associated costs. The Commission recognizes that it is difficult to quantify the value of ensuring the continuity of access to 988 Lifeline services, which includes its capacity to save lives and mitigate and prevent injuries. However, the Commission believes the considerable public safety value of the requirements adopted in the Report and Order as described above will exceed the limited costs of implementation. As discussed by commenters and in the 988 Outage NPRM, the 988 Lifeline directly benefits people in crisis and saves lives. When the 988 Lifeline is interrupted, people's lives are put into jeopardy. In May 2023, the 988 Lifeline answered 235,292 calls, which is an average of over 7,500 answered calls per day. The Commission finds that the outage reporting requirements would improve public safety by providing the Commission and other impacted entities with situational awareness of 988 outages, including the magnitude and causes of those outages, and allow for the identification of network reliability trends that can help identify best practices that could improve network reliability by helping to mitigate future outages. The Report and Order's notice and contact information retention requirements are intended to ensure that when 988 calling is disrupted, parties responsible for the varying aspects of the 988 call pathway notify 988 special facilities, share critical information in a timely and standardized manner, and hasten the timely restoration of 988 Lifeline services. The Commission describes in the Report and Order how even a very small increase in the speed of restoration of access to 988 Lifeline services could provide benefits that outweigh the costs of adopting the requirements.

36. The benefits of reducing suicide via 988 are driven by the staggering societal costs of deaths by suicide. In 2021, there were over 48,000 deaths by suicide in the United States, which, as noted above, averages out to approximately one death every 11 minutes. For every suicide death, there were 3 hospitalizations for suicide attempts, 8 suicide-related emergency department visits, and 38 self-reported suicide attempts. Suicides and suicide attempts annually impose billions of dollars in medical, first-responder,

productivity-loss, and lost-quality-of-life costs on society. In addition to lives saved and injuries avoided, time-saving network outage protocols will also alleviate the devastating emotional toll wrought by suicide on victims' families, friends, and communities.

37. Notifying SAMHSA, the VA, and the 988 Lifeline administrator of the disruption of access to 988 Lifeline services will allow these parties to manage the impact of outages on their operations, quickly notify the public of the 988 service outage, and promote alternative ways for people to access 988 Lifeline services during the outage, which may include notifying the public of alternative call numbers, or encouraging people to text to 988 or use the *https://988lifeline.org/* link to chat with a crisis management counselor. This, in turn, will enhance the 988 Lifeline's ability to direct scarce resources toward mitigating outages rather than seeking out information as to whether an outage is occurring, the scope of such an outage, or its impact. One of the benefits of implementing short dialing for calls and text messages to the Lifeline was to reduce the burdens on 911 and other emergency services arising from calls related to mental health and suicide. The Commission believes that the rules adopted in the Report and Order will further reduce the burden on 911 and other emergency services by promoting 988 reliability so that 988 calls go through when individuals need 988 service the most.

38. The Commission disagrees with Southern Linc's argument that the rules adopted in the Report and Order place unnecessary regulatory burdens on smaller non-nationwide providers, which they assert will be strained due to the same personnel being responsible for both reporting and responding to outages, as well as complying with other regulatory requirements. As explained above, the Commission finds that the significant public safety benefits arising from the requirements adopted in the Report and Order outweigh their associated burdens, particularly since the cost of these requirements is likely to be relatively low due to commonalities with existing outage reporting requirements. The Commission again notes that the outages experienced by smaller providers with fewer subscribers would generally take longer to meet the required reporting thresholds, which would effectively provide more time to investigate an outage before it is required to be reported. Southern Linc further accuses the Commission of ''assuming that all employees of a provider's affiliates—no matter how distant—should be considered 'available resources' to support the provider's compliance efforts, regardless of whether the employees of those affiliates have any responsibility to support wireless network operations.'' The Commission does not make this assumption. If the Commission were to assume that service providers already had available staff to implement the requirements adopted in the Report and Order, then the costs to service providers would be estimated to be zero. To the contrary, the cost estimates that the Commission makes in the Report and Order are grounded in the additional labor hours and wages needed to comply with the Report and Order's adopted rules.

D. Legal Authority

39. In the 988 Outage NPRM, the Commission sought comment on potential sources of legal authority under titles II and III and section 4(i) of the Communications Act and section 104 of the Twenty-First Century Communications and Video Accessibility Act (CVAA) for Commission action to promote the reliability and resiliency of the 988 Lifeline. The Commission noted that Congress amended section 251 of the Communications Act of 1934 to specify 988 as the universal telephone number for the National Suicide Prevention Lifeline and that the proposed rules were intended to ensure that the Lifeline remains operational in accordance with the policies identified by Congress in that 2020 legislation and that any outages are quickly identified and reported, thus promoting the safety of life and property. The Commission now finds that section 4 and section 251 provide ample authority for the reporting and notice obligations adopted in the Report and Order.

40. Title II of the Communications Act gives the Commission clear authority over service providers, including covered 988 service providers, to the extent that they provide interstate common carrier service. The statute provides that ''practices'' for and in connection with interstate common carrier services must be ''just and reasonable,'' and that a common carrier must ''provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier.'' The Commission is also authorized to ''inquire into the management of the business of all carriers and obtain from them full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.''

41. The Commission further notes that the Communications Act directs that ''[f]or the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life and property,'' the Commission ''shall investigate and study all phases of the problem and the best methods of obtaining the cooperation and coordination of these systems.'' Both originating service providers and covered 988 service providers play critical roles in ensuring the cooperation and coordination of the 988 system, and the Commission has previously relied on section 4(n) as providing authority to require reporting of interconnected VoIP outages, and to require emergency alerting plans to allow the Commission and other stakeholders ''to more easily review and identify gaps'' in emergency alerting architecture, ''detect problems, and take measures to address these shortcomings.'' By requiring reporting of outages affecting access to 988 by both originating service providers and covered 988 service providers the Commission is enabling the Commission's ongoing review of sources of disruption to this critical emergency service, which in turn will contribute to greater reliability going forward. The Commission concludes that these sources provide it with sufficient authority for the 988 outage reporting requirements adopted in the Report and Order.

42. Additionally, the Commission finds that imposing outage reporting requirements on covered 988 service providers is reasonably ancillary to our responsibility to ensuring that the 988 Lifeline service operates effectively. To exercise ancillary authority ''two conditions [must be] satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.'' The functions at issue here involve communications by wire or radio in that they either take the form of such transmission or involve the use of equipment for purposes of facilitating transmission by wire or radio. The Commission concludes that these reporting requirements are necessary to carry out our responsibility for the proper functioning of the 988 Lifeline service under section 251(e)(4). Obtaining outage information from covered 988 service providers is necessary because only the covered 988 service provider has visibility into

outages that occur at the point where the covered 988 service provider processes and forwards the call. Adopting outage reporting and notice requirements for entities that have the ability to receive, process, or forward calls to the 988 Lifeline furthers the Commission's goals to strengthen the 988 Lifeline's reliability and help save the lives of those who may be experiencing a suicidal crisis or mental health-related distress.

43. The Commission disagrees with CX360, a company that contracts with the 988 Lifeline administrator to provide voice and SMS-based services for communications after they reach the 988 Lifeline, that the Commission lacks authority to require the reporting of outages by entities that provide the 988 Lifeline with the capability to receive, process, or forward calls. As outlined above, the Commission clearly has authority to impose these reporting and notice requirements on CX360, on any entities that offer to the public for a fee ''transmission between points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received,'' and on entities that route calls from the 988 Lifeline to the appropriate crisis center(s), following routing instructions provided by the 988 Lifeline administrator. Even though the responsibilities of an originating service provider may conclude once a call reaches the 988 Lifeline, this does not mean that the services offered by other communications providers within the 988 call path that are necessary to connect the caller to their local crisis center, the Veterans Crisis Line, or other call taker, a service which CX360 states that it provides, cannot be regulated by the Commission.

44. The Commission specifically rejects CX360's argument that entities that ''process'' calls for the 988 Lifeline cannot be regulated by the Commission. The Commission finds that the processing of 988 calls—that is to say, conducting the necessary technical steps to prepare the call for forwarding to a crisis center or the Veterans Crisis Line and then transmitting those calls to that crisis center—falls within our authority to regulate via the reporting and notice requirements adopted in the Report and Order. To the extent that an entity uses an interactive voice response system to support these capabilities, the Commission acknowledges that such an offering may acquire, store, or process information related to how the call should be routed. But the Commission concludes that it has authority to require outage reporting and notice under the specific circumstances here from entities performing functions like CX360.

E. Timelines for Compliance

45. The Report and Order adopts deadlines for originating service providers to comply with the Report and Order's revisions to § 4.9 as the latest of (1) 30 days after the Commission issues a Public Notice announcing that OMB has completed review of any new information collection requirements associated with the adopted Report and Order; (2) 90 days after the publication of the summary of the Report and Order in the **Federal Register**, or (3) the date the Commission's updated 911 outage reporting and notification rules go into effect. Consistent with the Commission's proposal in the 988 Outage NPRM, the Commission agrees with Vibrant that the first two elements of this timeline provide sufficient time for compliance, as the Commission finds that the revisions constitute only minor changes to existing notice and reporting requirements for 911 network outages, and it will take a modest amount of time for originating service providers to adjust their processes to satisfy the proposed rules. The Commission also agrees with USTelecom that it is sensible to harmonize the compliance timeline for the rules adopted in the Report and Order with the compliance timeline for the 911 outage notification requirements adopted in November 2022 given the similarities between them.

46. The Commission is persuaded by CX360 that some covered 988 service providers may not have existing NORS filing or outage notification obligations and would need additional time to develop the capabilities and processes necessary to comply with the rules adopted in the Report and Order. Accordingly, the Commission agrees with CX360 that covered 988 service providers should be granted six additional months to come into compliance. The Report and Order adopts deadlines for covered 988 service providers to comply with the Report and Order's rules as the latest of (1) 30 days after the Commission issues a Public Notice announcing that OMB has completed review of any new information collection requirements associated with the adopted Report and Order; (2) nine months after the publication of the summary of the Report and Order in the **Federal Register**; or (3) the date the Commission's updated 911 outage reporting and notification rules go into effect.

II. Procedural Matters

47. *Paperwork Reduction Act of 1995 Analysis.* This document requires covered 988 service providers and originating service providers to adopt 988 reporting and notice procedures which represent new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. The document will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA and, with the exception of the revision to 47 CFR 4.9(e)(1)(iv), will not take effect until approved by OMB. OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirements contain in this proceeding. This document will be submitted to OMB for review under section 3507(d) of the PRA. In addition, the Commission notes that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission previously sought, but did not receive, specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. The Commission does not believe that the new or modified information collection requirements adopted in the Report and Order will be unduly burdensome on small businesses.

48. *Regulatory Flexibility Act Analysis.* The Regulatory Flexibility Act of 1980, as amended (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' As required by the RFA, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the 988 Outage NPRM adopted January 26, 2023 (88 FR 20790 (Apr. 7, 2023)). The Commission sought written public comment on the proposals in the 988 Outage NPRM, including comment on the IRFA. No comments were filed addressing the IRFA. The Commission prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the potential impact of the rule and policy changes adopted in the Report and Order on small entities. The FRFA is set forth in Appendix B of the Report and Order.

III. Ordering Clauses

49. *Accordingly, it is ordered* that, pursuant to the authority contained in

sections 1, 4(i), 4(j), 4(n), 201(b), 214, 218, 251(e)(3), 251(e)(4), 301, 303(b), 303(g), 303(r), 307, 309(a), 332, and 403, of the Communications Act of 1934, as amended, and sections 3(b) and 6 of the Wireless Communications and Public Safety Act of 1999, as amended, 47 U.S.C. 151, 154(i), 154(j) 154(n), 201(b), 214, 218, 251(e)(3), 251(e)(4), 301, 303(b), 303(g), 303(r), 307, 309(a), 332, 403, 615, 615a–1, the National Suicide Hotline Improvement Act of 2018, Public Law 115–233, 132 Stat. 2424 (2018), and the National Suicide Hotline Designation Act of 2020, Public Law 116–172 (2020), the Report and Order IS hereby *adopted.*

50. *It is further ordered* that the amendments of the Commission's Rules as set forth in Appendix A of the Report and Order are *adopted*, effective 30 days after publication in the **Federal Register**, except for the amendments to 47 CFR 4.9. The amendments to 47 CFR 4.9 will not become effective until OMB completes any review that the Public Safety and Homeland Security Bureau determines is required under the Paperwork Reduction Act and the Public Safety and Homeland Security Bureau announces an effective date consistent with section III.E of the Report and Order by subsequent Public Notice.

51. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

52. *It is further ordered* that the Office of the Managing Director, Performance and Program Management, *shall send* a copy of the Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 4

Communications common carriers, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 4 as follows:

PART 4—DISRUPTIONS TO COMMUNICATIONS

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

Authority: 47 U.S.C. 34–39, 151, 154, 155, 157, 201, 251, 307, 316, 615a–1, 1302(a), and 1302(b); 5 U.S.C. 301, and Executive Order no. 10530.

■ 2. Section 4.3 is amended by:
■ a. Removing the heading from paragraph (i); and
■ b. Adding paragraph (j).
The addition reads as follows:

§ 4.3 Communications providers covered by the requirements of this part.

* * * * *

(j) *Covered 988 service providers* are providers that provide the 988 Suicide & Crisis Lifeline with capabilities such as the ability to receive, process, or forward calls. ''Covered 988 service provider'' shall not include any entity that constitutes a crisis center that participates in the 988 Lifeline, or any entity that offers the capability to originate 988 calls where another service provider delivers those calls to the appropriate crisis center.

■ 3. Section 4.5 is amended by revising the section heading and adding paragraph (f) to read as follows:

§ 4.5 Definitions of outage, special offices and facilities, 911 special facilities, and 988 special facilities.

* * * * *

(f) An outage that potentially affects a 988 special facility occurs whenever there is a loss of the ability of the 988 Suicide & Crisis Lifeline to receive, process, or forward calls, potentially affecting at least 900,000 user-minutes and lasting at least 30 minutes duration.

■ 4. Delayed indefinitely, § 4.9 is amended by revising paragraphs (a)(4), (c)(2)(iv), (e)(1)(v), (f)(4), and (g)(1)(i) and adding paragraph (i) to read as follows:

§ 4.9 Outage reporting requirements—threshold criteria.

(a) * * *

(4) Potentially affects a 911 special facility (as defined in § 4.5(e)) or potentially affects a 988 special facility (as defined in § 4.5(f)), in which case they also shall notify the affected facility in the manner described in paragraph (h) or (i) of this section, respectively. Not later than 72 hours after discovering the outage, the provider shall submit electronically an Initial Communications Outage Report to the Commission. Not later than 30 days after discovering the outage, the provider shall submit electronically a Final Communications Outage Report to the Commission. The notification and the initial and final reports shall comply with all of the requirements of § 4.11.

* * * * *

(c) * * *

(2) * * *

(iv) Potentially affecting a 911 special facility (as defined in § 4.5(e)) or potentially affecting a 988 special facility (as defined in § 4.5(f)), in which case the affected facility shall be notified in the manner described in paragraph (h) or (i) of this section, respectively.

* * * * *

(e) * * *

(1) * * *

(v) That potentially affects a 911 special facility (as defined in § 4.5(e)) or potentially affects a 988 special facility (as defined in § 4.5(f)), in which case they also shall notify the affected facility in the manner described in paragraph (h) or (i) of this section, respectively.

* * * * *

(f) * * *

(4) Potentially affects a 911 special facility (as defined in § 4.5(e)) or potentially affects a 988 special facility (as defined in § 4.5(f)), in which case they also shall notify the affected facility in the manner described in paragraph (h) or (i) of this section, respectively. Not later than 72 hours after discovering the outage, the provider shall submit electronically an Initial Communications Outage Report to the Commission. Not later than 30 days after discovering the outage, the provider shall submit electronically a Final Communications Outage Report to the Commission. The Notification and the Initial and Final reports shall comply with all of the requirements of § 4.11.

(g) * * *

(1) * * *

(i) Within 240 minutes of discovering that they have experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration that potentially affects a 911 special facility (as defined in § 4.5(e)) or potentially affects a 988 special facility (as defined in § 4.5(f)), in which case they also shall notify the affected facility in the manner described in paragraph (h) or (i) of this section, respectively; or

* * * * *

(i) *988 Special facility outage notification.* All cable, satellite, wireless, wireline, interconnected VoIP, and covered 988 service providers shall notify any official at a 988 special facility who has been designated by the affected 988 special facility as the provider's contact person(s) for communications outages at the facility of any outage that potentially affects that 988 special facility (as defined in § 4.5(f)) in the following manner:

(1) *Appropriate contact information.* To ensure prompt delivery of outage notifications to 988 special facilities, covered 988 service providers shall exercise special diligence to identify, maintain, and, on an annual basis, confirm current contact information appropriate for outage notification for each 988 special facility that serves areas that the service provider serves.

(2) *Content of notification.* Covered 988 service providers' outage notifications must convey all available material information about the outage. For the purpose of this paragraph (i), ''material information'' includes the following, where available:

(i) An identifier unique to each outage;

(ii) The name, telephone number, and email address at which the notifying 988 service provider can be reached for follow up;

(iii) The name of the covered 988 service provider experiencing the outage;

(iv) The date and time when the incident began (including a notation of the relevant time zone);

(v) The types of communications service(s) affected;

(vi) The geographic area affected by the outage;

(vii) A statement of the notifying covered 988 service provider's expectations for how the outage potentially affects the special facility (*e.g.,* dropped calls or missing metadata);

(viii) Expected date and time of restoration, including a notation of the relevant time zone;

(ix) The best-known cause of the outage; and

(x) A statement of whether the message is the notifying covered 988 service provider's initial notification to the special facility, an update to an initial notification, or a message intended to be the service provider's final assessment of the outage.

(3) *Means of notification.* Covered 988 service providers' outage notifications must be transmitted by telephone and in writing via electronic means in the absence of another method mutually agreed upon in writing in advance by the special facility and the service provider.

(4) *Timing of initial notification.* Covered 988 service providers shall provide an outage notification to a potentially affected 988 special facility as soon as possible, but no later than within 30 minutes of discovering that they have experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage that potentially affects a 988 special facility (as defined in § 4.5(f)).

(5) *Follow-up notification.* Covered 988 service providers shall communicate additional material information to potentially affected 988 special facilities in notifications subsequent to the initial notification as soon as possible after that information becomes available, but providers shall send the first follow-up notification to potentially affected 988 special facilities no later than two hours after the initial contact. After that, covered 988 service providers are required to continue to provide material information to the special facilities as soon as possible after discovery of the new material information until the outage is completely repaired and service is fully restored.

[FR Doc. 2024–00428 Filed 1–12–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 12–375; FCC 22–76; FR ID 193391]

Rates for Interstate Inmate Calling Services; Correction

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date; correction and establishment of applicability.

SUMMARY: The Federal Communications Commission (Commission) published a document in the **Federal Register** of January 3, 2024, announcing that the Office of Management and Budget (OMB) had approved, for a period of three years, an information collection associated with the Commission's *2022 ICS Order,* FCC 22–76 (September 30, 2022). The document incorrectly announced an effective date for an amendment published on December 9, 2022, which triggered its codification into the CFR on December 21, 2023. This document establishes the applicability of OMB's approval, published on January 3, 2024.

DATES: As of January 16, 2024, the final rule announcing the effective date for 47 CFR 64.6040(c), published January 3, 2024, at 89 FR 269, is corrected to provide an applicability date of January 16, 2024.

FOR FURTHER INFORMATION CONTACT: William Kehoe, Pricing Policy Division, at (202) 418–7122, or email: *William.Kehoe@fcc.gov.*

SUPPLEMENTARY INFORMATION: On December 9, 2022, at 87 FR 75496, the Commission published a final rule amending 47 CFR 64.6040, effective January 9, 2023, by adding paragraph (c). The addition of paragraph (c) to § 64.6040 (amendatory instruction 11) was delayed indefinitely.

On December 21, 2023, at 88 FR 88257, the Commission announced the effective date of December 21, 2023 (with an implied applicability date of December 21, 2023), for § 64.6040(c) and other amendments in the December 2022 rule. That effective date for § 64.6040(c) in the December 21, 2023 document was established in error, but that error went undetected until the publication of the second effective date announcement on January 3, 2024, which contained a second incorrect effective date (with implied applicability date) of January 9, 2023.

Therefore, the announcement of effective date, published January 3, 2024, at 89 FR 269, is corrected as follows:

Correction

In FR Doc. 2023–28765, published in the **Federal Register** of January 3, 2024 (89 FR 269), on page 269, in the second column, correct the **DATES** section to read:

DATES: As of December 21, 2023, the applicability of 47 CFR 64.6040(c) is delayed until January 16, 2024.

Federal Communications Commission

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2024–00350 Filed 1–12–24; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register

Vol. 89, No. 10

Tuesday, January 16, 2024

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0028; Project Identifier AD–2023–00919–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2021–09–06, which applies to all The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. AD 2021–09–06 requires repetitive inspections for cracking of the left- and right-hand side outboard chords of certain frame fittings and failsafe straps at a certain station around eight fasteners, and repair if any cracking is found. Since the FAA issued AD 2021–09–06, additional reports of cracking in the area were received and it was determined that additional inspections are needed to address the unsafe condition. This proposed AD would require repetitive detailed and ultrasonic inspections for cracking of the left-and right-hand sides of certain frame fittings and failsafe straps, and repair if any cracking is found. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by March 1, 2024.

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

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

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2024–0028; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* by searching for and locating Docket No. FAA–2024–0028.

FOR FURTHER INFORMATION CONTACT: Owen Bley-Male, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3992; email *owen.f.bley-male@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2024–0028; Project Identifier AD–2023–00919–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Owen Bley-Male, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3992; email *owen.f.bley-male@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2021–09–06, Amendment 39–21519 (86 FR 23595, May 4, 2021) (AD 2021–09–06), for all The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. AD 2021–09–06 was prompted by reports of cracking discovered in the station (STA) 663.75 frame fitting outboard chords and failsafe straps adjacent to the stringer S–18A straps and a determination that the initial inspection threshold and repetitive inspection interval required by AD 2019–22–10, Amendment 39–19789 (84 FR 61533, November 13, 2019), were inadequate to address cracking in a timely manner. AD 2021–09–06 requires repetitive inspections for cracking of the left- and right-hand side outboard chords of frame fittings and failsafe straps at a certain station around eight fasteners, repair if any cracking is found, and an inspection report. The agency issued AD 2021–09–06 to address cracking in the STA 663.75 frame fitting outboard chords and failsafe straps adjacent to the stringer S–18A straps, which could result in failure of a principal structural element (PSE) to sustain limit load. This condition could adversely affect the structural integrity of the airplane and result in loss of control of the airplane.

Actions Since AD 2021–09–06 Was Issued

Since the FAA issued AD 2021–09–06, additional reports have been made of several cracks in the STA 663.75 frame fittings and failsafe straps. Cracks have also been found at the aft fastener common to the failsafe strap upper row. Several cracks in the frame fitting were found extending beyond the aft fastener hole to the forward fastener hole. An additional report was made of a visible crack in the failsafe strap without any visibly detectable crack in the frame fitting. These additional reports led to a determination that the detailed visual inspection required by AD 2021–09–06 might not be adequate to detect STA 663.75 failsafe strap cracking.

Additionally, the preamble to AD 2021–09–06 explained that the FAA considered the requirements ''interim action'' and was considering further rulemaking. The FAA has now determined that further rulemaking is indeed necessary and this proposed AD follows from that determination.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 737–53A1414 RB, Revision 1, dated November 20, 2023. This service information specifies procedures for repetitive internal detailed inspection for cracking of the frame fitting and visible areas of the failsafe strap at STA 663.73 (left- and right-hand sides), repetitive external detailed and ultrasonic inspections for cracking of the failsafe strap at STA 663.75 (left- and right-hand sides), and repair if any cracking is found. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in ADDRESSES.

Proposed AD Requirements in This NPRM

Although this proposed AD does not explicitly restate the requirements of AD 2021–09–06, this proposed AD would retain the inspection requirements of AD 2021–09–06. Those requirements are referenced in the service information identified previously, which, in turn, is referenced in paragraph (g) of this proposed AD.

This proposed AD would require accomplishing the actions specified in the service information already described except for any differences identified as exceptions in the regulatory text of this proposed AD. For information on the procedures and compliance times, see this service information at regulations.gov under Docket No. FAA–2024–0028.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 1,911 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	4 work-hours × $85 per hour = $340 per inspection cycle.	$0	$340 per inspection cycle	$649,740 per inspection cycle.

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

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2021–09–06, Amendment 39–21519 (86 FR 23595, May 4, 2021), and

■ b. Adding the following new AD:

The Boeing Company: Docket No. FAA–2024–0028; Project Identifier AD–2023–00919–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by March 1, 2024.

(b) Affected ADs

This AD replaces AD 2021–09–06, Amendment 39–21519 (86 FR 23595, May 4, 2021) (AD 2021–09–06).

(c) Applicability

This AD applies to all The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by reports of cracking in the station (STA) 663.75 frame fitting outboard chords and failsafe straps adjacent to the stringer S–18A area and a determination that additional inspections are needed to address the unsafe condition. The FAA is issuing this AD to address cracking in the STA 663.75 frame fitting outboard chords and failsafe straps adjacent to the stringer S–18A straps, which could result in failure of a Principal Structural Element (PSE) to sustain limit load. The unsafe condition, if not addressed, could adversely affect the structural integrity of the airplane and result in loss of control of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 737–53A1414 RB, Revision 1, dated November 20, 2023, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 737–53A1414 RB, Revision 1, dated November 20, 2023.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 737–53A1414, Revision 1, dated November 20, 2023, which is referred to in Boeing Alert Requirements Bulletin 737–53A1414 RB, Revision 1, dated November 20, 2023.

(h) Exceptions to Service Information Specifications

(1) Where the Condition and Compliance Time columns of the tables in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 737–53A1414 RB, Revision 1, dated November 20, 2023, use the phrase ''the original issue date of Requirements Bulletin 737–53A1414 RB,'' or ''the Revision 1 date of Requirements Bulletin 737–53A1414 RB,'' this AD requires using ''the effective date of this AD.''

(2) Where Boeing Alert Requirements Bulletin 737–53A1414 RB, Revision 1, dated November 20, 2023, specifies contacting Boeing for repair instructions: This AD requires doing the repair using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, AIR–520, Continued Operational Safety Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Owen Bley-Male, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3992; email *owen.f.bley-male@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (k)(3) and (4) of this AD.

(k) Material Incorporated by Reference

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

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

(i) Boeing Alert Requirements Bulletin 737–53A1414 RB, Revision 1, dated November 20, 2023.

(ii) [Reserved]

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

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

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

Issued on January 5, 2024.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2024–00345 Filed 1–12–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0031; Project Identifier MCAI–2022–01307–T]

RIN 2120–AA64

Airworthiness Directives; MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain MHI RJ Aviation ULC Model CL–600–2C10 (Regional Jet Series 700, 701 & 702); CL–600–2C11 (Regional Jet Series 550); CL–600–2D15 (Regional Jet Series 705); and CL–600–2D24 (Regional Jet Series 900) airplanes. This proposed AD was prompted by a determination that a potential crack of the tombstone fitting lug cannot be detected as the bushings remaining in place during accomplishment of the special detailed inspection (SDI) required by a certain airworthiness limitation (ALI) task. This proposed AD would require inspecting the tombstone fitting lug with a new SDI sub-surface ultrasound procedure when accomplishing the ALI task, as specified in a Transport Canada AD, which is proposed for incorporation by reference (IBR). This proposed AD would also require corrective actions if necessary. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by March 1, 2024.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–0031; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For material that is proposed for IBR in this AD, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca.* You may find this material on the Transport Canada website at *tc.canada.ca/en/aviation.* It is also available at *regulations.gov* under Docket No. FAA–2024–0031.
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

FOR FURTHER INFORMATION CONTACT: Yaser Osman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2024–0031; Project Identifier MCAI–2022–01307–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Yaser Osman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF–2022–54R1, dated October 4, 2022 (Transport Canada AD CF–2022–54R1) (also referred to after this as the MCAI), to correct an unsafe condition for certain MHI RJ Aviation ULC Model CL–600–2C10 (Regional Jet Series 700, 701 & 702); CL–600–2C11 (Regional Jet Series 550); CL–600–2D15 (Regional Jet Series 705); and CL–600–2D24 (Regional Jet Series 900) airplanes. Transport Canada AD CF–2022–54R1 superseded Transport Canada AD CF–2022–54, dated September 13, 2022 (Transport Canada AD CF–2022–54), to correct a reference to an incorrect maintenance requirements manual number.

Transport Canada AD CF–2022–54R1 states that MHI RJ discovered that the MHI RJ Non-Destructive Testing Manual (NDTM) Part 6, Procedure 53–61–121–250, associated with ALI Task 53–61–121, is not adequate to detect a potential crack of the tombstone fitting lug before the critical crack size is reached as the bushings remain in place during the SDI. Transport Canada AD CF–2022–54R1 mandates the use of new ultrasonic MHI RJ NDTM Part 4, Procedure 53–61–121–270, in conjunction with NDTM Part 6, Procedure 53–61–121–250, during accomplishment of the SDIs required by ALI Task 53–61–121.

The FAA is proposing this AD to address the undetected cracking of the tombstone fitting lug. If the crack is not detected, the tombstone fitting lug will eventually fail. The failure will cause a transfer of load to other engine attachment points, which will then be overloaded and compromised in their structural integrity. This can lead to a rapid failure mode, potentially resulting in the loss of the engine. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0031.

Related Service Information Under 1 CFR Part 51

Transport Canada AD CF–2022–54R1 specifies procedures for accomplishing a special detailed inspection for cracks of the engine forward support frame's tombstone top and bottom fitting lugs at frame fuselage station (FS) 1051.30, during the accomplishment of the SDIs required by ALI Task 53–61–121. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

FAA's Determination

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

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in Transport Canada AD CF–2022–54R1 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD, and except as discussed under ''Difference Between this Proposed AD and the MCAI.''

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate Transport Canada AD CF–2022–54R1 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with Transport Canada AD CF–2022–54R1 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Service information required by Transport Canada AD CF–2022–54R1 for compliance will be available at regulations.gov under Docket No. FAA–2024–0031 after the FAA final rule is published.

Difference Between This NPRM and the MCAI

Transport Canada AD CF–2022–54R1 did not specify any corrective action for cracking found during the required inspection. This proposed AD would require repairing all cracks before further flight.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 597 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × $85 per hour = $170 (per interval)	$0	$170 (per interval)	$101,490 (per interval).

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§39.13 [Amended]

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

MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.): Docket No. FAA–2024–0031; Project Identifier MCAI–2022–01307–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by March 1, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.) Model CL–600–2C10 (Regional Jet Series 700, 701 & 702); CL–600–2C11 (Regional Jet Series 550); CL–600–2D15 (Regional Jet Series 705); and CL–600–2D24 (Regional Jet Series 900) airplanes, certificated in any category, as identified in Transport Canada AD CF–2022–54R1, dated October 4, 2022 (Transport Canada AD CF–2022–54R1).

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a determination that the MHI RJ Non-Destructive Testing Manual (NDTM) Part 6, Procedure 53–61–121–250, associated with Airworthiness Limitations (ALI) Task 53–61–121, is not adequate to detect a potential crack of the tombstone fitting lug as the bushings remain in place during the special detailed inspection (SDI). The FAA is issuing this AD to address the undetected cracking of the tombstone fitting lug. If the crack is not detected, the tombstone fitting lug will eventually fail. The failure will cause a transfer of load to other engine attachment points, which will then be overloaded and compromised in their structural integrity. This can lead to a rapid failure mode, potentially resulting in the loss of the engine.

(f) Compliance

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

(g) Requirements

Except as required by paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Transport Canada CF–2022–54R1.

(h) Exceptions to Transport Canada CF–2022–54R1

(1) Where Transport Canada AD CF–2022–54R1 refers to the effective date of AD CF–2022–54 (September 27, 2022), this AD requires using the effective date of this AD.

(2) Where paragraph A. of Transport Canada AD CF–2022–54R1 specifies inspecting ''For aeroplanes that, as of the effective date of AD CF–2022–54 (27 September 2022), have not been inspected as required by MRM CSP B–053 Part 2 ALI Task 53–61–121,'' this AD requires replacing those words with ''For all airplanes.''

(3) This AD does not adopt paragraph B. of Transport Canada AD CF–2022–54R1.

(4) Where paragraph A. of Transport Canada AD CF–2022–54R1 specifies inspecting ''within the intervals in MRM CSP B–053 Part 2 for ALI Task 53–61–121,'' for this AD, the initial compliance time for the task is within the ''threshold'' specified in the service information identified in paragraph A. Transport Canada AD CF–2022–54R1 or within 90 days after the effective date of this AD, whichever occurs later.

(i) Crack Repair

If any cracking is found during the actions required by paragraph (g) of this AD, repair the cracking before further flight using a method approved by the Manager, International Validation Branch, FAA; or Transport Canada; or MHI RJ Aviation ULC's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DOA-authorized signature.

(j) No Reporting Requirement

Although the service information referenced in Transport Canada AD CF–2022–54R1 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(k) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(l) Additional Information

For more information about this AD, contact Yaser Osman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.*

(m) Material Incorporated by Reference

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

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

(i) Transport Canada AD CF–2022–54R1, dated October 4, 2022.

(ii) [Reserved]

(3) For Transport Canada AD CF–2022–54R1, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca.* You may find this Transport Canada AD on the Transport Canada website at *tc.canada.ca/en/aviation.*

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

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

Issued on January 6, 2024.

Caitlin Locke,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2024–00493 Filed 1–12–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2482; Airspace Docket No. 23–AAL–26]

RIN 2120–AA66

Modification of Class E Airspace; Edward G. Pitka Sr. Airport, Galena, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the Class E airspace designated as a surface area and modify the Class E airspace extending upward from 700 feet above the surface at Edward G. Pitka Sr. Airport, Galena, AK. Additionally, this action proposes administrative amendments to update the airport's geographic coordinates in the legal description to match the FAA database. These actions would support the safety and management of instrument flight rules (IFR) operations at the airport.

DATES: Comments must be received on or before March 1, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–2482 and Airspace Docket No. 23–AAL–26 using any of the following methods:

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

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

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

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

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

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

FOR FURTHER INFORMATION CONTACT: Keith T. Adams, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–2428.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify Class E airspace to support IFR operations at Edward G. Pitka Sr. Airport, Galena, AK.

Comments Invited

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

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

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

Availability of Rulemaking Documents

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

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

Incorporation by Reference

The Class E2 and E5 airspace designations are published in paragraphs 6002 and 6005, respectively, of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 that would modify the Class E airspace designated as a surface area and modify the Class E airspace extending upward from 700 feet above the surface at Edward G. Pitka Sr. Airport, Galena, AK.

The Class E airspace designated as a surface area of a 4.2-mile radius around the airport, should be appropriately sized to 4.1-mile radius. This reduction in airspace would more efficiently contains IFR departures until reaching 700 feet above the surface or the next adjacent controlled airspace.

The Class E airspace area extending upward from 700 feet above the surface should be modified to contain IFR aircrafts executing IFR arrival procedures descending through 1,500 feet above the surface. The Very High Frequency Omnidirectional Range (VOR) Runway (RWY) 26 and Area Navigation (RNAV) Global Positioning System (GPS) RWY 8 final approach bearings currently are not aligned and not contained within the existing Class E airspace area extensions. The airspace proposal would adjust both Class E airspace extensions, to contain IFR arrivals descending below 1,500 feet above the surface. The RNAV (GPS) RWY 8 would be contained with a western extension from the airport's 269° bearing, with a width of 2.1 nautical miles (NM) on either side of centerline and extend westward 12.2 NM. The required airspace extension to contain the VOR RWY 26 would extend from the airports 086° bearing, with a width of 4.8 NM on either side of centerline and extend eastward 20.2 NM. The VOR RWY 26 final approach fix is located within 1,500 feet of the highest terrain. The terrain's proximity requires containment of the approach's hold-in-lieu primary area by the airport's Class E airspace area extending upward from 700 feet above the surface.

The additional airspace required to contain the VOR RWY 26 hold-in-lieu primary area would also contain IFR departures until the aircraft reaches 1,200 feet above the surface; therefore, the existing inner circumference of the Class E airspace area extending from 700 feet above the surface would be reduced from a 7.2-mile radius to a 6.6-mile radius.

Finally, the FAA proposes an administrative action to the airport's legal description. The airport's geographic coordinates on line 3 of both legal descriptions should be updated to match the FAA's database.

Regulatory Notices and Analyses

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

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 6002 Class E Airspace Area Designated as a Surface Area.

* * * * *

AAL AK E2 Galena, AK [Amended]

Edward G. Pitka Sr. Airport, AK
(Lat. 64°44′10″ N, long. 156°56′4″ W)

That airspace extending upward from the surface within a 4.1-mile radius of the airport.

* * * * *

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

* * * * *

AAL AK E2 Galena, AK [Amended]

Edward G. Pitka Sr. Airport, AK
(Lat. 64°44′10″ N, long. 156°56′4″ W)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of the airport, within 4.8 miles of each side of the airport's 086° bearing extending to 20.2 miles east of the airport, and within 2.1 miles each side of the airport's 269° bearing extending to 12.2 miles west of the airport; that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of the airport.

* * * * *

Issued in Des Moines, Washington, January 9, 2024.

B.G. Chew,

Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2024–00642 Filed 1–12–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2315; Airspace Docket No. 22–AEA–26]

RIN 2120–AA66

Amendment and Revocation of Multiple Air Traffic Service (ATS) Routes; Eastern United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend three Very High Frequency Omnidirectional Range (VOR) Federal airways and two United States Area Navigation (RNAV) routes; and to revoke two VOR Federal airways and three jet routes in the eastern United States. The FAA is taking this action due to the planned decommissioning of the Elmira, NY (ULW), VOR/Distance Measuring Equipment (VOR/DME). This action is in support of the FAA's VOR Minimum Operational Network (MON) Program.

DATES: Comments must be received on or before March 1, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–2315 and Airspace Docket No. 22–AEA–26 using any of the following methods:

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

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

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

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

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

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

FOR FURTHER INFORMATION CONTACT: Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System (NAS).

Comments Invited

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

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

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

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Avenue, College Park, GA, 30337.

Incorporation by Reference

Jet Routes are published in paragraph 2004, Domestic VOR Federal Airways are published in paragraph 6010(a), and United States Area Navigation Routes are published in paragraph 6011 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

Background

The FAA is planning to decommission the Elmira, NY (ULW), VOR/Distance Measuring Equipment (VOR/DME) in September 2024. The Elmira VOR/DME was a candidate Navigational Aid (NAVAID) identified for discontinuance by the FAA's VOR MON program and listed in the Final policy statement notice, ''Provision of Navigation Services for the Next Generation Air Transportation System (NextGen) Transition to Performance-Based Navigation (PBN) (Plan for Establishing a VOR Minimum Operational Network),'' published in the **Federal Register** of July 26, 2016 (81 FR 48694), Docket No. FAA–2011–1082.

The Air Traffic Service (ATS) routes affected by the planned Elmira VOR/DME decommissioning are Jet Routes J–132, J–223, and J–227; VOR Federal Airways V–35, V–36, V–147, and V–270; and RNAV Routes T–440 and T–445. With the planned decommissioning of the Elmira VOR/DME, the remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of the affected ATS routes. As such, proposed modifications to V–35 and V–270 would result in the airways being shortened; to V–147 would result in a gap being created; and to J–132, J–223, J–227, and V–36 would result in the airways being revoked.

To overcome the proposed modifications to the affected routes, instrument flight rules (IFR) traffic could receive air traffic control (ATC) radar vectors to fly through or circumnavigate the affected area. Additionally, IFR pilots with Area Navigation (RNAV) equipped aircraft could also use the adjacent RNAV Routes T–440 and T–445, proposed in this action or navigate point-to-point using the existing fixes that will remain in place to support continued operations though the affected area. Visual flight rules (VFR) pilots who elect to navigate via airways through the affected area could also take advantage of ATC services listed previously.

Prior to this NPRM, the FAA published a final rule for airspace docket 23–AGL–17 in the **Federal Register** (88 FR 65311; September 22, 2023) amending VOR Federal Airway V–36 by removing the airway segment between the Thunder Bay, Ontario (ON), Canada VOR/DME and the Sault Ste Marie, MI, VOR/DME. The effective date for that action was November 30, 2023. Subsequent to the final rule, the FAA published a final rule, delay of effective date in the **Federal Register** (88 FR 71990; October 19, 2023) delaying the effective date to March 21, 2024. That airway amendment, effective March 21, 2024, is included in this action.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to amend VOR Federal Airways V–35, V–147, and V–270; to amend RNAV Routes T–440 and T–445; and to revoke VOR Federal Airway V–36 and Jet Routes J–132, J–223, and J–227. The proposed changes are due to the scheduled decommissioning of the Elmira VOR/DME. The proposed ATS route changes are described below.

J–132: J–132 currently extends between the Elmira, NY (ULW), VOR/DME and the Huguenot, NY (HUO), VOR/DME. The FAA proposes to remove this route in its entirety.

J–223: J–223 currently extends between the La Guardia, NY (LGA), VOR/DME and the intersection of the La Guardia VOR/DME 310° and Elmira, NY (ULW), VOR/DME 110° radials (CORDS Fix). The FAA proposes to remove this route in its entirety.

J–227: J–227 currently extends between the Armel, VA (AML), VOR/DME and the Elmira, NY (ULW), VOR/DME. The FAA proposes to remove this route in its entirety.

V–35: V–35 currently extends between the Dolphin, FL (DHP), VOR/Tactical Air Navigation (VORTAC) and the Pecan, GA (PZD), VOR/DME; between the intersection of the Dublin, GA (DBN), VORTAC 309° and the Athens, GA (AHN), VOR/DME 195° radials (SINCA Fix) and the Morgantown, WV (MGW), VOR/DME; and between the Philipsburg, PA (PSB), VORTAC and the Syracuse, NY (SYR), VORTAC. The FAA proposes to remove the route segments between the Stonyfork, PA (SFK), VOR/DME and the Syracuse VORTAC. As amended, the route would extend between the Dolphin VORTAC and the Pecan VOR/DME, between the SINCA Fix and the Morgantown VOR/DME, and between the Philipsburg VORTAC and the Stonyfork VOR/DME.

V–36: V–36 currently extends between the Elmira, NY (ULW), VOR/DME and the intersection of the La Guardia, NY (LGA), VOR/DME 310° and the Stillwater, NJ (STW), VOR/DME 043° radials. The FAA proposes to remove the route in its entirety.

V–147: V–147 currently extends between the Yardley, PA (ARD), VOR/DME and the Rochester, NY (ROC), VOR/DME. The FAA proposes to remove the route segments between the Wilkes-Barre, PA (LVZ), VORTAC and the Geneseo, NY (GEE), VOR/DME. As amended, the route would extend between the Yardley VOR/DME and the Wilkes-Barre VORTAC, and between the Geneseo VOR/DME and the Rochester VOR/DME.

V–270: V–270 currently extends between the Elmira, NY (ULW), VOR/DME and the Boston, MA (BOS), VOR/DME. The FAA proposes to remove the route segment between the Elmira VOR/DME and the Binghamton, NY (CFB), VOR/DME. Additionally, the FAA proposes to remove the Delancey, NY (DNY), VOR/DME from the route and replace it with the intersection of the Binghamton VOR/DME 088° True (T)/098° Magnetic (M) and the Sparta, NJ (SAX), VORTAC 344° T/355° M radials (DANZI Fix). Replacement of the Delancey VOR/DME with the DANZI Fix would provide continued connection to other ATS routes in the route structure. As amended, the route would extend between the Binghamton VOR/DME and the Boston VOR/DME.

T–440: T–440 currently extends between the Elmira, NY (ULW), VOR/DME and the TALLI, PA, Fix. The FAA proposes to remove the Elmira VOR/DME and replace it with the STUBN, NY, WP which is located 60 feet southeast of the Elmira VOR/DME. The amended RNAV route would mitigate the proposed V–147 airway segment removal and provide route continuity. As amended, the route would extend between the STUBN WP and the TALLI Fix.

T–445: T–445 currently extends between the Harrisburg, PA (HAR), VORTAC and the AIRCO, NY, Fix. The FAA proposes to remove the Elmira, NY (ULW), VOR/DME and replace it with the STUBN, NY, WP which is located 60 feet southeast of the Elmira VOR/DME. As amended, the route would continue to extend between the Harrisburg VORTAC and the AIRCO Fix.

The NAVAID radials listed in the VOR Federal airway descriptions in the proposed regulatory text of this NPRM are unchanged and stated in degrees True north.

Regulatory Notices and Analyses

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

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 2004 Jet Routes.

* * * * *

J–132 [Removed]

* * * * *

J–223 [Removed]

* * * * *

J–227 [Removed]

* * * * *

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–35 [Amended]

From Dolphin, FL; INT Dolphin 266° and Cypress, FL, 110° radials; INT Cypress 110° and Lee County, FL, 138° radials; Lee County; INT Lee County 326° and St. Petersburg, FL, 152° radials; St. Petersburg; INT St. Petersburg 350° and Cross City, FL, 168° radials; Cross City; Greenville, FL; to Pecan, GA. From INT Dublin, GA, 309° and Athens, GA, 195° radials; Athens; Electric City, SC; Sugarloaf Mountain, NC; Holston Mountain, TN; Glade Spring, VA; Charleston, WV; INT Charleston 051° and Elkins, WV, 264° radials; Clarksburg, WV; to Morgantown, WV. From Philipsburg, PA; to Stonyfork, PA.

V–36 [Removed]

* * * * *

V–147 [Amended]

From Yardley, PA; INT Yardley 294° and East Texas, PA, 124° radials; East Texas; to Wilkes-Barre, PA. From Geneseo, NY; to Rochester, NY.

* * * * *

V–270 [Amended]

From Binghamton, NY; INT Binghamton 088°T/098°M and Sparta, NJ, 344°T/355°M radials; Chester, MA; INT Chester 091° and Boston, MA, 262° radials; to Boston.

* * * * *

Paragraph 6011 United States Area Navigation Routes.

* * * * *

T–440 STUBN, NY to TALLI, PA [Amended]

STUBN, NY	WP	(Lat. 42°05′38.58″ N, long. 077°01′28.68″ W)
WLKES, PA	W	(Lat. 41°16′22.57″ N, long. 075°41′21.60″ W)
TALLI, PA	FIX	(Lat. 41°19′01.60″ N, long. 075°06′43.17″ W)

* * * * *

T–445 Harrisburg, PA (HAR) to AIRCO, NY [Amended]

Harrisburg, PA (HAR)	VORTAC	(Lat. 40°18′08.06″ N, long. 077°04′10.41″ W)
Selinsgrove, PA (SEG)	VOR/DME	(Lat. 40°47′27.09″ N, long. 076°53′02.55″ W)
LYKOM, PA	WP	(Lat. 41°20′18.75″ N, long. 076°46′30.30″ W)
STUBN NY	WP	(Lat. 42°05′38.58″ N, long. 077°01′28.68″ W)
BEEPS, NY	FIX	(Lat. 42°49′13.26″ N, long. 076°59′04.84″ W)
Rochester, NY (ROC)	VOR/DME	(Lat. 43°07′04.65″ N, long. 077°40′22.06″ W)
AIRCO, NY	FIX	(Lat. 43°12′36.66″ N, long. 078°28′57.00″ W)

* * * * *

Issued in Washington, DC, on January 8, 2024.

Frank Lias,

Manager, Rules and Regulations Group.

[FR Doc. 2024–00547 Filed 1–12–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2502; Airspace Docket No. 23–ASO–15]

RIN 2120–AA66

Establishment of United States Area Navigation (RNAV) Route Q–108 and Revocation of RNAV Route Q–104; Eastern United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish United States Area Navigation (RNAV) Route Q–108 and revoke RNAV Route Q–104 in the eastern United States. This action supports the Northeast Corridor Atlantic Coast Routes (NEC ACR) Optimization Project to improve the efficiency of the National Airspace System (NAS).

DATES: Comments must be received on or before March 1, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–2502 and Airspace Docket No. 23–ASO–15 using any of the following methods:

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

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

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

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

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

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

FOR FURTHER INFORMATION CONTACT: Brian Vidis, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

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

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

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

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Avenue, College Park, GA 30337.

Incorporation by Reference

United States Area Navigation Routes are published in paragraph 2006 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to establish RNAV Route Q–108 and revoke Q–104 in the eastern United States. This action supports the NEC ACR Optimization Project to improve the efficiency of the

NAS. The proposed route changes are described below.

Q–104: Q–104 currently extends between the ACORI, AL, Waypoint (WP), and the St Petersburg, FL (PIE), Very High Frequency Omnidirectional Range/Tactical Air Navigation (VORTAC). Air Traffic Control (ATC) no longer uses the route. The FAA proposes to remove the route in its entirety.

Q–108: Q–108 is a new RNAV route proposed to extend between the Louisville, KY (IIU), VORTAC and the Sea Isle, NJ (SIE), VORTAC. The route would overlay jet route J–526 between the Louisville VORTAC and the Beckley, WV (BKW), VOR/Distance Measuring Equipment (VOR/DME); RNAV route Q–34 between the SITTR, WV, WP and the MAULS, VA, WP; RNAV route Q–97 between the SAWED, VA, WP and the BYSEL, MD, Fix; and RNAV route Q–439 between the BYSEL Fix and the HOWYU, DE, WP. The new proposed RNAV route would provide connectivity between the Louisville, KY area and the Atlantic City, NJ area.

Regulatory Notices and Analyses

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

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 2006 United States Area Navigation Routes.

* * * * *

Q–104 [Removed]

* * * * *

Q–108 Louisville, KY (IIU) to Sea Isle, NJ (SIE) [New]

Louisville, KY (IIU)	VORTAC	(Lat. 38°06′12.47″ N, long. 085°34′38.77″ W)
ZIEBR, KY	FIX	(Lat. 37°37′58.24″ N, long. 082°45′10.76″ W)
SITTR, WV	WP	(Lat. 37°46′49.13″ N, long. 081°07′23.70″ W)
DENNY, VA	FIX	(Lat. 37°52′00.15″ N, long. 079°44′13.75″ W)
MAULS, VA	WP	(Lat. 37°52′49.36″ N, long. 079°19′49.19″ W)
QUART, VA	WP	(Lat. 37°31′25.15″ N, long. 077°42′53.29″ W)
HURTS, VA	WP	(Lat. 37°27′41.87″ N, long. 076°57′17.75″ W)
SAWED, VA	WP	(Lat. 37°32′00.73″ N, long. 075°51′29.10″ W)
KALDA, VA	WP	(Lat. 37°50′31.06″ N, long. 075°37′35.34″ W)
ZJAAY, MD	WP	(Lat. 38°03′09.95″ N, long. 075°26′34.27″ W)
BYSEL, MD	FIX	(Lat. 38°15′02.70″ N, long. 075°16′52.87″ W)
ACTUP, DE	FIX	(Lat. 38°42′12.11″ N, long. 075°11′10.30″ W)
Sea Isle, NJ (SIE)	VORTAC	(Lat. 39°05′43.83″ N, long. 074°48′01.24″ W)

* * * * *

Issued in Washington, DC, on January 8, 2024.

Frank Lias,

Manager, Rules and Regulations Group.

[FR Doc. 2024–00560 Filed 1–12–24; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 465

RIN 3084–AB76

Rule on the Use of Consumer Reviews and Testimonials

AGENCY: Federal Trade Commission.

ACTION: Initial notice of informal hearing; final notice of informal hearing; list of Hearing Participants; requests for submissions from Hearing Participants.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') recently published a notice of proposed rulemaking (''NPRM'') in the **Federal Register**, titled ''Rule on the Use of Consumer Reviews and Testimonials'' (''Reviews and Testimonials Rule'' or ''Rule''), which would prohibit certain specified unfair or deceptive acts or practices involving consumer reviews or testimonials. The NPRM announced the opportunity for interested parties to present their positions orally at an informal hearing. Three commenters requested to present their positions orally at the informal hearing.

DATES:

Hearing date: The informal hearing will be conducted virtually on February 13, 2024, at 10 a.m. Eastern, and the Commission's Chief Presiding Officer, the Chair, has appointed Administrative Law Judge for the Securities and Exchange Commission, the Honorable Carol Fox Foelak, to serve as the presiding officer of the informal hearing.

Participation deadline: If you are a hearing participant and would like to submit your oral presentation in writing or file a supplementary documentary submission, you can do so by submitting a comment on this rulemaking docket. You must do so on or before January 30, 2024. Write ''Reviews and Testimonials Rule; Project No. P214504'' on your submission.

ADDRESSES: Hearing Participants may submit their oral presentations in writing or file supplementary documentary submissions, online or on paper, by following the instructions in Part IV of the **SUPPLEMENTARY INFORMATION** section below. Write

''Reviews and Testimonials Rule; Project No. P214504'' on your submission, and file it online through *https://www.regulations.gov.* If you prefer to file your submission on paper, mail it via overnight service to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex R), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Michael Ostheimer, Attorney, (202) 326–2699, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

On November 8, 2022, the Commission published an advance notice of proposed rulemaking (''ANPRM'') in the **Federal Register** announcing that the Commission was considering the promulgation of regulations to prohibit certain specified unfair or deceptive acts or practices involving consumer reviews or testimonials. *See* 87 FR 67424 (Nov. 8, 2022). On July 31, 2023, following the consideration of comments received in response to the ANPRM, the Commission published a NPRM in the **Federal Register**, proposing to add part 465 to 16 CFR, Chapter I, to prohibit certain specified unfair or deceptive acts or practices involving consumer reviews or testimonials. *See* 88 FR 49364 (July 31, 2023).

In accordance with section 18(b)(1) of the FTC Act, 15 U.S.C. 57a(b)(1), which requires the Commission to provide the opportunity for an informal hearing in section 18 rulemaking proceedings, the NPRM also announced the opportunity for interested persons to present their positions orally at an informal hearing.[1] During the NPRM's comment period, the Commission received 100 responsive comments.[2] Three of the commenters requested the opportunity to present their position orally at an informal hearing.

II. The Requests for an Informal Hearing; Presentation of Oral Submissions

Section 18 of the FTC Act, 15 U.S.C. 57a, as implemented by the Commission's Rules of Practice, 16 CFR 1.11(e),[3] provides interested persons with the opportunity to present their positions orally at an informal hearing upon request.[4] To make such a request, a commenter must submit, no later than the close of the comment period for the NPRM, (1) a request to make an oral submission; (2) a statement identifying the interested person's interests in the proceeding; and (3) any proposal to add disputed issues of material fact to be addressed at the hearing.[5]

The following three commenters requested to present their positions orally at the informal hearing in accordance with requirements of 16 CFR 1.11(e):

1. Fake Review Watch;[6]
2. Interactive Advertising Bureau (''IAB'');[7] and
3. A group of three researchers at Brigham Young University, The Pennsylvania State University, and Emory University (''Researchers'').[8]

The Commission finds these requests were adequate and therefore will hold an informal hearing. These commenters will have the opportunity to make oral presentations during the informal hearing. No other interested persons requested under 16 CFR 1.11(e) to participate in an informal hearing, and therefore no other interested persons will be permitted to make oral presentations at the informal hearing. The Commission declines to identify any group of interested persons with the same or similar interest in the proceeding.[9]

III. Disputed Issues of Material Fact; Final Notice

In the NPRM, the Commission did not identify any disputed issues of material fact that needed to be resolved at an informal hearing. However, the Commission may still do so in the initial notice of informal hearing, either on its own initiative or in response to a persuasive showing from a commenter.[10] IAB proposed several potential disputed issues of material fact for the Commission's consideration.[11] IAB[12] indicated that it ''intended to raise'':

1. ''Whether color, size, count, and flavor are the only attributes that would not confuse consumers when combined on a product page.''
2. ''Whether the compliance costs for businesses will be minimal, particularly if the 'knew or should have known' standard is finalized.''
3. ''Whether the Commission's finding that unintended consequences from the NPRM are unlikely [is correct] (*e.g.,* for fear of violating the review suppression section, businesses will allow more fake reviews to stay up on their websites).''

To be appropriate for cross-examination or rebuttal, a disputed issue of material fact must raise ''specific facts'' that are ''necessary to be resolved''[13] and not ''legislative facts.''[14] Unlike specific facts,

[1] *See* 88 FR 49364 (July 31, 2023).

[2] *See* FTC, Reviews and Testimonials Rule, *https://www.regulations.gov/document/FTC-2023-0047-0001/comment.* The Commission also received sixteen comments that are non-responsive and two that are duplicates.

[3] The FTC Act provides that ''an interested person is entitled to present his position orally or by documentary submission (or both).'' 15 U.S.C. 57a(c)(2)(A).

[4] 16 CFR 1.11(e).

[5] 16 CFR 1.11(e)(1) through (3).

[6] Fake Review Watch identified itself as an entity that ''has been investigating online review fraud for over five years and has produced over 80 videos documenting the scope of the problem across multiple third-party review platforms,'' and it recommended that the Commission impose specific disclosure requirements on third-party review platforms. Fake Review Watch, Cmt. on NPRM at 1 (Aug. 8, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0015.*

[7] IAB represents ''over 700 leading media companies, brand marketers, agencies, and technology companies'' responsible for ''selling, delivering, and optimizing digital advertising and marketing campaigns,'' and whose members ''account for 86 percent of online advertising expenditures'' in the U.S. IAB, Cmt. on NPRM at 1, (Sept. 29, 2023) *https://www.regulations.gov/comment/FTC-2023-0047-0101.*

[8] The Researchers ''have studied how online review platforms can earn consumer trust by taking specific actions against firms and reviewers who write and propagate fake reviews.'' The Researchers, Cmt. on NPRM, (Sept. 22, 2023) *https://www.regulations.gov/comment/FTC-2023-0047-0060.*

[9] 16 CFR 1.12(a)(5) requires the initial notice of informal hearing to include a ''list of the groups of interested persons determined by the Commission to have the same or similar interests in the proceeding.''

[10] *See* 16 CFR 1.12(a)(3); 15 U.S.C. 57a(c)(2)(B); *see also* 88 FR 49364, 49381 (July 31, 2023).

[11] Fake Review Watch requested that ''the FTC hold an informal public hearing to give consumer advocates an opportunity to present evidence showing how third-party review platform policies and failures have contributed to the need for this rule in the first place.'' Fake Review Watch, Cmt. on NPRM at 3–44. Fake Review Watch, however, failed to identify any specific, disputed issues of material fact. The Researchers requested the opportunity to speak at a hearing to provide further explanation of their findings but did not identify any specific disputed issues of material fact. The Researchers, Cmt. on NPRM at 3.

[12] IAB, Cmt. on NPRM at 15.

[13] *See, e.g.,* 16 CFR 1.13(b)(1)(i) (issues that ''must'' be considered for cross-examination or rebuttal are only those disputed issues of fact the Commission determines to be ''material'' and ''necessary to resolve'').

[14] 16 CFR 1.12(b)(1) (''An issue for cross-examination or the presentation of rebuttal submissions, is an issue of specific fact in contrast to legislative fact.''). ''The only disputed issues of material fact to be determined for resolution by the Commission are those issues characterized as issues of specific fact in contrast to legislative fact. It was the judgment of the conferees that more effective, workable and meaningful rules will be promulgated if persons affected by such rules have the opportunity afforded by the bill, by cross-examination and rebuttal evidence or other submissions, to challenge the factual assumptions on which the Commission is proceeding and to show in what respect such assumptions are

Continued

legislative facts ''help . . . determine the content of law and of policy'' and do not need to ''be developed through evidentiary hearings'' because they ''combine empirical observation with application of administrative expertise to reach generalized conclusions.'' [15] Moreover, the relevant legislative history explains ''disputed issues of material fact necessary to be resolved'' should be interpreted narrowly.[16] In this context, ''disputed'' and ''material'' are given the same meaning as in the standard for summary judgment.[17] As in summary judgment, the challenging party must do more than simply assert there is a dispute regarding the Commission's findings. If those findings are otherwise adequately supported by record evidence, the challenging party must come forward with sufficient evidence to show there is a genuine, *bona fide* dispute over material facts that will affect the outcome of the proceeding.[18] IAB proposed disputed issues of material fact challenging (1) the Commission's proposed definition of ''substantially different product'' as a ''product that differs from another product in one or more material attributes other than color, size, count, or flavor''; (2) the Commission's statements on the proposed Rule's economic impact; and (3) the Commission's NPRM's finding that unintended consequences from finalizing the proposed rule are unlikely.

IAB's first proposed disputed issue of material fact questions the proposed definition of ''substantially different product,'' a term that, beyond the definition itself, appears only in proposed § 465.3. IAB asserted that the record did not contain evidence as to whether there are product attributes other than color, size, count, or flavor that can be combined on a product page without misleading consumers. In response to the NPRM, IAB and other commenters asserted that the reviews of products with certain differences other than color, size, count, or flavor could be linked without deceiving consumers and gave examples of what they argue are or could be such non-deceptive product differences.[19] Other commenters supported the proposed definition as written but did not address whether there were other non-deceptive product differences.[20] The Commission has decided to not proceed at this time with proposed § 465.3. It is therefore not necessary to address IAB's proposed disputed issue of material fact relating to the proposed definition of ''substantially different product.''

IAB also proposed two other disputed issues of material fact, which involve the Commission's findings: (1) on the proposed Rule's economic impact; and (2) that unintended consequences from finalizing the proposed rule are unlikely.

First, such findings are sufficiently supported by substantial evidence in the record, and the commenter identified no evidence challenging the FTC's conclusions. For example, the cost estimates in the NPRM are specific and based on empirical data. Staff's careful analysis of this data resulted in the well-reasoned conclusion that, even under a ''heightened compliance review scenario'' for firms that decide to be extra-cautious, and even with a conservative estimation of benefits, such benefits would still dwarf the minimal costs.

Second, these two proposed issues challenge the Commission's findings only as to ''legislative facts,'' which, unlike specific facts, ''help . . . determine the content of law and of policy'' and do not need to ''be developed through evidentiary hearings'' because they ''combine empirical observation with application of administrative expertise to reach generalized conclusions.'' [21] General concerns about a rule's overall effect on the marketplace, whether framed in terms of economic impact or unintended consequences, are precisely the sort of questions of policy or broad fact intended to fall under the category of ''legislative facts.'' As these two issues do not raise questions of ''specific fact,'' they do not warrant cross-examination and rebuttal submissions.[22]

Thus, the Commission finds that there are no ''disputed issues of material fact''

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erroneous.'' H.R. Rep. No. 93–1606, at 34 (Dec. 16, 1974) (Conf. Rep.). Further, as explained in *Association of National Advertisers, Inc.* v. *FTC,* 627 F.2d 1151, 1164 (D.C. Cir. 1979), the distinction between ''specific fact'' and ''legislative fact'' grew out of a recommendation from the Administrative Conference of the United States (ACUS):

Conference Recommendation 72–5 is addressed exclusively to agency rulemaking of general applicability. In such a proceeding, almost by definition, adjudicative facts are not at issue, and the agency should ordinarily be free to, and ordinarily would, proceed by the route of written comments, supplemented, perhaps, by a legislative-type hearing. Yet there may arise occasionally in such rulemaking proceedings factual issues which, though not adjudicative, nevertheless justify exploration in a trial-type format because they are sufficiently narrow in focus and sufficiently material to the outcome of the proceeding to make it reasonable and useful for the agency to resort to trial-type procedure to resolve them. These are what the Recommendation refers to as issues of specific fact.

Id. at 1164.

[15] *Ass'n of Nat'l Advertisers,* 627 F.2d at 1161–62.

[16] *See, e.g.,* H.R. Rep. No. 93–1107, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 7702, 7728; *Ass'n of Nat'l Advertisers,* 627 F.2d at 1163 (quoting H.R. Rep. No. 93–1606, at 33 (1974) (Conf. Report)).

[17] As explained in the legislative history:

The words 'disputed issues of material fact' are intended to describe and limit the scope of cross-examination in a rulemaking proceeding. Thus, the right of participants in the proceeding to cross-examine Commission witnesses does not include cross-examination on issues as to which there is not a bona fide dispute. In this connection, the Committee considers the rules of summary judgment applied by the courts analogous. Where the weight of the evidence is such that there can be no bona fide dispute over the facts, summary judgment is proper. Similarly, in such a situation cross-examination would not be permitted; neither is a participant entitled to cross-examination where the disputed issues do not involve material facts. This language in the bill is used to distinguish facts which might be relevant to the proceeding but not of significant enough import to rise to the level of materiality. The word material is used here with the same meaning it is given under the common law rules of evidence. Also of importance is the word 'fact.' Cross-examination is not required regarding issues in rulemaking proceedings which are not issues of fact. Examples of such issues are matters of law or policy or matters whose determination has been primarily vested by Congress in the Federal Trade Commission. Thus, unless the subject matter with regard as to which cross-examination is sought relates to disputed issues, which are material to the proposed rule and which are fact issues, there is no right to cross-examination on the part of any party to the proceeding.

H.R. Rep. No. 93–1107, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C. C.A.N. 7702, 7728.

[18] *Id.; see also Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986) (explaining the standard as ''[o]nly disputes over facts that might affect the outcome''); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).

[19] *See* IAB, Cmt. on NPRM at 8 (asserting that it is non-deceptive for reviews of a book offered as a paperback, e-book, audiobook, and hard cover to be presented on the same page); *Amazon.com*, Inc., Cmt. on NPRM at 10 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0085* (asserting non-deceptive linking of crew neck and v-neck undershirts); U.S. Chamber of Commerce, Cmt. on NPRM at 7 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0087* (referring to linked reviews for cotton and sateen sheets from the same company, for a ceramic bowl with or without handles from a small seller, or for annual iterations of dog toys with new characters); National Retail Federation, Cmt. on NPRM at 7–8 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0090* (asserting non-deceptive linking of the same products with different patterns, materials, or artwork; t-shirts with v-necks and crewnecks; scents of soap; and individual golf clubs of the same set); Retail Industry Leaders Association, Cmt. on NPRM at 3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0094* (arguing that other attributes that do not change the overall design and formulation of a product should not be considered ''substantial differences''); Association of National Advertisers, Cmt. on NPRM at 15–16 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0105* (asserting that the bundling of air fresheners with different scents or sunscreens with different SPFs can be non-deceptive and making similar assertions about products that come in squeeze tube versions or that are sold in bundles).

[20] *See* Trustpilot, Cmt. on NPRM at 10 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0084;* Consumer Reports, Cmt. on NPRM at 7 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0099.*

[21] *Ass'n of Nat'l Advertisers,* 627 F.2d at 1161–62.

[22] *See supra* nn.13–17.

to resolve at the hearing [23] and no need for cross-examination or rebuttal submissions.[24]

This initial notice of informal hearing also serves as the ''final notice of informal hearing.'' [25] A final notice of informal hearing is limited in its substance to matters that arise only when the Commission designates disputed issues of material fact: who will conduct cross-examination; whether any interested persons with similar interests will be grouped together for such purposes; and who will make rebuttal submissions.[26] Because cross-examination and submission of rebuttal evidence are not anticipated to occur in this informal hearing, no separate final notice of informal hearing is necessary.

IV. List of Hearing Participants; Making an Oral Statement; Requests for Documentary Submissions

Pursuant to Commission Rule 1.12(a)(4), 16 CFR 1.12(a)(4), the following is the list of interested persons (''Hearing Participants'') who will have the opportunity to make oral presentations at the informal hearing:

1. Fake Review Watch;
2. IAB; and
3. The Researchers.

Oral statements will be limited to 30 minutes, although they may be supplemented by documentary submissions as described below, and the presiding officer may grant an extension of time for good cause shown. Transcripts of the oral statements will be placed in the rulemaking record. Hearing Participants will be provided with instructions as to how to participate in the virtual hearing.

If you are a Hearing Participant and would like to submit your oral presentation in writing or file a supplementary documentary submission, you can do so by submitting a comment on this rulemaking docket. You must do so on or before January 30, 2024. Write ''Reviews and Testimonials Rule; Project No. P214504'' on your submission. If you file a documentary submission under this section, your documentary submission—including your name and your state—will be placed on the public record of this proceeding, including on the website *https://www.regulations.gov.* To ensure the Commission considers your online documentary submission, please follow the instructions on the web-based form.

Because your documentary submission will be placed on the public record, you are solely responsible for making sure that it does not include any sensitive or confidential information. Your documentary submission should not contain sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your documentary submission does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your documentary submission should not include any ''[t]rade secret or any commercial or financial information which . . . is privileged or confidential''—as provided in section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including, in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Documentary submissions containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c), 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the submission must include the factual and legal basis for the confidentiality request and must identify the specific portions to be withheld from the public record. *See* Commission Rule 4.9(c). Your documentary submission will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your documentary submission has been posted publicly at *https://www.regulations.gov*—as legally required by Commission Rule 4.9(b), 16 CFR 4.9(b)—we cannot redact or remove it, unless you submit a confidentiality request that meets the requirements for such treatment under Commission Rule 4.9(c), 16 CFR 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of submissions to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive documentary submissions it receives from the Hearing Participants on or before January 30, 2024. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Hearing Participants who need assistance should indicate as much in their comment, and the Commission will endeavor to provide accommodations. Hearing Participants without the computer technology necessary to participate in video conferencing will be able to participate in the informal hearing by telephone; they should indicate as much in their comments.

V. Conduct of the Informal Hearing; Role of Presiding Officer

The Commission's Chief Presiding Officer, the Chair, has appointed and designates the Honorable Carol Fox Foelak, Administrative Law Judge for the Securities and Exchange Commission, to serve as the presiding officer of the informal hearing. Judge Foelak will conduct the informal hearing virtually using video conferencing starting at 10:00 a.m. Eastern on February 13, 2024. The informal hearing will be available for the public to watch live from the Commission's website, *https://www.ftc.gov,* and a recording or transcript of the informal hearing will be placed in the rulemaking record.

Because there are no ''disputed issues of material fact'' to resolve at the informal hearing, the presiding officer is not anticipated to make a recommended decision. The role of the presiding officer therefore will be to preside over and ensure the orderly conduct of the informal hearing, including selecting the sequence in which oral statements will be heard, and to place the transcript and any additional written submissions received into the rulemaking record. The presiding officer may prescribe additional procedures or issue rulings in accordance with 16 CFR 1.13. In execution of the presiding officer's obligations and responsibilities under the Commission Rules, the presiding officer may issue additional public notices.

VI. Communications by Outside Parties to the Commissioners or Their Advisors

Pursuant to Commission Rule 1.18(c)(1), 16 CFR 1.18(c)(1), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or

[23] If any interested person seeks to have additional disputed issues of material fact designated, the person may make such request to the presiding officer pursuant to 16 CFR 1.13(b)(1)(ii).

[24] 16 CFR 1.12(b).

[25] 16 CFR 1.12(c).

[26] *Id.*

Commissioner advisor shall be subject to the following treatment. Written communications and summaries or transcripts of oral communications shall be placed on the rulemaking record if the communication is received before the end of the comment period. They shall be placed on the public record if the communication is received later. Unless the outside party making an oral communication is a member of Congress, such communications are permitted only if advance notice is published in the Weekly Calendar and Notice of ''Sunshine'' Meetings.[27]

By direction of the Commission.

Joel Christie,

Acting Secretary.

[FR Doc. 2024–00678 Filed 1–12–24; 8:45 am]

BILLING CODE 6750–01–P

[27] *See* 15 U.S.C. 57a(i)(2)(A); 16 CFR 1.18(c).

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Parts 1112, 1130, and 1243

[CPSC Docket No. 2023–0047]

Safety Standard for Infant Support Cushions

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Danny Keysar Child Product Safety Notification Act, section 104 of the Consumer Product Safety Improvement Act of 2008 (CPSIA), requires the U.S. Consumer Product Safety Commission (Commission or CPSC) to promulgate consumer product safety standards for durable infant or toddler products. Under this statutory direction, the Commission is proposing a safety standard for infant support cushions. The Commission is also proposing to amend CPSC's consumer registration requirements to identify infant support cushions as durable infant or toddler products and proposing to amend CPSC's list of notices of requirements (NORs) to include infant support cushions.

DATES: Submit comments by March 18, 2024.

ADDRESSES: Comments related to the Paperwork Reduction Act aspects of the marking, labeling, and instructional literature requirements of the proposed rule should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: CPSC Desk Officer, FAX: 202–395–6974, or emailed to *oira_submission@omb.eop.gov.*

Other comments, identified by Docket No. CPSC–2023–0047, may be submitted electronically or in writing, as follows:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: *https://www.regulations.gov.* Follow the instructions for submitting comments. Do not submit through this website: confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. CPSC typically does not accept comments submitted by email, except as described below.

Mail/Hand Delivery/Courier/Confidential Written Submissions: CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal. You may, however, submit comments by mail, hand delivery, or courier to: Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504–7479.

Instructions: All submissions received must include the agency name and docket number for this proposed rulemaking. CPSC may post all comments without change, including any personal identifiers, contact information, or other personal information provided, to: *www.regulations.gov.* If you wish to submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public, you may submit such comments by mail, hand delivery, or courier, or you may email them to: *cpsc-os@cpsc.gov.*

Docket: For access to the docket to read background documents or comments received, go to: *https://www.regulations.gov,* insert the docket number, CPSC–2023–0047, into the ''Search'' box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Stefanie Marques, Ph.D., Project Manager, Directorate for Health Sciences, U.S. Consumer Product Safety Commission, 5 Research Place, Rockville, MD 20850; email: *smarques@cpsc.gov;* telephone: (301) 987–2581.

SUPPLEMENTARY INFORMATION:

I. Background and Statutory Authority

Section 104(b) of the CPSIA requires the Commission to (1) examine and assess the effectiveness of voluntary consumer product safety standards for durable infant or toddler products, in consultation with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts and (2) promulgate consumer product safety standards for durable infant and toddler products. 15 U.S.C. 2056a(b)(1). The Commission must continue to promulgate standards for all categories of durable infant or toddler products ''until the Commission has promulgated standards for all such product categories.'' 15 U.S.C. 2056a(b)(2).

The Commission is issuing this notice of proposed rulemaking (NPR) to establish a consumer product safety rule for infant support cushions to further implement section 104 of the CPSIA.[1] The proposed rule defines an ''infant support cushion'' as ''an infant product that is filled with or comprised of resilient material such as foam, fibrous batting, or granular material or with a gel, liquid, or gas, and which is marketed, designed, or intended to support an infant's weight or any portion of an infant while reclining or in a supine, prone, or recumbent position.'' This includes infant pillows, infant loungers, nursing pillows with a lounging function, infant props or cushions used to support an infant for activities such as ''tummy time,'' and other similar products.

CPSC staff identified at least 79 reported fatalities involving infant support cushions from January 1, 2010, through December 31, 2022, as well as 125 nonfatal incidents or reports involving these products within the same time period. There were 17 deaths in 2020, and at least 17 more in the potentially incomplete data from 2021. More than 80 percent of the fatalities associated with these products involved infants three months old and younger. In more than 60 percent of the fatalities, the official cause of death was either asphyxia or probable asphyxia, and these incidents typically involved use of an infant support cushion placed in or on a sleep-related consumer product such as an adult bed, futon, crib, bassinet, play yard, or a on a couch. For the nonfatal incidents, the most common circumstances involved an infant falling from an infant support cushion placed on a raised surface such as a bed or a sofa or the threat of asphyxia or entrapment.

This proposed rule addresses the risk of death and injury associated with

[1] On November 29, 2023, the Commission voted (4–0) to publish this notice of proposed rulemaking, with an amendment proposed by Commissioner Trumka. Commissioners Trumka and Boyle issued statements in connection with their votes, available at: *https://www.cpsc.gov/s3fs-public/2023-11-29-Commission-Meeting-Minutes-Infant-Support-Cushions-NPR-Decisional.pdf?VersionId=9Y0qjnS2A74SHa932SzV9txWDIaMddXU.*

infant support cushions primarily due to suffocation, entrapment, and fall hazards. The proposed rule would address positional asphyxiation hazards by requiring that all surfaces be sufficiently firm that they are unlikely to conform to an infant's face and occlude the airways, and by setting a maximum incline angle that would prevent hazardous positioning of an infant's head and neck along the surfaces of the product. The proposed rule would set a side angle requirement that addresses the risk of entrapment between the sidewall and the occupant support surface. It addresses fall hazards by effectively limiting sidewall height to discourage caregivers from mistakenly believing these products to be safe for unattended infants. The proposed rule also requires a strongly worded, conspicuous, and permanent on-product warning.

Consistent with section 104(b)(1)(A) of the CPSIA, CPSC consulted with manufacturers, retailers, trade organizations, laboratories, consumer advocacy groups, consultants, and the public to develop this rule, including through participation in the juvenile products subcommittee meetings of ASTM.[2] Currently, however, no voluntary or mandatory safety standard for infant support cushions exists to address the hazards posed by these products.

Infant support cushions are a durable infant or toddler product under section 104(f) of the CPSIA. Section 104(f)(1) defines the term ''durable infant or toddler product'' as ''a durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years.'' 15 U.S.C. 2056a(f)(1). Section 104(f)(2) of the CPSIA provides a non-exhaustive list of product categories within the definition of ''durable infant or toddler products.'' Although infant support cushions are not specifically listed in section 104(f)(2), they are ''durable infant or toddler products'' because (as explained in Part II, below) they are: not disposable; have a useful life of up to several years and often are used by multiple children successively; are similar to other durable infant and children's products such as crib mattresses and sling carriers; and are primarily intended to be used by children five years old or younger.

Section 104(d) of the CPSIA requires manufacturers of durable infant or toddler products to establish a product registration program and comply with CPSC's rule for product registration cards, 16 CFR part 1130. The Commission proposes to amend part 1130 to include infant support cushions in the list of durable infant or toddler products that must comply with these product registration requirements. *See* 16 CFR 1130.2(a).

Manufacturers of children's products also must comply with product registration requirements, as well as testing and certification requirements for children's products that are codified in 16 CFR parts 1107 and 1109. Section 14(a)(3) of the Consumer Product Safety Act (CPSA) requires the Commission to publish an NOR for the accreditation of third party conformity assessment bodies (test laboratories) to assess conformity with a children's product safety rule to which a children's product is subject. The proposed rule would be a children's product safety rule that requires issuance of an NOR.

II. The Product Category

A. Infant Support Cushions

Infant support cushions include products that support an infant for lounging, meaning reclining or lying in a supine, prone, or recumbent position. Infant products within this category may or may not contain infants with perimeter walls. Most infant support cushions on the market today are filled with cushy foam or soft fibrous batting, covered by flexible fabric. Some infant support cushions are marketed for use in a crib or other infant sleep product, notwithstanding warnings from the Commission and others, including the American Academy of Pediatrics (AAP), that soft objects, such as pillows and excess bedding, should not be placed in an infant's sleep environment.

Illustrative pictures of infant support cushions can be found in Tab C of staff's briefing package for this proposed rule.[3] A non-exhaustive list of examples of infant support cushions includes:

- head positioner pillows;
- flat baby loungers;
- crib pillows;
- wedge pillows for infants;
- infant sleep positioners, unless regulated by the Food and Drug Administration (FDA) as medical devices;
- stuffed toys marketed for use as an infant support cushion;
- infant ''tummy time'' or ''lounging'' pillows, whether flat or inclined;
- multi-purpose pillows marketed for both nursing and lounging;
- anti-rollover pillows with or without straps that fasten the pillow to the infant;
- infant ''self-feeding'' pillows that hold a bottle in front of the face of a reclining or lying infant;
- pads and mats; and
- accessory pillows and other padded accessories, often marketed for use with an infant car seat, stroller, or bouncer, but not sold with that product and therefore not included in the mandatory safety standard for those products.

These in-scope products would be required to meet the performance standards of this rule. To avoid potentially duplicative or conflicting obligations, however, the scope of products that would be subject to this proposed rule does not include durable infant products that are already regulated by the Commission and included in the list of products at 16 CFR 1130.2(a).

Illustratively, the following products are not infant support cushions within the scope of this proposed rule:

- Pillows not marketed or intended for use by infants, such as adult bed and throw pillows;
- nursing pillows if subject to Commission's proposed nursing pillow rule 88 FR 65865 (Sept. 26, 2023) if that rule is finalized, unless they are also marketed for lounging;
- crib and play yard mattresses that are in scope of the play yard and crib mattress standard in 16 CFR part 1241;
- purely decorative nursery pillows, such as those personalized with a baby's name and birthdate, that are not for infant use;
- stuffed toys (unless they meet the definition of an infant support cushion in this proposed rule);
- padded seat liners that are sold with a rocker, stroller, car seat, infant carrier, swing, highchair, or bouncer that are specifically designed to fit that product; and
- sleeping accommodations, which are regulated under the Commission's infant sleep product rule at 16 CFR part 1236.

B. Market Description

Most types of new infant support cushions are sold online, including from

[2] CPSC formally began the consultation process for this rulemaking in December 2021, via a letter from CPSC staff requesting that ASTM form a working group to develop a voluntary standard to reduce the risk of death and injury from hazards associated with infant pillow products, including nursing pillows. In response, ASTM formed two subcommittees intended to develop two separate voluntary standards: the F15.16 Infant Feeding Supports subcommittee, intended to develop a standard for nursing pillows; and the F15.21 Infant Loungers subcommittee. CPSC staff has been actively participating in both ASTM subcommittees to develop voluntary standards that address hazards associated with these products.

[3] Staff Briefing Package: Staff's Draft Proposed Rule for Infant Support Cushions (November 8, 2023) (Staff's NPR Briefing Package), available at: *https://www.cpsc.gov/s3fs-public/Briefing-Package-Notice-of-Proposed-Rulemaking-Safety-Standard-for-Infant-Support-Cushions.pdf?VersionId=rA60lesWHddS1.wrk_EvV00xeX75dsFc.*

general online retailers, online sites for ''big box'' stores, online baby products sites, and online marketplaces for hand-crafted items. A few types of infant support cushions, however, are also available from brick-and-mortar baby specialty stores and general retail stores, particularly crib pillows and baby loungers. Prices for new infant support cushions average roughly $30 and range from less than $15 for a simple head positioner pillow or crib pillow to more than $250 for a lounger with a removable cover or a large stuffed toy marketed for sleep. Several thousand manufacturers and importers, including hundreds of handcrafters and direct foreign shippers, supply infant support cushions to the U.S. market. *See* Staff's NPR Briefing Package, Tab E.

Infant support cushions may be re-used for multiple children or sold for use after an infant outgrows the product. Commission staff observed that used infant support cushions are widely available on secondary marketplaces such as eBay and Mercari. In June 2023, for example, staff found listings on Mercari for used changing pads, large stuffed toys marketed for infant sleep, crib wedge pillows, baby neck pillows, baby sleep positioners, baby loungers, baby sleep mats, baby ''pillow chairs,'' infant ''self-feeding'' pillows, baby/toddler bean bag chairs, and crib pillows.

C. Infant Cushion/Pillow Ban

In 1992, pursuant to the Commission's authority under the Federal Hazardous Substances Act (FHSA), 15 U.S.C. 1261–1278, the Commission issued a ban on certain infant cushions and pillows filled with foam, plastic beads, or other granular material. 57 FR 27912 (June 23, 1992). That ban prohibits ''infant cushions,'' ''infant pillows,'' and similar articles that are:

- made with a flexible fabric covering;
- loosely filled with granular material, including but not limited to, polystyrene beads or pellets;
- easily flattened;
- capable of conforming to the body or face of an infant; and
- intended or promoted for use by children under one year of age.

16 CFR 1500.18(a)(16). This proposed rule for infant support cushions does not change the FHSA ban. That ban was limited to products with the specific hazard presented by loosely filled granular material such as polystyrene beads or pellets, and those products will continue to be banned under the FHSA. Infant support cushions that are not subject to the ban are within the scope of this proposed rule and would be required to comply with the performance requirements of this proposed rule.[4]

III. Incident Data and Hazard Patterns

CPSC staff searched the Consumer Product Safety Risk Management System (CPSRMS)[5] and National Electronic Injury Surveillance System (NEISS)[6] databases for fatalities, incidents, and concerns associated with infant support cushions and involving infants up to 12 months old, reported to have occurred between January 1, 2010, and December 31, 2022. Tab A of Staff's NPR Briefing Package describes the incident and hazard patterns associated with infant support cushions.

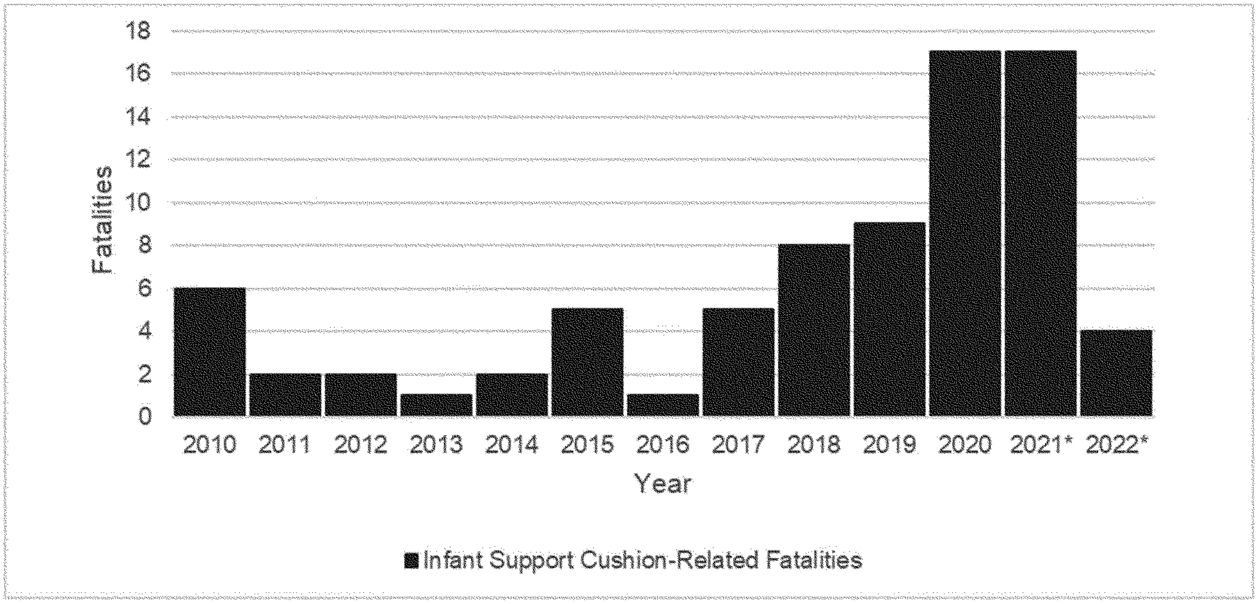
Commission staff identified 79 fatal incidents and 125 nonfatal incidents and consumer concerns reported to CPSC from 2010–2022. Of the 125 non-fatal reports. 22 consisted of emergency-department-treated injuries, three involved hospital admissions, 46 reports involved no injury, and for 52 reports the disposition was either unknown or unspecified. Table 1 provides the distribution of fatal incidents by year.

[4] An exemption to the infant pillow ban applies to Boston Billow nursing pillows and substantially similar nursing pillows that are designed to be used only as nursing aids for breastfeeding mothers. 16 CFR 1500.86(a)(9). The exemption applies specifically to the FHSA ban and is not applicable to this proposed rule or to the proposed standard for nursing pillows.

[5] CPSRMS is the epidemiological database that houses all anecdotal reports of incidents received by CPSC, ''external cause''-based death certificates purchased by CPSC, all in-depth investigations of these anecdotal reports, as well as investigations of select NEISS injuries. CPSRMS documents include hotline reports, online reports, news reports, medical examiner's reports, death certificates, retailer/manufacturer reports, and documents sent by state and local authorities, among others.

[6] NEISS is a statistically valid surveillance system for collecting injury data. NEISS is based on a nationally representative probability sample of hospitals in the U.S. and its territories. Each participating NEISS hospital reports patient information for every emergency department visit associated with a consumer product or a poisoning to a child younger than five years of age. The total number of product-related hospital emergency department visits nationwide can be estimated from the sample of cases reported in the NEISS. *See https://www.cpsc.gov/Research-Statistics/NEISS-Injury-Data.*

Table 1: Infant Support Cushion-Related Fatalities Reported by Year for Children 12 Months of Age or Younger: 2010-2022



Source: CPSRMS and NEISS databases.
Asterisks (*) indicate that reporting is ongoing for CPSRMS; the years 2021–2022 are considered incomplete.

Table 2 summarizes the number of reported fatalities related to infant support cushions for victims 12 months and younger by age in months and by gender. As reflected in Table 2, 80 percent of the fatalities with a known age were infants in the zero to three month age range. Among the 76 fatalities for which the sex is known, half were male and half were female.

TABLE 2—INFANT SUPPORT CUSHION-RELATED FATALITIES FOR VICTIMS AGES 12 MONTHS AND YOUNGER AND SEX: 2010–2022

Age (In months)	Total (% of total)	Male (% of total)	Female (% of total)	Unknown (% of total)
Total	79 (100%)	38 (48%)	38 (48%)	3 (4%)
1	26 (33%)	12 (15%)	14 (18%)	0
2	19 (24%)	10 (13%)	9 (11%)	0
3	18 (23%)	8 (10%)	10 (13%)	0
4	7 (9%)	4 (5%)	3 (4%)	0
5	3 (4%)	1 (1%)	0	2 (3%)
6	1 (1%)	0	1 (1%)	0
7	2 (3%)	1 (1%)	1 (1%)	0
8	0	0	0	0
9	0	0	0	0
10	1 (1%)	1 (1%)	0	0
11	1 (1%)	1 (1%)	0	0
12	0	0	0	0
Unknown	1 (1%)	0	0	1 (1%)

Source: CPSRMS and NEISS databases. Percentages may not add to 100 due to rounding; the years 2021–2022 are considered incomplete.

The official cause of death reported by the medical examiner in the majority of the 79 reported fatalities 49 (62 percent) was asphyxia or probable asphyxia; 13 (17 percent) were determined to be due to sudden unexpected infant death (SUID) events; 12 (15 percent) had an undetermined cause of death; and for five (six percent), no medical examiner's report was available. Nearly all reported fatalities (75 of 79) involved placement of the infant support cushion on another sleep-related consumer product. For the remaining four fatalities, the placement of the infant support cushion was either undetermined or unknown.

In the 125 nonfatal incidents associated with infant support cushions that involved children ages 12 months and younger and occurred between January 1, 2010, and December 31, 2022, three infants were admitted to the hospital and 22 infants were reported to have been treated and released from an emergency department. In 52 of these nonfatal incidents, the severity of the injury was unspecified or unknown, and in 46 of the incidents no injury was reported. Table 3 summarizes the disposition of the nonfatal incident reports associated with infant support cushions and victims ages 12 months and younger.

TABLE 3—INFANT SUPPORT CUSHION-RELATED NONFATAL REPORTS BY SEVERITY FOR VICTIMS AGES 12 MONTHS AND YOUNGER: 2010–2022

Severity	Total reports (% of total)
Total Non-Fatal Reports	125 (100%)
Hospital Admissions	3 (2%)
Emergency Department Treated	22 (18%)
Left without being seen	1 (1%)
Seen by a Medical Professional	1 (1%)
Unspecified/Unknown	52 (42%)
No Injury Reported	46 (37%)

Source: CPSRMS and NEISS databases. Percentages may not add to 100 due to rounding; the years 2021–2022 are considered incomplete.

For the 46 reports for which no injury was reported, many of the descriptions in the incident reports indicated the potential for serious injury or death. Staff's analysis of the narratives associated with these incident reports indicated that in 29 reports (23 percent) of the incidents, an infant support cushion occupied by an infant had been place on an elevated surface (such as an adult bed or couch) and the infant had fallen off; 27 (22 percent) specified threatened asphyxia; and 17 incidents (14 percent) involved various types of rashes caused by the product. Table 4 summarizes the hazard patterns for infant support cushion-related nonfatal incidents.

TABLE 4—INFANT SUPPORT CUSHION-RELATED NON-FATAL REPORTS BY HAZARD PATTERN FOR VICTIMS AGES 12 MONTHS AND YOUNGER: 2010–2022

Event	Number of non-fatal reports (% of total)
	Children (0 to 12 months)
Fall	29 (23%)
Threatened Asphyxia	27 (22%)
Rash	17 (14%)
Limb Entrapment	1 (1%)
Mold	1 (1%)
Choking	1 (1%)
Near Strangulation	1 (1%)
Vomiting	1 (1%)
Consumer Complaints	47 (38%)
Total Non-Fatal Reports	125 (100%)

Source: CPSRMS and NEISS databases. Percentages may not add to 100 due to rounding; the years 2021–2022 are considered incomplete.

Staff, based on review of nonfatal incident and report data, identified falls and threatened asphyxia as the two major nonfatal hazard patterns associated with infant support cushions. In the case of falls, the reports revealed that in most incidents infant support cushions had been placed on elevated surfaces including adult beds and couches. The injuries associated with falls include concussions, facial injuries, and scalp injuries.

In the case of threatened asphyxia, the narratives described scenarios of infants being rescued after being found hanging partially or completely off of the infant support cushion with their mouths and noses obstructed, with their heads wedged between sleep positioner side cushions, or having rolled to a face-down position that put them at risk of an obstructed airway.

IV. International Standards for Infant Support Cushions

The Commission is aware of two international standards, both British, that contain performance requirements that address suffocation and asphyxiation hazards associated with infant pillows. BS 1877–8:1974, *Specification for Domestic bedding—Part 8: Pillows and bolsters for domestic use (excluding cellular rubber pillows and bolsters)* (BS 1877–8:1974) and BS 4578:1970, *Specification for Methods of test for hardness of, and for air flow through, infants' pillows* (BS 4578:1970). The scope of BS 1877–8:1974 includes both adult and cot pillows (infant pillows), and recommends that cot pillows be filled firmly enough to prevent infants' heads from sinking into the products and that the pillow covering not be loose enough to be drawn into an infant's mouth. BS 1877–8:1974 has requirements for cot pillow size, filling, and covering. Cot pillows must be 58 x 38 cm (23 x 15 inches) and their covering must be of open construction to allow air permeability. Both the filling and covering must meet performance requirements described in BS 4578:1970 for ''hardness'' (*i.e.,* firmness) and air permeability.

The hardness test in BS 4578:1970 requires that a 100 mm diameter probe be placed in the center of the product with 10 newtons (N) of force for one minute. BS 1877–8:1974 requires that displacement of the pillow when the force is applied shall not exceed 25 percent of the thickness. Staff assesses that the proportional approach used in this standard allows thicker pillows to have a greater displacement than thinner pillows, which does not sufficiently protect against the suffocation and asphyxia hazards associated with infant support cushions because that greater displacement could allow the product to obstruct the infant's airways.

V. Boise State University Contractor Report

CPSC awarded a contract to Boise State University (BSU) for infant biomechanics and suffocation research and consultancy services. This research included an analysis of the risk of injury or death to infants associated with the use of nursing pillows and infant support cushions during activities such as feeding, nursing, sleeping, propping, and lounging. *See* Staff's NPR Briefing Package, Tab C.

BSU delivered its final report on June 30, 2022 (the BSU Final Report).[7] The BSU Final Report provides recommendations and conclusions related to the performance and design of infant support cushions, including the following.

Firmness Testing. The BSU Final Report recommends that all infant support cushions be required to undergo firmness testing because products that lack firmness are more likely to conform around an infant's nose and mouth and present a suffocation hazard. The report recommended testing all infant pillows for firmness using a three-inch diameter, anthropometry-based hemispheric probe that is geometrically similar to, and sized to represent the breadth of, an infant's face. The report recommends that the probe should be applied to the product at three locations: the location of maximum thickness, the location of minimum thickness, and a subjective location of interest (*i.e.,* another soft location most likely to result in failure). The force required to displace the probe one inch into the product at each location must exceed 10 N. Meeting this requirement would mean that the product has firmness comparable to crib mattresses.

Airflow Testing. The BSU Final Report recommends that products that do not pass firmness testing be required to pass an airflow test. Passing the airflow test would mean that the product has airflow characteristics comparable to current mesh crib liners, which the BSU researchers concluded would mitigate the suffocation hazard. However, the report recommends against requiring that airflow testing for products that pass the BSU Final

[7] Mannen, E.M., Davis, W., Goldrod, S., Lujan, T., Siddicky, S.F., Whitaker, B., & Carroll, J. (2022). *Pillows Product Characterization and Testing.* Prepared for the U.S. Consumer Product Safety Commission under contract no. 61320620D0002, task order no. 61320621F1015. Available at: *https://www.cpsc.gov/content/Pillows-Product-Characterization-and-Testing.*

Report's proposed firmness testing, because a firm product is unlikely to form a seal around an infant's nose and mouth.

Sagittal-Plane Testing. BSU developed prototype sagittal-plane testing devices to allow for more comprehensive assessments of infant positioning in and on infant support cushions.[8] The BSU Final Report recommends further research to determine appropriate worst-case positions for testing and to set threshold values for acceptable body positions that would not negatively impact infant breathing.

Tab C of Staff's NPR Briefing Package contains staff's summary of how the Commission's proposed rule reflects the conclusions and recommendations of the BSU Final Report.

VI. ASTM's Working Draft Standard

There are no published U.S. voluntary standards for infant support cushions. ASTM is working toward a voluntary standard for infant loungers under Subcommittee F15.21 on Infant Carriers, Bouncers, and Baby Swings.[9] In the draft voluntary standard, an ''infant lounger'' is a product ''with a raised perimeter, a recess, or other area that is intended to be placed on the floor and to provide a place for an infant to sit, lie, recline, or rest, while supervised by an adult.'' That draft definition would govern only a subset of the products covered by this proposed rule, which includes infant positioners, nursing products with dual use for lounging, infant cushions, and other infant pillow-like products, as well as the infant loungers being considered by ASTM. Staff has been working with ASTM to develop performance requirements intended to address the primary hazards associated with infant loungers, but to date ASTM has not issued a ballot on a standard for infant loungers.

ASTM's draft voluntary standard includes general requirements typically found in other ASTM juvenile product standards, such as requirements addressing lead content, small parts, hazardous sharp edges or points, and toy accessories that are attached to, removable from, or sold with the products. The ASTM draft also specifies that if the lounger can be converted to another product it shall comply with the applicable requirements of that product's standard. The general requirements of the draft infant lounger standard also state that the sidewall height of the product shall be less than four inches when measured according to the sidewall height measurement test method specified in the draft standard. The draft voluntary standard further includes the following performance requirements:

- *Stability:* The product shall not tip over and shall retain the CAMI dummy[10] when tested in all manufacturers' use positions.
- *Infant Restraints:* The product shall not have a restraint system.
- *Fabric/Mesh Integrity:* This requirement is intended to address product integrity issues such as seam failures and material breakage.
- *Bounded Openings:* This requirement is intended to address potential entrapment hazards associated with openings in the product.
- *Occupant Support Surface:* This requirement is intended to address the thickness of, dimensions of, and potential gaps in the occupant support surface.
- *Occupant Support Surface Firmness:* This requirement uses an eight-inch diameter, disc-shaped ''firmometer'' probe and requires that there shall be no point where the feeler arm of the device, which hangs over the edge of a disc, comes in contact with the occupant support surface.
- *Sidewall Firmness:* The top of the sides of the product cannot be displaced more than one inch when a three-inch diameter hemispheric probe is applied to the product with 10 N of force.
- *Side Angle and Deflection:* To address potential entrapment hazards at the intersection of the side wall and occupant support surface, the angle between the sidewall and the occupant support surface of the infant support cushion shall be greater than 90 degrees.

The draft voluntary standard also includes marking, labeling, and instructional literature requirements, such as warning the consumer on the product about not using the product for sleep or naps, only using the product when the occupant baby is supervised, only using the product on the floor, keeping soft bedding out of the product, not using the product on raised surfaces, and not using the product to carry or move an infant. The draft standard requires the warnings to be ''permanent'' and ''conspicuous.''

The product's instructions must, among other requirements, indicate the manufacturer's recommended maximum weight, height, age, developmental level, or combination of these attributes for any infant using the product, as well as any limitation on use of the product by a child for any specific unintended use.

VII. Description of the Proposed Mandatory Standard for Infant Support Cushions[11]

To address established risks of death and injury associated with infant suffocations, asphyxiations, entrapments, and falls, and as section 104 of the CPSIA requires, the Commission is issuing this proposed rule to establish mandatory performance and labeling requirements for infant support cushions.

The text of the proposed rule is based on an evaluation of incident data associated with infant support cushions, the ASTM working draft standard for infant loungers that is under development, and the recommendations of the BSU Final Report. The proposed rule is summarized below and explained in more detail in Tabs C and F of Staff's NPR Briefing Package.

A. Scope and Definitions

Section 1243.1 of the proposed rule explains that the rule would apply to infant support cushions, including infant positioners, nursing products with a dual use for lounging, infant loungers, infant props, or cushions used to support an infant for activities such as ''tummy time,'' and other infant pillow-like products. It would exclude, however, products already regulated by other Commission mandatory standards for durable infant products, which are listed in 16 CFR 1130.2(a). The proposed rule would apply to all infant support cushions manufactured after the effective date of the rule.

Section 1243.2 of the proposed rule defines ''infant support cushion'' as ''an infant product that is filled with or comprised of resilient material such as foam, fibrous batting, or granular material or with a gel, liquid, or gas, and which is marketed, designed, or intended to support an infant's weight or any portion of an infant while reclining or in a supine, prone, or recumbent position.''

The scope of ''infant support cushions'' is intended to encompass the products described in Part II above.

As noted previously, this proposed definition of ''infant support cushions'' includes, but is not limited to, the infant

[8] The sagittal plane is an anatomical plane that runs vertically through the human body, dividing it into left and right sections. It can be thought of as viewing the human body in profile.

[9] *See* Staff's NPR Briefing Package, Tab B. This ASTM standard is still in draft form and has not completed the full consensus process to be an approved standard and the draft language is subject to change.

[10] CAMI (Civil Aeromedical Institute) dummies, which are designated ASTM test devices, are based on child anthropometric data and come in multiple sizes. ASTM's working draft references the six-month-old size.

[11] *See* Staff's NPR Briefing Package, Tab C.

loungers that would be subject to ASTM's draft voluntary standard. The proposed rule would define ''infant lounger'' as ''an infant product with a raised perimeter, a recess, or other area that provides a place for an infant to recline or to be in a supine, prone, or recumbent position.'' Because, however, incident data show that the suffocation, asphyxiation, and fall hazards this rule seeks to address are posed by other infant pillow-like products, in addition to those with a raised perimeter or recess, the proposed broader definition more effectively addresses the hazards posed by these products. For example, the proposed rule would apply to ''infant positioners,'' defined as a product intended to help keep an infant in a particular position while supine or prone.

As discussed above, ASTM is working concurrently on developing voluntary standards for both ''infant feeding supports'' and ''infant loungers.'' The draft ASTM standards address hazards posed by ''dual use'' products intended to be used both to feed an infant and to support a lounging infant by requiring such products to comply with both standards. Adopting ASTM's approach, the proposed rule would apply to nursing pillows with a dual use for lounging, while excluding those nursing pillows that are solely intended to be used for nursing or feeding, along with other products already regulated by other Commission mandatory standards for durable infant products.

The Commission invites public comment on the scope of the proposed rule, including whether it addresses all products that pose the identified hazards and whether it is sufficiently clear and administrable. For example, the Commission invites public comment on whether it is appropriate to subject ''dual use'' products to both the proposed nursing pillow rule and the proposed infant support cushion rule (assuming that both are finalized), and what nursing products should be considered ''dual use.''

B. General Requirements

The proposed rule includes many of the general requirements included in the ASTM draft standard for infant loungers to address sharp edges or points, small parts, and lead in paints. It also requires that toy accessories that are attached to, removable from, or sold with the products comply with 16 CFR part 1250, which establishes a mandatory safety standard for toys, as well as requirements for the permanency of labels and warnings. However, while ASTM's draft standard for infant loungers would allow a maximum sidewall height of four inches, the Commission is concerned that this height may give consumers the mistaken impression that an infant can safely be left unattended in or on the product. For that reason, the proposed rule addresses the positional asphyxia hazard with a maximum incline requirement that effectively sets a lower limit on sidewall height, rather than the maximum side height requirement currently favored by ASTM. The Commission invites public comment on side height limit and incline angle requirements.

C. Proposed Performance Requirements

1. Firmness

The Commission's proposed firmness requirements and associated test methods are consistent with those applicable to crib mattresses and more stringent than those currently included in ASTM's draft standard for infant loungers. As explained in Tab C of Staff's NPR Briefing Package, based upon the findings and recommendations in the BSU Final Report as well as staff's analysis of the incidents and hazard patterns associated with facial occlusion into infant support cushions, the proposed rule requires firmness testing at three locations: the occupant support surface, the sidewall, and the intersection of the occupant support surface with the sidewall, as follows:

a. Occupant Support Surface (OSS) Firmness

The proposed rule includes a firmness test for the occupant support surface [12] that is based on the BSU Final Report, with modifications to improve the test methodology. The firmness test is intended to reduce the likelihood that the OSS can conform to an infant's face and cause suffocation. The proposed rule requires that OSS firmness be tested using the three-inch diameter hemispheric probe developed by BSU, rather than the eight-inch firmometer probe in the ASTM draft standard. The three-inch probe is more consistent, in both size and shape, with the size and dimensions of an infant's head, enabling it to more accurately detect any material deformations and surface features that an infant's face may come in contact with on an infant support cushion. In addition, staff's testing showed that an eight-inch disc probe may not be as accurate as a three-inch hemispheric probe when used on certain models of infant support cushions with smaller dimensions or an OSS surface that is not completely flat, so that the eight-inch firmometer cannot fit well enough in the product to provide accurate measurement.

To meet the proposed rule's firmness requirement, the force required to displace the probe one inch into the OSS test location (as well as the two other test locations) must exceed 10 N (about 2.25 pounds), which indicates product firmness that is at least comparable to a crib mattress. Figure 1, below, illustrates the firmness test being applied to the OSS of an infant support cushion.

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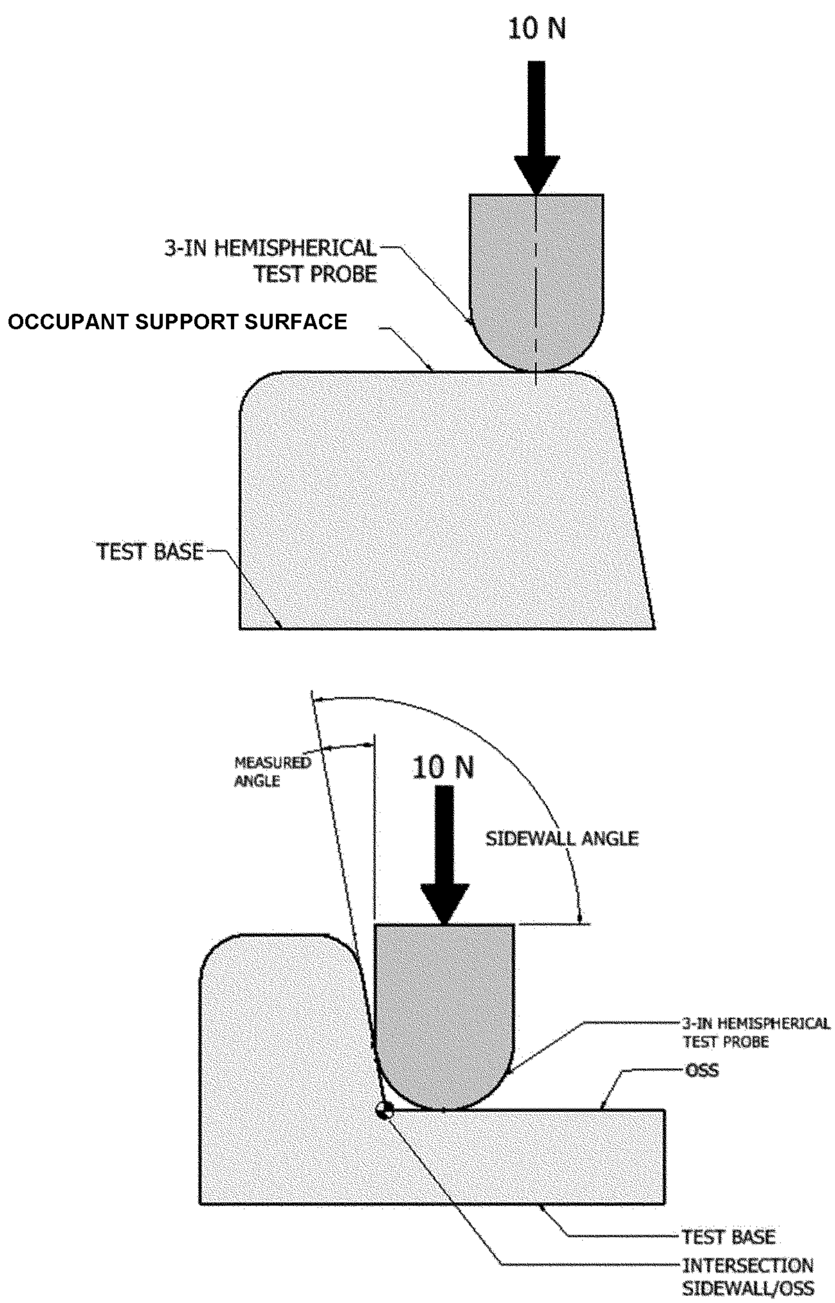
[12] The proposed rule uses ASTM's draft definition of an infant support cushion's ''occupant support surface'' or OSS as ''the area that holds up and bears the infant or any portion of the infant.''

Figure 1: Firmness Test Applied to OSS or Sidewall



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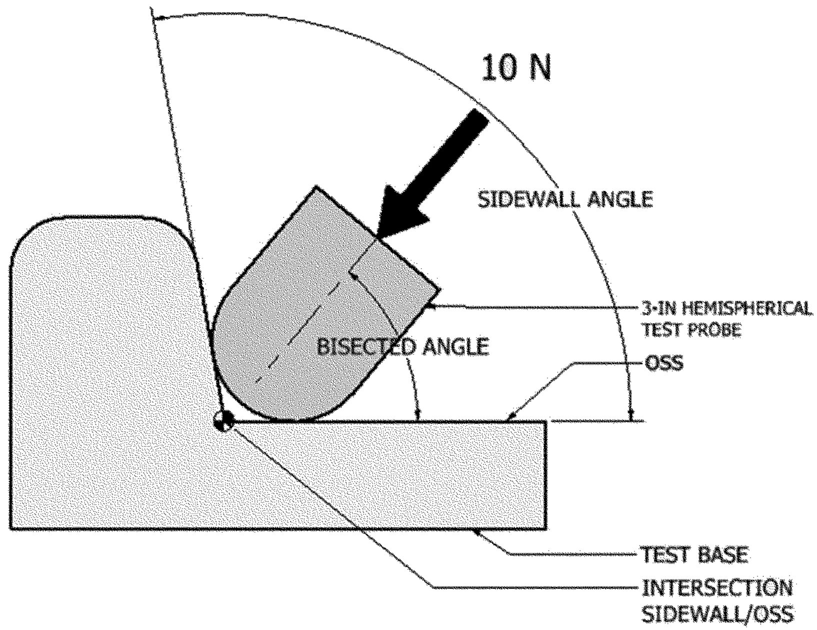
Because an infant's head or face may rest on the sidewall of a product, as well as on the product's OSS, the proposed rule includes firmness requirements for any product sidewall. While the ASTM working draft also requires firmness testing of sidewalls, the proposed rule requires testing a minimum of four sidewall locations, including the location of maximum sidewall height, and requires that the test locations include at least one location most likely to fail, rather than requiring that sidewalls be tested in six-inch increments around the product as stated in ASTM's draft. The differences from ASTM in testing protocol are intended to provide more accurate testing for both smaller head pillows and larger lounger products.

b. Intersection of OSS With Sidewall

To address the hazard of suffocation when an infant's face is surrounded on two sides by the OSS and a sidewall, the proposed rule includes firmness requirements based on testing the angle at which the two surfaces intersect, to ensure sufficient firmness to prevent the product from conforming to the infant's mouth or face and obstructing airways. It requires testing of firmness with the three-inch hemispherical probe positioned to bisect the angle formed where the two surfaces intersect, as shown in Figure 2.

Figure 2: Test Configuration for Intersection of Sidewall and Occupant Support Surface Firmness



The proposed rule's firmness requirements for the OSS/Sidewall intersection are similar to those in ASTM's draft standard.

2. Sidewall Angle

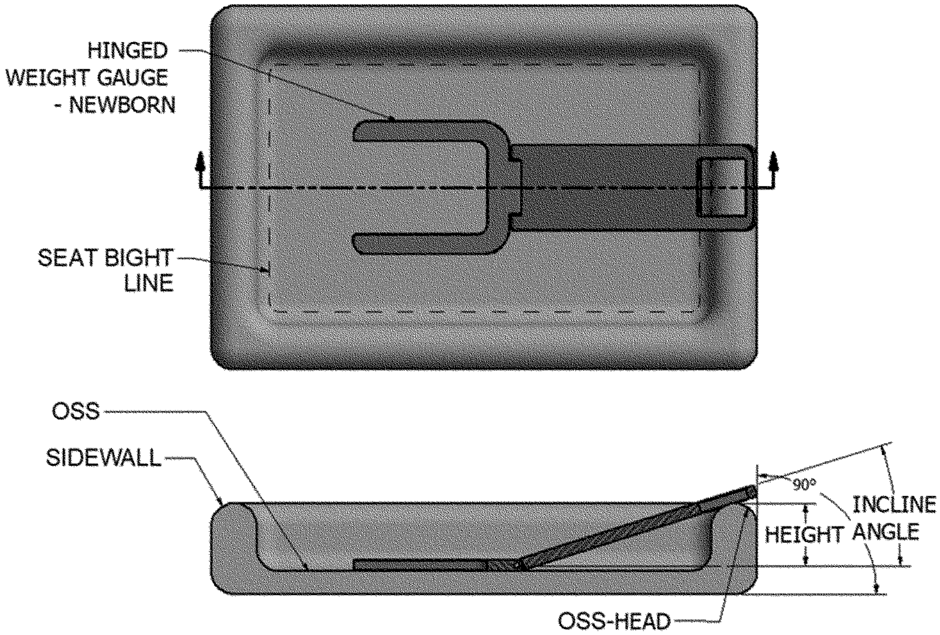
The proposed rule, like ASTM's draft, requires that the angle formed between the product's OSS and any sidewall be greater than 90 degrees to reduce potential entrapment hazards between the sidewall and the occupant support surfaces. The proposed rule requires a slightly different methodology for measuring this angle than does ASTM's draft. While ASTM's draft requires that this angle be measured with a protractor or similar tool at four-inch intervals along the product's interior, the proposed rule specifies assessing this angle with the cylindrical side of the three-inch probe, with a 10 N force applied to the probe. The probe, which is designed to simulate the size and shape of an infant's head, is used to determine whether there is any contact between the sidewall and the probe's side when the ''face'' of the probe is pressed against the OSS/sidewall intersection. If there is such contact, indicating an entrapment risk, that indicates that the angle is less than 90 degrees and the product would fail. Conversely, if there is no contact between the sidewall and the side of the probe, the angle is greater than 90 degrees and the product meets this requirement.

3. Maximum Incline Angle

The proposed rule, like ASTM's draft, requires that any incline of the OSS of an infant support cushion not exceed 10 degrees. This requirement is consistent with incline test of CPSC's *Safety Standard for Infant Sleep Products,* 16 CFR part 1236, and the ban of inclined sleepers for infants in the Safe Sleep for Babies Act, 15 U.S.C. 2057d, and similarly it addresses the hazards associated with inclined sleep products.

The proposed rule, however, differs from ASTM's maximum incline angle requirements and test procedures in order to improve test consistency across all infant support cushion products and to address additional locations of potential inclined lounging, reclining, and sleep. The three ways in which the proposed rule modifies ASTM's proposed testing protocol are: (1) setting a maximum incline angle that applies not only to all of a manufacturer's recommended use positions, but also to all other infant cushion surfaces that can feasibly support an infant's head, including, for example, the angle from any sidewall to the OSS or from the sidewall to the floor; (2) use of a newborn hinged weight gauge, rather than an infant gauge; and (3) positioning the gauge differently throughout testing. Figure 3 below, shows the use of a hinged weight gauge to measure the incline on an infant support cushion with a sidewall. The proposed rule requires use of a newborn hinged weight gauge, rather than the heavier infant gauge specified in the ASTM draft, because infant support cushions are commonly used for newborns, who are at higher risk of suffocation.

Figure 3: Test Fixture Configuration to Measure Incline Angle on an Infant Lounger



4. Sidewall Height

The proposed rule limits the height of any sidewall of an infant support cushion, as does ASTM's draft. However, the proposed rule addresses the hazards associated with relatively high sidewalls in a manner that is more closely tailored to the hazards, and applies to all of the products that fall within the scope of the proposed rule. These hazards are that caregivers may judge that an infant support cushion with relatively high sidewalls can safely contain an infant without supervision and is suitable for use on top of an adult bed or in a crib notwithstanding any contrary warnings, and that high sidewalls can cause hazardous positioning of the infant's neck when an infant's head is placed on top of the sidewall while their body is on a lower surface either inside or outside of the product. *See* Staff's NPR Briefing Package, Tabs B and C. While ASTM's draft sets a four-inch limit on sidewall height, the proposed rule addresses these hazards by limiting the maximum incline angle and provides testing protocols based on the type of product (for example, lounger-type products or head cushions). Using the test methodology prescribed in the proposed rule, sidewall heights, for products that have sidewalls, would be limited to approximately 1.9 inches.

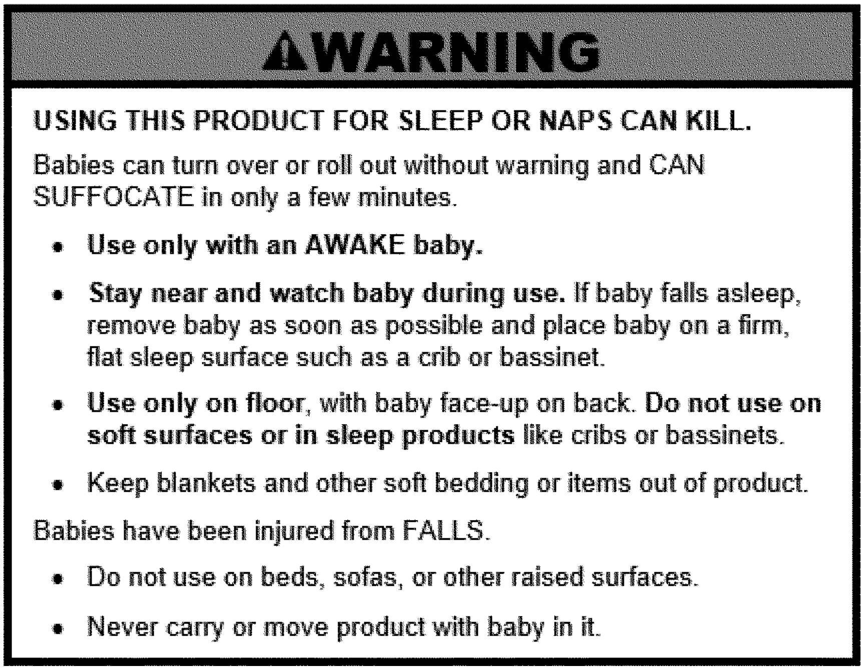
The Commission invites public comments on the proposed rule's method for addressing hazards posed by sidewall heights via measurement of maximum incline angle and what methodology would most effectively address the identified fall and positional asphyxia hazards.

D. Warning and Instructional Requirements

Compared to the performance requirements described above, warnings are less effective in eliminating or adequately reducing exposure to hazards associated with infant support cushions. Nevertheless, prominent and well-designed warnings can provide consumers with important information about the hazards associated with these products and appropriate behaviors to avoid the hazards. Thus, the proposed rule includes requirements for on-product warnings that address the primary hazards associated with infant support cushions.

The proposed rule includes warning content and format requirements similar to those in the ASTM draft standard. Figure 4 shows the warning statements and format that would be required on infant support cushions:

Figure 4: Example of Infant Support Cushion Warning



The proposed rule, like ASTM's draft, requires on-product warning labels to be ''conspicuous,'' defined as ''visible, when the product is in each manufacturer's recommended use position, to a person while placing an infant into or onto the product.'' Also, like ASTM's draft, the proposed rule requires such warning labels to be ''permanent,'' with permanence requirements based on ASTM's draft but better addressing the potential for consumers to attempt to remove on-product warning labels. The draft ASTM warning label for infant loungers indicates that the product should only be used on the floor, ''with baby face-up on back.'' This proposed rule would adopt ASTM's draft language. However, this proposed rule for infant support cushions includes products that can be used for ''tummy time,'' for which infants are on their stomach. The Commission invites public comments in answer to the following questions: Should manufacturers have flexibility to remove or change the ''with baby face-up on back'' language in the warning label? If so, in what circumstances?

The proposed rule incorporates by reference American National Standards Institute (ANSI) ANSI Z535.4, *Product Safety Signs and Labels,* which includes requirements related to safety alert symbol use; signal word selection; warning panel format, arrangement, and shape; color requirements for each panel; and letter style. The Commission specifically references the warning format requirements published in sections 6.1–6.4, 7.2–7.6.3, and 8.1. *See* Staff's NPR Briefing Package, Tab D, 80–81.

In addition to on-product warnings, the ASTM draft standard includes basic warning requirements for instructional literature that are the same as those in ASTM's draft.

VIII. Proposed Amendment to 16 CFR Part 1112 To Include NOR for Infant Support Cushions

Products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard, or regulation under any other act enforced by the Commission, must be certified as complying with all applicable CPSC-enforced requirements. 15 U.S.C. 2063(a). Certification of children's products subject to a children's product safety rule must be based on testing conducted by a CPSC-accepted third-party conformity assessment body. 15 U.S.C. 2063(a)(2). The Commission must publish an NOR for the accreditation of testing laboratories as third party conformity assessment bodies to assess conformity with a children's product safety rule. 15 U.S.C. 2063(a)(3). The proposed standard for infant support cushions would be a children's product safety rule that requires the issuance of an NOR.

The Commission's rules, at 16 CFR part 1112, establish requirements for accreditation of third party conformity assessment bodies to test for conformance with a children's product safety rule in accordance with section 14(a)(2) of the CPSA. Part 1112 also lists the NORs that the CPSC has published. The Commission proposes to amend part 1112 to include the *Safety Standard for Infant Support Cushions* in the list of children's product safety rules for which the CPSC has issued NORs.

Laboratories applying for acceptance as a CPSC-accepted third party conformity assessment body to test to the new standard are required to meet the third party conformity assessment body accreditation requirements in part 1112. When a laboratory meets the requirements as a CPSC-accepted third party conformity assessment body, the laboratory can apply to the CPSC to have the *Safety Standard for Infant Support Cushions* included in its scope of accreditation as reflected on the CPSC website at: *www.cpsc.gov/labsearch.*

IX. Product Registration Rule Amendment

In addition to requiring the Commission to issue safety standards for durable infant or toddler products, section 104 of the CPSIA directed the Commission to issue a rule requiring that manufacturers of durable infant or toddler products establish a program for consumer registration of those products. 15 U.S.C. 2056a(d). Section 104(f) of the CPSIA defines the term ''durable infant or toddler product'' as ''a durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years,'' and lists 12 distinct product categories. 15

U.S.C. 2056a(f). The product categories listed in section 104(f)(2) of the CPSIA represent a non-exhaustive list of durable infant or toddler product categories. Infant support cushions are not included in the statutory list of durable infant or toddler products.

In 2009, the Commission issued a rule implementing the consumer registration requirement. 74 FR 68668 (Dec. 29, 2009) (establishing 16 CFR part 1130). As section 104(d) of the CPSIA directs, the consumer registration rule requires each manufacturer of a durable infant or toddler product to provide a postage-paid consumer registration form with each product; keep records of consumers who register their products with the manufacturer; and permanently place the manufacturer's name and certain other identifying information on the product.

When issuing the consumer registration rule, the Commission identified six additional products as durable infant or toddler products: children's folding chairs; changing tables; infant bouncers; infant bathtubs; bed rails; and infant slings. 74 FR 68669. The Commission explained that the specified statutory categories are not exclusive, and that the Commission is charged with identifying the product categories that are covered. ''Because the statute has a broad definition of a durable infant or toddler product but also includes 12 specific product categories,'' the Commission noted, ''additional items can and should be included in the definition, but should also be specifically listed in the rule.'' *Id.* at 68670.

The Commission proposes in this NPR to amend part 1130 to include ''Infant Support Cushions'' as durable infant or toddler products. Infant support cushions are a category of ''durable infant or toddler product'' for purposes of CPSIA section 104 because they: (1) are intended for use, and may be reasonably expected to be used, by children under the age of five years; (2) are products similar to other products listed in section 104(f)(2), such as crib mattresses and sling carriers; and (3) are commonly resold or ''handed down'' for use by other children over a period of years.

X. Incorporation by Reference

The proposed rule incorporates by reference ANSI Z535.4–2011, *American National Standard for Product Safety Signs and Labels* and ASTM D3359, *Standard Test Methods for Rating Adhesion by Tape Test.* In accordance with regulations of the Office of the Federal Register (OFR), 1 CFR part 51, Part VII.D of this preamble summarizes ANSI Z535.4–2011. ASTM D3359 covers procedures for assessing the adhesion of relatively ductile coating films to metallic substrates by applying and removing pressure-sensitive tape over cuts made in the film.

Both standards are reasonably available to interested parties in several ways. By permission of ANSI, the ANSI standard can be viewed as a read-only document during the comment period on this NPR, at: *https://www.surveymonkey.com/r/DQVJYMK.* To download or print the standard, interested persons may purchase a copy of ANSI Z535.4–2011 from ANSI via its website, *https://www.ansi.org,* or by mail from ANSI, 25 West 43rd Street, 4th Floor, New York, NY 10036, telephone: (212)–642–4900. By permission of ASTM, this ASTM standard can be viewed as a read-only document during the comment period on this NPR, at: *https://www.astm.org/cpsc.htm.* To download or print the standard, interested persons may purchase a copy of ASTM D3359 from ASTM, through its website, *https://www.astm.org,* or by mail from ASTM International, 100 Barr Harbor Drive, P.O. Box 0700, West Conshohocken, PA 19428–2959. Alternatively, interested parties may inspect a copy of the standards at CPSC's Office of the Secretary by contacting Alberta E. Mills, Commission Secretary, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone: (301) 504–7479; email: *cpsc-os@cpsc.gov.*

XI. Effective Date

The Administrative Procedure Act (APA) generally requires that the effective date of a rule be at least 30 days after publication of the final rule. 5 U.S.C. 553(d). The Commission proposes an effective date of 180 days after publication of the final rule in the **Federal Register**, such that the requirements of the rule would apply to all infant support cushions manufactured after that date. This amount of time is typical for rules issued under section 104 of the CPSIA. It is also the period that the Juvenile Products Manufacturers Association (JPMA) typically allows for products in their certification program to shift to a new standard once that new standard is published. Therefore, juvenile product manufacturers are accustomed to adjusting to new standards within this time. A 180-day effective date should also be sufficient for manufacturers to comply with this rule because the proposed requirements do not demand significant preparation by testing laboratories. For example, no new complex testing instruments or devices would be required to test infant support cushions for compliance with the proposed rule. The Commission invites comments, particularly from small businesses, that provide specific data addressing whether the proposed 180-day effective date period is appropriate.

XII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA; 5 U.S.C. 601–612) requires that agencies review a proposed rule's potential economic impact on U.S. small entities, including small businesses. Section 603 of the RFA generally requires that agencies make an initial regulatory flexibility analysis (IRFA) available to the public for comment when the NPR is published. The IRFA must describe the impact of the proposed rule on small entities and identify significant alternatives that accomplish the statutory objectives and minimize any significant economic impact of the proposed rule on small entities. Staff prepared an IRFA for this rulemaking that appears at Tab E of the Staff's NPR Briefing Package. We summarize the IRFA below.

A. Reasons and Legal Basis for the NPR

Part I of this preamble describes the reasons and legal basis for this NPR. As discussed in Parts VII–IX of this preamble, and detailed in Tab B of Staff's NPR Briefing Package, the proposed rule sets out mandatory requirements for infant support cushions to address the suffocation, entrapment, and fall hazards associated with these products; adds infant support cushions to the list of products for which a registration card is required; and adds infant support cushions to the list of durable infant products for which an NOR is required.

B. Small Entities to Which the Proposed Rule Would Apply

As explained in Tab E to Staff's NPR Briefing Package, Commission staff has identified more than 2,000 suppliers of infant support cushions to the U.S. market, including manufacturers, importers, and foreign direct shippers. The majority of these suppliers are small businesses.

C. Impact of the Proposed Rule on Small Manufacturers and Importers

Most in-scope products on the market will require redesign to meet the requirements in the proposed rule, and redesign costs would be potentially significant for a substantial number of small firms, particularly small-volume home crafters, for the first year that a rule is effective. Staff considers a ''significant'' impact to be at least one percent of annual revenue, which is consistent with the regulatory flexibility analyses of other federal agencies. With an estimated 2,000 models to be redesigned, the total cost of redesign to the industry in the first year could be up to $27 million. However, as discussed in Tab E of Staff's Briefing Package, suppliers may be able to cover these costs by implementing modest retail price increases which would reduce the rule's impact on individual small entities. For example, a firm supplying 5,000 infant support cushions per year could cover the entire cost of redesign by raising the retail price by $2.70.

If issued, a final rule would require all manufacturers and importers of infant support cushions to meet additional third party testing requirements under section 14 of the CPSA. As specified in 16 CFR part 1109, entities that are not manufacturers of children's products, such as importers and wholesalers, may rely on the certificates of compliance provided by others. However, manufacturers could pass on at least some of the cost of testing for compliance to U.S. importers and wholesalers.

Third party testing costs for infant support cushions are estimated to be $500 to $1,000 per model. The annual cost of samples for testing is estimated at around $100, bringing the overall annual testing cost to an estimated $600 to $1,100 per model. The costs of testing per model would be similar for suppliers of all sizes, although larger firms may be more likely to qualify for volume discounts. As with redesign costs, these testing costs could largely be covered by modest retail price increases.

The hand crafters of infant support cushions with the smallest sales volumes may not have sufficient sales volume to cover these costs and may exit the market. However, consumers would likely not experience a significant loss of utility as there are many different products available from different suppliers.

D. Other Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

The Commission has not identified any federal rules that duplicate, overlap with, or conflict with the proposed rule.

E. Alternatives Considered To Reduce the Impact on Small Entities

The Commission considered the following alternatives to the proposed rule to reduce the impact on small businesses. The Commission requests comments on these alternatives and other alternatives that could reduce the potential burden on U.S. small entities.

1. Not Establishing a Safety Standard

The Commission considered not establishing a safety standard for infant support cushions. While this alternative would result in no regulatory impact on small entities, deaths and injuries from the use of infant support cushions would likely continue to occur at similar rates as those observed during the period from 2010 through 2022. In 2020 alone, there were 17 fatalities involving infant support cushions. Another 17 fatalities have been recorded in the potentially incomplete data for 2021. *See* Staff NPR Briefing Package, Tab A.

2. Delay To Await Publication of a Voluntary Standard

The Commission considered delaying the draft proposed rule to allow possible publication of a voluntary standard. Although this alternative would delay any impact on small businesses, it would also allow the hazard to continue indefinitely, as there is no clear date at which ASTM or any other voluntary standards organization will adopt a relevant standard, nor any assurance that a voluntary standard, if published, would be complied with by industry or adequately address the identified hazards.

3. Earlier or Later Effective Date

The Commission is proposing an effective date 180 days after publication of the final rule in the **Federal Register**. An earlier effective date would achieve the safety benefits of the rule more quickly, but it would also increase the burden on small businesses to quickly redesign and test their products. In addition, a significantly earlier effective date could result in temporary shortages of infant support cushions due to a potential lack of availability of testing laboratory resources.

The Commission is not proposing a later effective date, which would somewhat reduce burdens on small suppliers, because 180 days has generally been sufficient time for suppliers to come into compliance with durable infant or toddler product rules. Additionally, six months from the change in a voluntary standard is the period that JPMA uses for its certification program, so compliant manufacturers are used to this time frame to comply with a modified standard. Testing laboratories should have no difficulty preparing to test to the proposed new mandatory standards within a 180-day period.

F. Impact on Testing Labs

The proposed rule should not have a significant adverse impact on testing laboratories. Laboratories will not need to acquire complex or costly testing instruments or devices to test infant support cushions for compliance, and laboratories will decide for themselves, based on expected demand for their testing services, whether to offer testing services for infant support cushion compliance.

XIII. Environmental Considerations

Certain categories of CPSC actions normally have ''little or no potential for affecting the human environment'' and therefore do not require an environmental assessment or an environmental impact statement. Safety standards providing requirements for consumer products come under this categorical exclusion. 16 CFR 1021.5(c)(1). The proposed rule for infant support cushions falls within the categorical exclusion.

XIV. Paperwork Reduction Act

This proposed rule contains information collection requirements that are subject to public comment and review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA; 44 U.S.C. 3501–3521). In this document, pursuant to 44 U.S.C. 3507(a)(1)(D), we set forth:

- a title for the collection of information;
- a summary of the collection of information;
- a brief description of the need for the information and the proposed use of the information;
- a description of the likely respondents and proposed frequency of response to the collection of information;
- an estimate of the burden that shall result from the collection of information; and
- notice that comments may be submitted to the OMB.

Title: Safety Standard for Infant Support Cushions.

Description: The proposed rule would require each infant support cushion within the scope of the rule to meet the rule's performance and labeling requirements. It would require suppliers to conduct third party testing to demonstrate compliance and provide the specified warning label and instructions. These requirements fall within the definition of a ''collection of information,'' as defined in 44 U.S.C. 3502(3).

Description of Respondents: Persons who manufacture or import infant support cushions.

Estimated Burden: We estimate the burden of this collection of information as follows:

TABLE 7—ESTIMATED ANNUAL REPORTING BURDEN

Burden type	Number of respondents	Frequency of response	Total annual responses	Hours per response	Total burden hours
Labeling and instructions	2,000	1	2,000	2	4,000

While some infant support cushion products currently have labels, all of these products would have to meet the specific labeling requirements and instructions specified in the proposed rule, which provides the text and graphics for the required labels and instructions. Specialized expertise in graphics design would not be required to develop the warnings and instructions. Most reporting and recordkeeping requirements in this proposed rule would be new for all suppliers.

CPSC estimates there are 2,000 entities that would respond to this collection annually, the majority of which would be small entities. We estimate that the time required to create and/or modify labeling and instructions is about two hours per response. Therefore, the estimated burden associated with this collection is 2,000 responses × one response per year × two hours per response = 4,000 hours annually.

We estimate the hourly compensation for the time required to respond to the collection is $37.88 (U.S. Bureau of Labor Statistics, ''Employer Costs for Employee Compensation,'' June 2023, Table 4, total compensation for all sales and office workers in goods-producing private industries: *https://www.bls.gov/news.release/archives/ecec_09122023.pdf.* Therefore, the estimated annual cost of the collection is $151,520 ($37.88 per hour × 4,000 hours = $151,520).

Based on this analysis, the proposed standard for infant support cushions would impose a burden to industry of 4,000 hours at a cost of $151,520.

Comments. CPSC has submitted the information collection requirements of this proposed rule to OMB for review in accordance with PRA requirements. 44 U.S.C. 3507(d). CPSC requests that interested parties submit comments regarding information collection to the Office of Information and Regulatory Affairs, OMB (see the **ADDRESSES** section at the beginning of this NPR). Pursuant to 44 U.S.C. 3506(c)(2)(A), the Commission invites comments on:

• whether the collection of information is necessary for the proper performance of CPSC's functions, including whether the information will have practical utility;

• the accuracy of CPSC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• ways to enhance the quality, utility, and clarity of the information to be collected;

• ways to reduce the burden of the collection of information on respondents, including the use of automated collection techniques when appropriate and other forms of information technology; and

• the estimated burden hours associated with label modification, including any alternative estimates.

XV. Preemption

Section 26(a) of the CPSA, 15 U.S.C. 2075(a), provides that when a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a standard or regulation that prescribes requirements for the performance, composition, contents, design, finish, construction, packaging, or labeling of such product dealing with the same risk of injury unless the state requirement is identical to the federal standard. Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to the Commission for an exemption from this preemption under certain circumstances. Section 104(b) of the CPSIA refers to the rules to be issued under that section as ''consumer product safety rules.'' Therefore, if finalized, the preemption provision of section 26(a) of the CPSA would apply to this rule for infant support cushions.

XVI. Request for Comments

The Commission seeks public comment on all aspects of the proposed rule. In particular, the Commission seeks comments on the scope of the proposed rule, with respect to both in scope and out of scope products, including comments on whether the proposed definition of ''infant support cushion'' is sufficient to include all infant support cushions that are not subject to the FHSA infant pillow ban, 16 CFR 1500.18(a)(16). The Commission would also welcome comments on the wording of proposed warning label as well as on whether the on-product warning label requirement included in the proposed rule should be applied to replacement covers for infant support cushions in addition to the cushions themselves. In addition, the Commission invites public comment on the proposed limit on sidewall height and whether the proposed rule's incline angle requirements provide appropriate protection against positional asphyxiation. The Commission also seeks comment on whether an anti-stockpiling provision should be included and, if so, whether the Commission should include an anti-stockpiling provision comparable to the one proposed in the recent SNPR for portable generators at 88 FR 24346, 24372 (Apr. 20, 2023). Finally, the Commission requests comments on the proposed effective date and the costs of compliance with, and testing to, the proposed rule.

Submit comments in accordance with the instructions in the **ADDRESSES** section at the beginning of this NPR.

List of Subjects

16 CFR Part 1112

Administrative practice and procedure, Audit, Consumer protection, Reporting and recordkeeping requirements, Third party conformity assessment body.

16 CFR Part 1130

Administrative practice and procedure, Business and industry, Consumer protection, Reporting and recordkeeping requirements.

16 CFR Part 1243

Consumer protection, Imports, Incorporation by reference, Infants and children, Labeling, Law enforcement, Pillows, Toys.

For the reasons discussed in the preamble, the Commission proposes to amend chapter II of title 16 of the Code of Federal Regulations as follows:

PART 1112—REQUIREMENTS PERTAINING TO THIRD PARTY CONFORMITY ASSESSMENT BODIES

■ 1. The authority citation for 16 CFR part 1112 continues to read as follows:

Authority: Pub. L. 110–314, section 3, 122 Stat. 3016, 3017 (2008); 15 U.S.C. 2063.

■ 2. Amend § 1112.15, as proposed to be amended at 88 FR 65865 (Sept. 26, 2023), by:

■ a. Removing the semicolons at the ends of paragraphs (b)(1) through (9) and (11) through (27), (b)(28)(v), (b)(29)(iv), (b)(30)(iv), and (b)(31)(ii) and adding periods in their place;

■ b. Adding periods at the ends of paragraphs (b)(32)(ii)(A) through (KK); and

■ c. Adding paragraph (b)(57).

The addition reads as follows:

§ 1112.15 When can a third party conformity assessment body apply for CPSC acceptance for a particular CPSC rule and/or test method?

* * * * *

(b) * * *

(57) 16 CFR part 1243, Safety Standard for Infant Support Cushions.

* * * * *

PART 1130—REQUIREMENTS FOR CONSUMER REGISTRATION OF DURABLE INFANT OR TODDLER PRODUCTS

■ 3. The authority citation for 16 CFR part 1130 continues to read as follows:

Authority: 15 U.S.C. 2056a, 2065(b).

■ 4. Amend § 1130.2, as proposed to be amended at 88 FR 65865 (Sept. 26, 2023) and 88 FR 73551 (Oct. 26, 2023), by:

■ a. Removing the semicolons at the ends of paragraphs (a)(1) through (16) and adding periods in their place;

■ b. Removing ''; and'' at the end of paragraph (a)(17) and adding a period in its place; and

■ c. Adding paragraph (a)(21).

The addition reads as follows:

§ 1130.2 Definitions.

* * * * *

(a) * * *

(21) Infant support cushions.

* * * * *

■ 5. Add part 1243 to read as follows:

PART 1243—SAFETY STANDARD FOR INFANT SUPPORT CUSHIONS

Sec.

Authority: 15 U.S.C. 2056a.

§ 1243.1 Scope, purpose, application, and exemptions.

(a) *Scope and purpose.* The consumer product safety standard in this part prescribes requirements to reduce the risk of death and injury from hazards associated with *infant support cushions,* as defined in § 1243.2. This includes but is not limited to *infant positioners,* nursing products with a dual use for lounging, *infant loungers,* and infant props or cushions used to support an infant. All *infant support cushions* must be tested according to the requirements of § 1243.5 and comply with all requirements of this part.

(b) *Application.* All infant support cushions manufactured after [effective date of the final rule], are subject to the requirements of this part.

(c) *Exemptions.* Products subject to another standard listed in 16 CFR 1130.2(a) are exempt from this part. Nursing pillows that also meet the definition of *infant lounger,* however, are not exempt from this part.

§ 1243.2 Definitions.

Conspicuous means visible, when the product is in each manufacturer's recommended use position, to a person while placing an infant into or onto the product.

Infant lounger means an infant product with a raised perimeter, a recess, or other area that provides a place for an infant to recline or to be in a supine, prone, or recumbent position.

Infant positioner means a product intended to help keep an infant in a particular position while supine or prone.

Infant support cushion means an infant product that is filled with or comprised of resilient material such as foam, fibrous batting, or granular material or with a gel, liquid, or gas, and which is marketed, designed, or intended to support an infant's weight or any portion of an infant while reclining or in a supine, prone, or recumbent position.

Occupant support surface (OSS) means the area that holds up and bears the infant or any portion of the infant.

Seat bight line means the intersection of the seat back surface with the seat bottom surface.

§ 1243.3 General requirements.

(a) *Hazardous sharp edges or points.* There shall be no hazardous sharp points or edges as defined in 16 CFR 1500.48 and 1500.49 before or after the product has been tested.

(b) *Small parts.* There shall be no small parts as defined in 16 CFR part 1501 before testing or presented as a result of testing.

(c) *Lead in paints.* All paint and surface coatings on the product shall comply with the requirements of 16 CFR part 1303.

(d) *Toys.* Toy accessories attached to, removable from, or sold with an infant pillow, as well as their means of attachment, shall comply with the applicable requirements of 16 CFR part 1250.

(e) *Side height.* The maximum side height for the product, measured from the OSS-body or test base, as appropriate, to the top of the sidewall, shall not exceed the maximum of the side heights determined in § 1243.5(d)(8).

(f) *Removal of components.* When tested in accordance with § 1243.5(k), any removal of components that are accessible to an infant while in the product or from any position around the product shall not present a small part, sharp point, or sharp edge as required in paragraphs (a) and (b) of this section.

(g) *Permanency of labeling and warnings.* (1) Warning labels, whether paper or non-paper, shall be permanent when tested in accordance with § 1243.5(b)(1) through (3).

(2) Warning statements applied directly onto the surface of the product by hot stamping, heat transfer, printing, wood burning, or any other method shall be permanent when tested in accordance with § 1243.5(b)(4).

(3) Non-paper labels shall not liberate small parts when tested in accordance with § 1243.5(b)(5).

(4) Warning labels that are attached to the fabric of the product with seams shall remain in contact with the fabric around the entire perimeter of the label when the product is in all manufacturer-recommended use positions and when tested in accordance with § 1243.5(b)(3).

(h) *Convertible products.* If the infant support cushion can be converted into another product for which a consumer product safety standard exists, the product also shall comply with the applicable requirements of that standard.

§ 1243.4 Performance requirements.

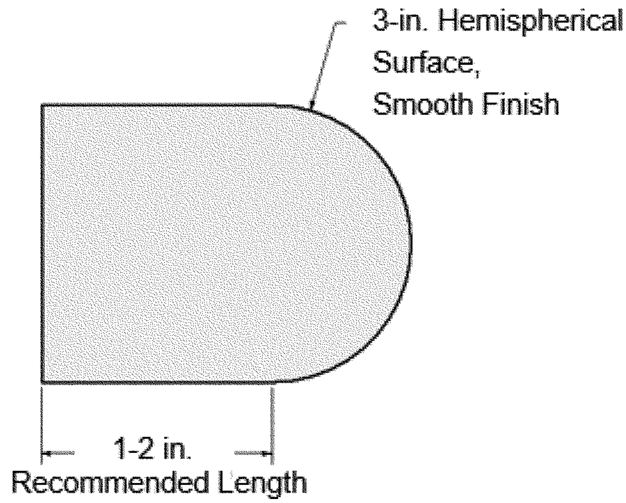
(a) *Restraint.* The product shall not include a restraint system.

(b) *Seam strength.* When tested in accordance with § 1243.5(j), fabric/mesh seams and points of attachment shall not fail such that a small part, sharp point, or sharp edge is presented, as required in § 1243.3(a) and (b).

(c) *Bounded openings.* When tested to § 1243.5(c), all completely bounded openings that exist in the front, sides, or back of the occupant lounging area, or that are created when an accessory is attached to the product, shall not allow complete passage of the small head probe unless it allows the complete passage of the large head probe.

(d) *Maximum incline angle.* The maximum incline angle shall not exceed 10 degrees when tested in accordance with § 1243.5(d).

(e) *Firmness*—(1) *Occupant support surface firmness.* When the three-inch diameter (figure 1 to this paragraph (e)(1)) hemispherical head probe is applied according to the test method for occupant support surface firmness, § 1243.5(f), the force required for a one-inch displacement shall be greater than 10 N.



(2) *Sidewall firmness.* When the three-inch diameter hemispherical head probe is applied according to the test method for sidewall firmness, § 1243.5(g), the force required for a one-inch displacement shall be greater than 10 N.

(3) *Firmness at intersection of sidewall and occupant support surface.* When the three-inch diameter hemispherical head probe is applied according to the test method for firmness at the intersection of sidewall and occupant support surface, § 1243.5(h), the force required for a one-inch displacement shall be greater than 10 N.

(f) *Sidewall angle.* Sidewall angle shall be greater than 90 degrees when determined according to the sidewall angle determination, § 1243.5(i).

§ 1243.5 Test methods.

(a) *Test conditions.* Condition the product for 48 hours at 23 °C ±2 °C (73.4 °F ±3.6 °F) and a relative humidity of 50% ±5%.

(b) *Permanence of labels and warnings.* (1) A paper label (excluding labels attached by a seam) shall be considered permanent if, during an attempt to remove it without the aid of tools or solvents, it cannot be removed, it tears into pieces upon removal, or such action damages the surface to which it is attached.

(2) A non-paper label (excluding labels attached by a seam) shall be considered permanent if, during an attempt to remove it without the aid of tools or solvents, it cannot be removed or such action damages the surface to which it is attached.

(3) A warning label attached by a seam shall be considered permanent if it does not detach when subjected to a 15-lbs (67–N) pull force applied in any direction using a 3 4-inch diameter clamp surface.

(4) Adhesion test for warnings applied directly onto the surface of the product.

(i) Apply the tape test defined in Test Method B, Cross-Cut Tape Test of ASTM D3359 (incorporated by reference, see § 1243.8), eliminating parallel cuts.

(ii) Perform this test once in each different location where warnings are applied.

(iii) The warning statements will be considered permanent if the printing in the area tested is still legible and attached after being subjected to this test.

(5) A non-paper label, during an attempt to remove it without the aid of tools or solvents, shall not be removed or shall not fit entirely within the small parts cylinder defined in 16 CFR part 1501 if it can be removed.

(c) *Head entrapment test.* For all applicable openings, rotate the small head probe (figure 2 to this paragraph (c)) to the orientation most likely to fail and gradually apply an outward force from the occupant lounging area of 25 lbs (111 N). Apply the force to the probe in the direction most likely to fail within a period of 5 seconds and maintain it for an additional 10 seconds. If the small head probe can pass entirely through the opening in any orientation, determine if the large head probe (figure 3 to this paragraph (c)) can be freely inserted through the opening.

Figure 2 to Paragraph (c)—Small Head Probe

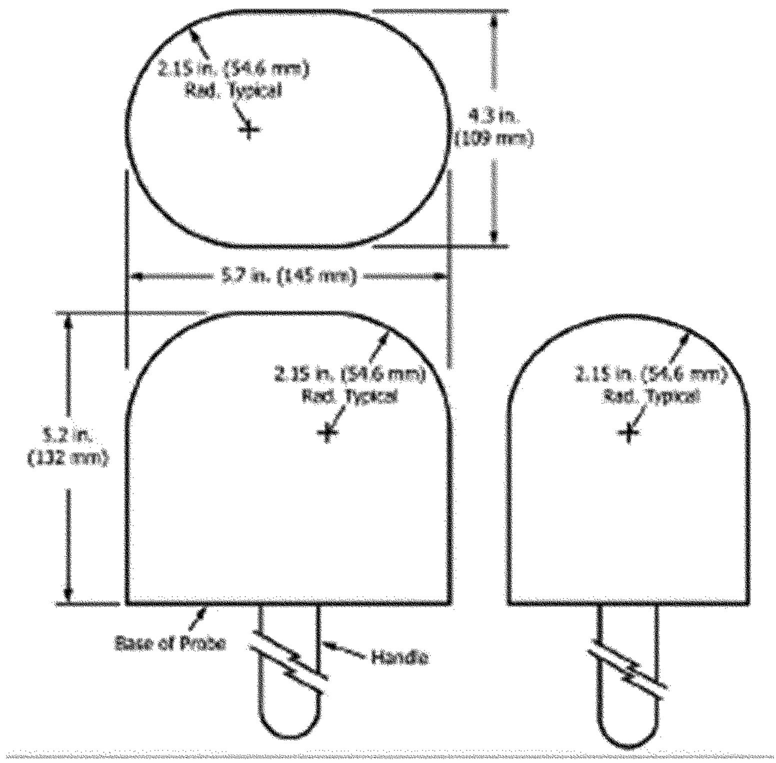
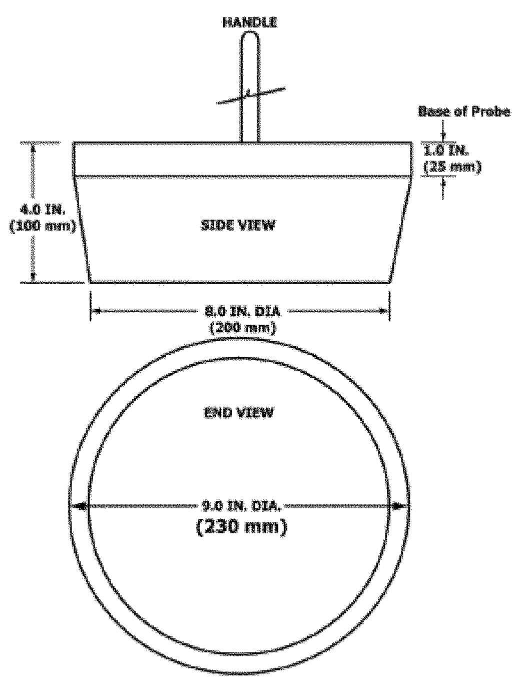


Figure 3 to Paragraph (c)—Large Head Probe



(d) *Maximum incline test.* (1) Equipment shall include:

(i) Digital protractor with accuracy +/− 1 degree;

(ii) Hinged weight gauge-newborn, requirements for part masses and assembly (figure 4 to this paragraph (d)(1)(ii));

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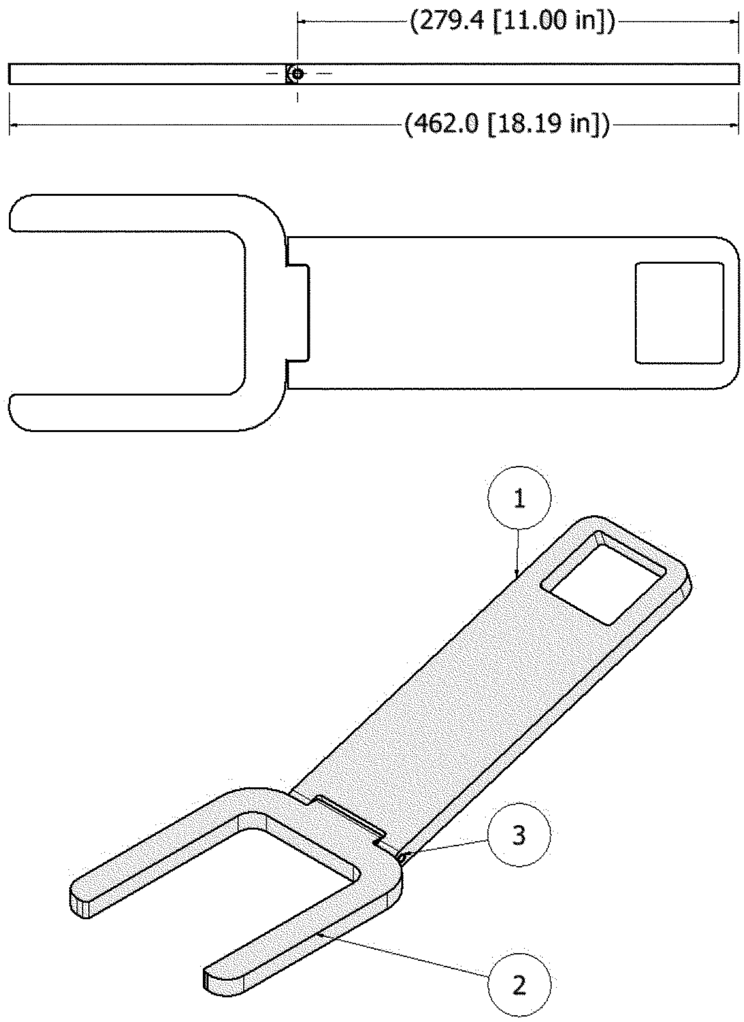
Figure 4 to Paragraph (d)(ii)—Hinged Weight Gauge-Newborn, Requirements for Part Masses and Assembly

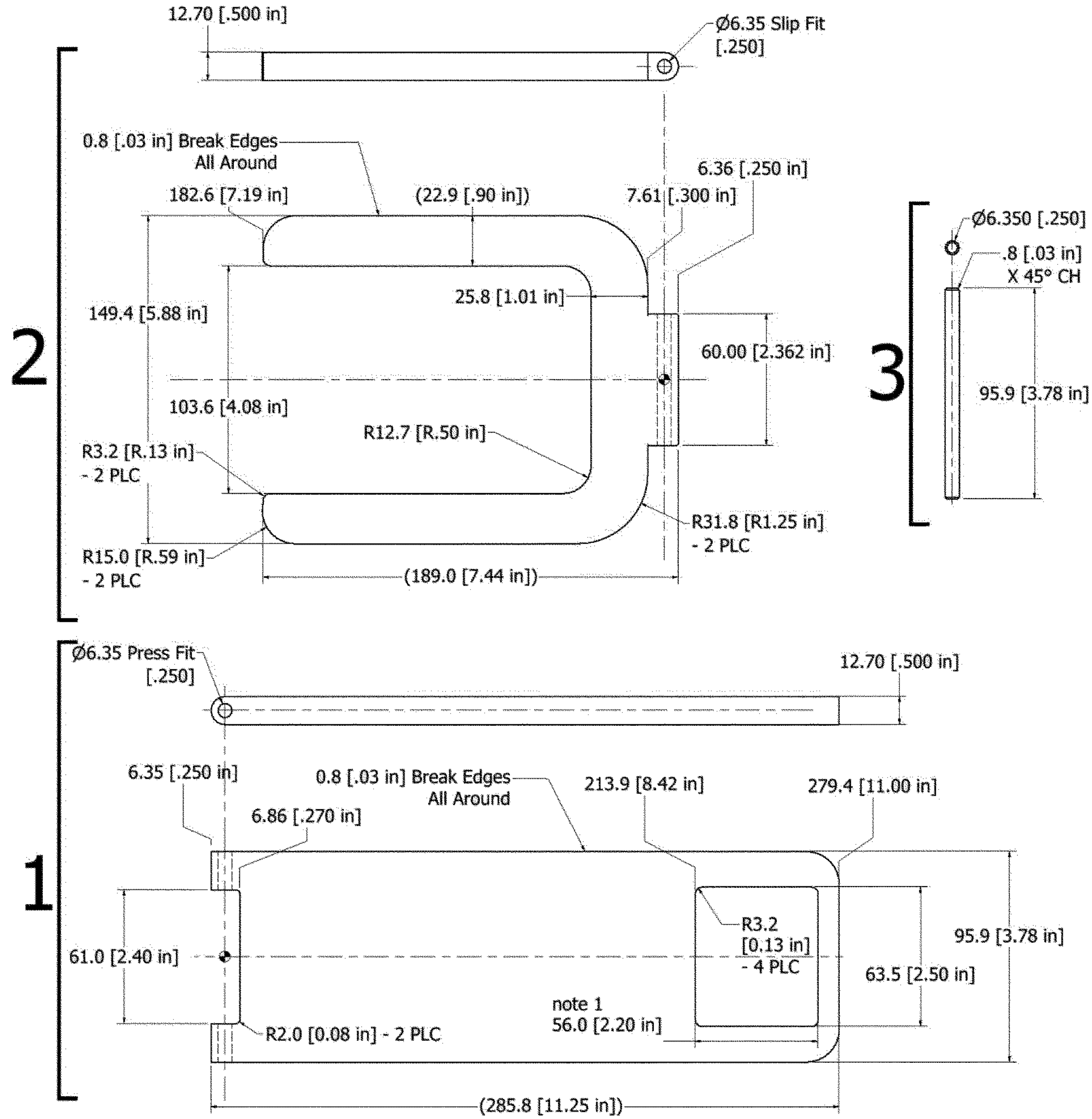
PARTS LIST			
ITEM	DESCRIPTION	MASS (1)	VOLUME
Assembly		3.378 ± .02 kg (7.447 ± .05 lb)	
1	Upper Plate	2.275 kg (5.016 lb)	289.8 cm^3 (17.68 in^3)
2	Lower Plate	1.079 kg (2.379 lb)	137.4 cm^3 (8.385 cm^3)
3	Pin	0.024 kg (0.053 lb)	3.03 cm^3 (0.185 in^3)

Note 1. Part mass is calculated as Volume divided by the density for mild steel of 7.85 g/cm^3 (0.283 lbs/in^3).



(iii) Hinged weight gauge-newborn, requirements for part dimensions (figure 5 to this paragraph (d)(1)(iii)); and

Figure 5 to Paragraph (d)(1)(iii)—Hinged Weight Gauge–Newborn, Requirements for Part Dimensions



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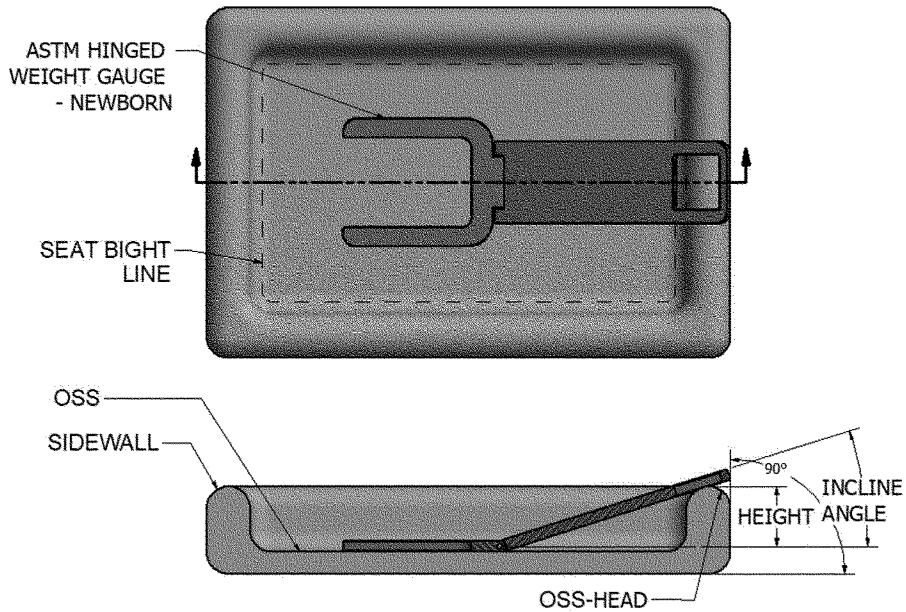
(iv) A test base that is horizontal, flat, firm, and smooth.

(2) If applicable, place the product in the manufacturer's recommended highest seat back angle position intended for lounging.

(3) If applicable, place the hinged weight gauge-newborn in the product and position the gauge with the hinge centered over the seat bight line and the upper plate of the gauge back. Place a digital protractor on the upper torso/head area lengthwise and measure the incline angle.

(4) Place the head/torso portion of the newborn hinged weight gauge on the product according to the manufacturer's recommended use position with the seat portion of the gauge, depending on the product design, allowed to lay freely on the product or on the test base (figure 6 to this paragraph (d)(4)).

Figure 6 to Paragraph (d)(4)—Test Fixture Configuration To Measure Incline Angle on an Infant Support Cushion Product



(5) Move and rotate the newborn hinged weight gauge the minimum amount necessary such that the head/torso portion rests on an OSS that could foreseeably support an infant's head, and place the head/torso portion of the gauge according to all situations that apply:

(i) In tests on products with an OSS for the infant's body, align the top edge of the head/torso portion of the gauge to coincide with a plumb line to the outermost edge of the OSS-head.

(ii) In all tests, place the seat portion of the gauge on the test base, adjust the newborn gauge to the greatest incline angle in which the top edge of the gauge maintains contact with the top surface of the product.

(6) If a product's seating bight area prevents reasonable positioning of the head/torso portion to the outermost edge, then position the seat portion of the newborn hinged weight gauge as far forward as possible towards the outermost edge and allow the head/torso portion of the gauge to rest on the product.

(7) Place a digital protractor lengthwise on the head/torso portion of the gauge and measure the incline angle.

(8) Remove the newborn gauge and determine the side height at the incline angle location, measured from the OSS-body or test base, as appropriate, to the top of the OSS-head.

(9) Measure the incline angle at the manufacturer's recommended use location(s), at feasible locations such as perpendicular to the recommended use location(s), and at least one location likely to fail in which the newborn gauge seat is supported on the test surface.

(10) Determine the maximum incline angle from the incline angle measurements.

(e) *Firmness test setup.* (1) Equipment shall include:

(i) Force gauge with accuracy +/− 0.05 N (0.01 lbs).

(ii) Distance gauge with accuracy +/− 0.01 inches (0.03 cm).

(2) Align the axis of the three-inch head probe (figure 1 to paragraph (e)(1) of § 1243.4) with a force gauge and parallel to a distance measurement device or gauge.

(3) Use a lead screw or similar device to control movement along a single direction.

(4) Support the firmness fixture to a test base such that the head probe does not deflect more than 0.01 inches (0.025 cm) under a 10.0 N (2.24 lbs) load applied in each orientation required in the test methods.

(f) *Occupant support surface firmness test method.* Perform the following steps to determine the occupant support surface firmness of the product as received from the manufacturer. *See* figure 7 to this paragraph (f).

(1) Orient the axis of the three-inch head probe perpendicular to the surface of the product at each test location that is oriented greater than five degrees relative to the test base or align the axis of the probe perpendicular to the test base (vertically) at each test location that is oriented equal to or less than five degrees to the test base.

(2) The first test location shall be at the location of maximum thickness of the surface being tested, perpendicular to the test base.

(3) Lay the product, with the occupant support surface facing up, on a test base that is horizontal, flat, firm, and smooth.

(4) Prevent movement of the product in a manner that does not affect the force or deflection measurement of the product surface under test. Provide no additional support beneath the product.

(5) Advance the probe into the product and set the deflection to 0.0 inches when a force of 0.1 N (0.02 lbs) force is reached.

(6) Continue to advance the head probe into the product at a rate not to exceed 0.1 inch per second and pause when the force exceeds 10.0 N (2.24 lbs), or the deflection is equal to 1.00 inches (2.54 cm).

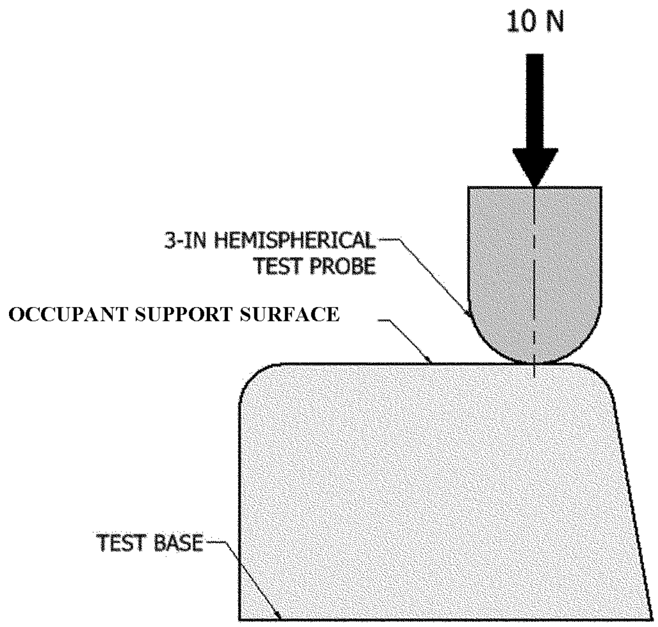
(7) Wait 30 seconds. If the deflection is less than 1.00 inches and the force is 10.0 N or less, repeat the steps in paragraphs (f)(6) and (7) of this section.

(8) Record the final force and deflection when the deflection has reached 1.00 inches or when the force has exceeded 10.0 N.

(9) If the maximum thickness of the OSS is greater than 1.0 inches (2.54 cm), perform additional tests, space permitting, at the geometric center of the OSS, at four locations along the product's longitudinal and lateral axes therefrom, 1.5 inches (3.8 cm) towards center from the intersection of the sidewall and OSS, and at one location most likely to fail.

(10) Repeat the occupant support surface firmness tests on any other occupant support surface and in all intended and feasible configurations that could affect an occupant support surface, such as the folding or layering of parts of the product.

Figure 7 to Paragraph (f)—Test Configuration for Occupant Support Surface Firmness Test



(g) *Sidewall firmness test method.* For sidewalls, perform the steps in paragraphs (f)(1) through (8) of this section to determine the sidewall firmness of the product as received from the manufacturer and then perform the following:

(1) Perform a minimum of four additional tests, located at intervals not to exceed six inches along the entire top perimeter of the sidewall, starting from the maximum side height location, and at one additional location most likely to fail.

(2) Repeat the sidewall firmness test in all the intended or feasible configurations that could affect the sidewall firmness, such as the folding or layering of parts of the product.

(h) *Intersection of sidewall and occupant support surface firmness.* Perform the following steps to determine the intersection firmness of the product as received from the manufacturer (figure 8 to this paragraph (h)).

(1) Orient the axis of the three-inch head probe perpendicular to the sidewall perimeter at an angle from horizontal that bisects the angle determined in sidewall angle determination with the axis directed at the intersection of the occupant support surface and the sidewall.

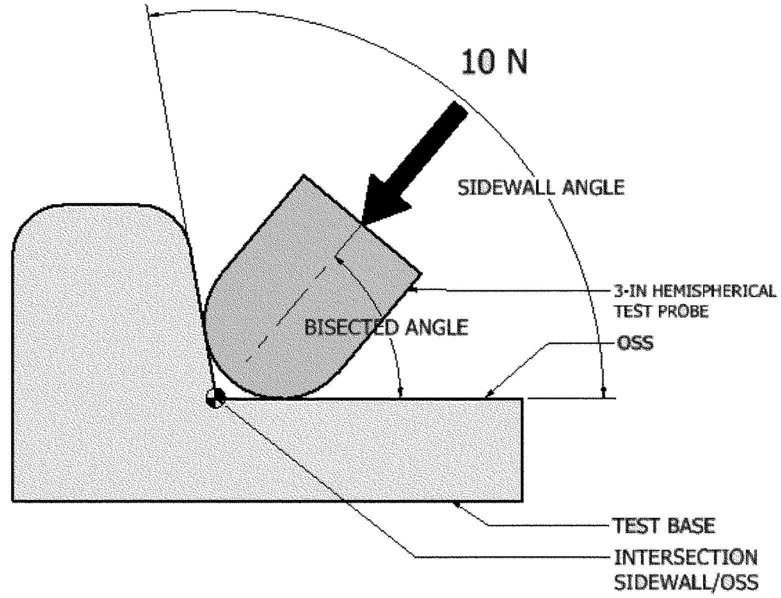
(2) The first test location shall be at the location of maximum product thickness parallel to the test base.

(3) Perform the steps in paragraphs (f)(3) through (8) of this section.

(4) Perform a minimum of four additional tests, located at intervals not to exceed six inches along the entire inside perimeter of the intersection of the sidewall and OSS, and at one additional location most likely to fail.

(5) Repeat the intersection of sidewall and occupant support surface firmness test in all the intended or feasible configurations that could affect the intersection firmness, such as the folding or layering of parts of the product.

Figure 8 to Paragraph (h)—Test Configuration for Intersection of Sidewall and Occupant Support Surface Firmness



(i) *Sidewall angle determination.* Perform the following steps to determine if the angle between the sidewall and OSS is 90 degrees or less, or to measure the angle above 90 degrees. *See* figure 9 to this paragraph (i).

(1) Orient the three-inch (7.62 cm) diameter hemispherical head probe vertically and place it over the OSS with the cylindrical surface of the probe tangent to the intersection of the sidewall and the OSS. Advance the probe into the product until a downward force of 10 N (2.2 lbs) force is reached.

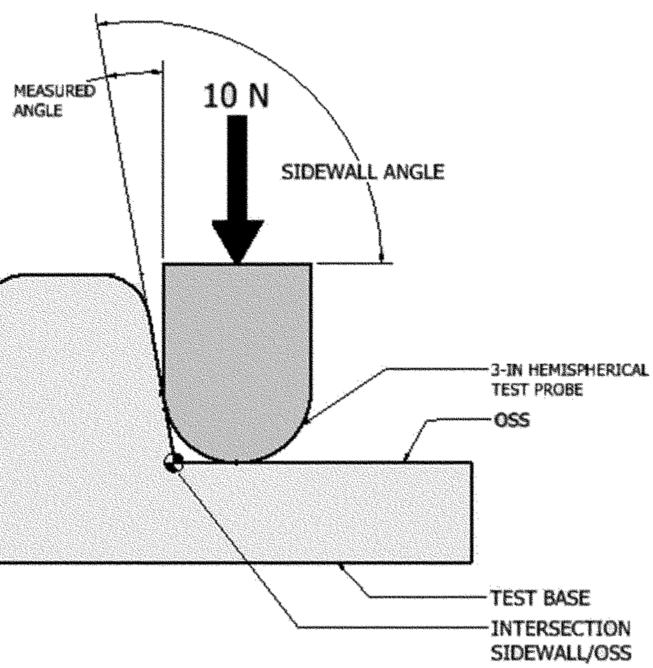
(2) After 30 seconds, determine whether the sidewall is in contact with the cylindrical side of the three-inch head probe. If the sidewall contacts the cylindrical part of the probe, the sidewall angle is equal to or less than 90 degrees.

(3) For sidewall angles greater than 90 degrees, calculate the sidewall angle as 90 degrees plus the measured angle between the cylindrical side of the three-inch head probe and the sidewall.

(4) Determine a minimum of four sidewall angles at locations not to exceed six inch (15.2 cm) intervals along the intersection of the sidewall and OSS.

(5) Measure the angle with a protractor or gauge placed to the depth of and in contact with the cylindrical side of the three-inch probe side and the sidewall.

Figure 9 to Paragraph (i)—Test Fixture Configuration for Sidewall Angle Measurement

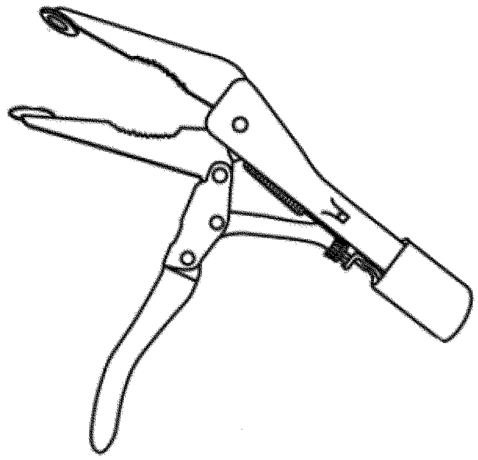


(j) *Seam strength test method.* (1) Equipment shall include:

(i) Clamps with 0.75 inches (1.9 cm) diameter clamping surfaces capable of holding fabric and with a means to attach a force gauge. *See* figure 10 to this paragraph (j)(1), or equivalent.

(ii) A force gauge, accuracy +/−0.5 lbs (1.1 N).

Figure 10 to Paragraph (j)(1)—Seam Clamp



(2) Clamp the fabric of the infant support cushion on each side of the seam under test with the 0.75 inches clamping surfaces placed not less than 0.5 inches (1.2 cm) from the seam.

(3) Apply a tension of 15 lbs (67 N) evenly over five seconds and maintain for an additional 10 seconds.

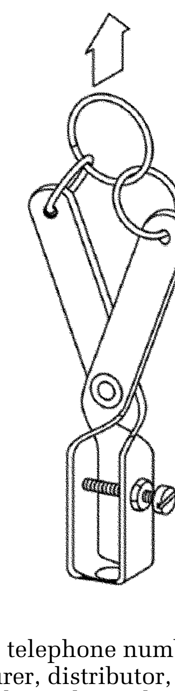
(4) Repeat the test on every distinct seam and every 12 inches (15 cm) along each seam.

(k) *Removal of components test method.* (1) For torque and tension tests, any suitable device may be used to grasp the component that does not interfere with the attachment elements that are stressed during the tests.

(2) Gradually apply a four lbs-inch (0.4 N-m) torque over five seconds in a clockwise rotation to 180 degrees or until four lbs-inch has been reached. Maintain for 10 seconds. Release and allow component to return to relaxed state. Repeat the torque test in a counterclockwise rotation.

(3) For components that can reasonably be grasped between thumb and forefinger, or teeth, apply a 15 lbs (67 N) force over five seconds, in a direction to remove the component. Maintain for 10 seconds. A clamp such as shown in figure 11 to this paragraph (k)(3) may be used if the gap between the back of the component and the base material is 0.04 inches (0.1 cm) or more.

Figure 11 to Paragraph (k)(3)—Tension Test Adapter Clamp



§ 1243.6 Marking and labeling.

(a) *General markings.* Each product and its retail package shall be marked or labeled clearly and legibly to indicate the following:

(1) The name, place of business (city, state, and mailing address, including zip code), and telephone number of the manufacturer, distributor, or seller.

(2) A code mark or other means that identifies the date (month and year as a minimum) of manufacture.

(3) The marking or labeling in paragraphs (a)(1) and (2) of this section are not required on the retail package if they are on the product and are visible in their entirety through the retail package. When no retail packaging is used to enclose the product, the information provided on the product shall be used for determining compliance with paragraphs (a)(1) and

(2) of this section. Cartons and other materials used exclusively for shipping the product are not considered retail packaging.

(b) *Permanency.* The marking and labeling on the product shall be permanent.

(c) *Upholstery labeling.* Any upholstery labeling required by law shall not be used to meet the requirements of this section.

(d) *Warning design for product.* (1) The warnings shall be easy to read and understand and be in the English language at a minimum.

(2) Any marking or labeling provided in addition to those required by this section shall not contradict or confuse the meaning of the required information or be otherwise misleading to the consumer.

(3) The warnings shall be conspicuous and permanent.

(4) The warnings shall conform to ANSI Z535.4–2011 (incorporated by reference, see § 1243.8) sections 6.1–6.4, 7.2–7.6.3, and 8.1, with the following changes.

(i) In sections 6.2.2, 7.3, 7.5, and 8.1.2, replace ''should'' with ''shall.''

(ii) In section 7.6.3, replace ''should (when feasible)'' with ''shall.''

(iii) Strike the word ''safety'' when used immediately before a color (for example, replace ''safety white'' with ''white'').

Note 1 to paragraph (d)(4)(iii): For reference, ANSI Z535.1, American National Standard for Safety Colors, provides a system for specifying safety colors.

(5) The safety alert symbol and the signal word ''WARNING'' shall be at least 0.2 inches (five mm) high. The remainder of the text shall be in characters whose upper case shall be at least 0.1 inches (2.5 mm), except where otherwise specified.

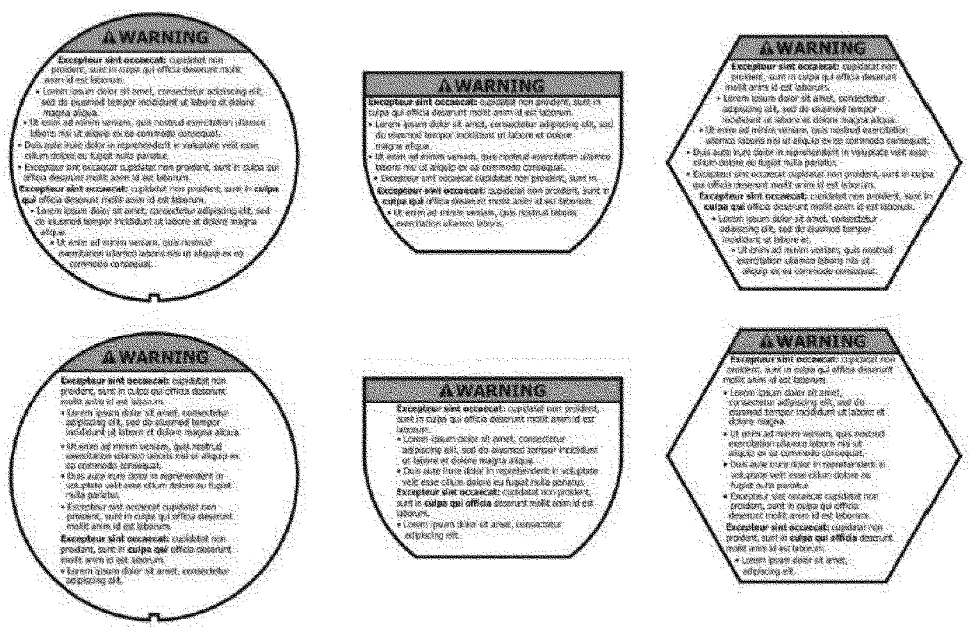
Note 2 to paragraph (d)(5): For improved warning readability, typefaces with large height-to-width ratios, which are commonly identified as ''condensed,'' ''compressed,'' ''narrow,'' or similar should be avoided.

(6) The message panel text should have the following layout:

(i) The text shall be left-aligned, ragged-right for all but one-line text messages, which can be left-aligned or centered. *See* figure 1 to this paragraph (d)(6) for examples of left-aligned text.

Figure 1 to Paragraph (d)(6)—Examples of Left-Aligned Text

The text shown for these warnings is filler text, known as lorem ipsum, commonly used to demonstrate graphic elements.



The text shown for these warnings is filler text, known as lorem ipsum, commonly used to demonstrate graphic elements.

Note 3 to paragraph (d)(6)(i): Left-aligned means that the text is aligned along the left margin, and in the case of multiple columns of text, along the left side of each individual column.

(ii) The text in each column should be arranged in list or outline format, with precautionary (hazard avoidance) statements preceded by bullet points. Multiple precautionary statements shall be separated by bullet points if paragraph formatting is used.

(7) An example warning in the format described in this section is shown in figure 2 to this paragraph (d)(7).

Figure 2 to Paragraph (d)(7)—Example of Warning

(e) *Warning statements.* Each product shall address the warning statements shown on figure 13 to paragraph (d)(7) of this section, at a minimum.

Note 4 to paragraph (e): ''Address'' means that verbiage other than what is shown can be used as long as the meaning is the same or information that is product-specific is presented.

§ 1243.7 Instructional literature.

(a) Instructions shall be provided with the product and shall be easy to read and understand and shall be in the English language at a minimum. These instructions shall include information on assembly, maintenance, cleaning, and use, where applicable.

(b) The instructions shall address the following additional warnings:

(1) Read all instructions before using this product.

(2) Keep instructions for future use.

(3) Do not use this this product if it is damaged or broken.

(4) Instructions shall indicate the manufacturer's recommended maximum weight, height, age, developmental level, or combination thereof, of the occupant for which the infant support cushion is intended. If this product is not intended for use by a child for a specific reason, the instructions shall state this limitation.

(c) The cautions and warnings in the instructions shall meet the requirements specified in § 1243.6(d)(4) though (6), except that sections 6.4 and 7.2–7.6.3 of ANSI Z535.4—2011 need not be applied. However, the signal word and safety alert symbol shall contrast with the background of the signal word panel, and the cautions and warnings shall contrast with the background of the instructional literature.

Note 1 to paragraph (c): For example, the signal word, safety alert symbol, and the warnings may be black letters on a white background, white letters on a black background, navy blue letters on an off-white background, or some other high-contrast combination.

(d) Any instructions provided in addition to those required by this section shall not contradict or confuse the meaning of the required information or be otherwise misleading to the consumer.

§ 1243.8 Incorporation by reference.

Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at the U.S. Consumer Product Safety Commission and at the National Archives and Records Administration (NARA). Contact the U.S. Consumer Product Safety Commission at: the Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; phone (301) 504–7479; email: *cpsc-os@cpsc.gov.* For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.* The material may be obtained from the following sources:

(a) American National Standards Institute (ANSI), 25 West 43rd Street, 4th Floor, New York, NY 10036, USA; phone: (212) 642–4900; website: *www.ansi.org* (*https://ibr.ansi.org/Standards/nema.aspx*).

(1) ANSI Z535.4–2011, *American National Standard for Product Safety Signs and Labels,* approved October 20, 2017; approved for § 1243.6.

(2) [Reserved]

(b) ASTM International, 100 Barr Harbor Drive, P.O. Box CB700, West Conshohocken, Pennsylvania 19428–2959; phone: (800) 262–1373; website: *www.astm.org.*

(1) ASTM D3359–23, Standard Test Methods for Rating Adhesion by Tape Test, approved [TBD]; approved for § 1243.5.

(2) [Reserved]

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2023–27324 Filed 1–12–24; 8:45 am]

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038–AF33

Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rule.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or

''CFTC'') proposes to amend certain of the Commission's regulations that impose minimum capital requirements and financial reporting obligations on swap dealers (''SDs'') and major swap participants (''MSPs''). The Commission proposes to do this by codifying parts of staff interpretive letter 21–15 to SDs addressing the Tangible Net Worth Capital Approach for calculating capital under the applicable Commission regulation and no-action letter 21–18 (and its successor no-action letter 23–11) regarding alternative financial reporting by SDs subject to the capital requirements of a prudential regulator (together, ''CFTC Letters''). The Commission is also proposing to amend certain of its regulations applicable to SDs, in areas including the required timing of certain notifications, the process for approval of subordinated debt for capital, and the revision of financial reporting forms to conform to the rules. The proposed amendments are intended to make it easier for SDs to comply with the Commission's financial reporting obligations and demonstrate compliance with minimum capital requirements.

DATES: Comments must be received on or before February 13, 2024.

ADDRESSES: You may submit comments, which must be in writing and identified by RIN 3038–AF33, by any of the following methods:

• *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.

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

• *Hand Delivery/Courier:* Follow the same instruction as for Mail, above.

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

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should only submit information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures in § 145.9 of the Commission's regulations. The Commission reserves the right, but shall have no obligation, to review, prescreen, filter, redact, refuse, or remove any or all of your submission from *https://comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act (APA) and other applicable laws and may be accessible under the FOIA.

FOR FURTHER INFORMATION CONTACT: Amanda L. Olear, Director, 202–418–5283, *aolear@cftc.gov;* Thomas Smith, Deputy Director, 202–418–5495, *tsmith@cftc.gov;* Joshua Beale, Associate Director, 202–418–5446, *jbeale@cftc.gov;* Jennifer Bauer, Special Counsel, 202–418–5472, *jbauer@cftc.gov;* Maria Aguilar-Rocha, Attorney Advisor, 202–418–5840, *maguilar-rocha@cftc.gov;* Andrew Pai, Attorney Advisor, 646–746–9893, *apai@cftc.gov;* Market Participants Division; Lihong McPhail, Research Economist, 202–418–5722, *lmcphail@cftc.gov,* Office of the Chief Economist; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION: On September 15, 2020, the Commission published in the **Federal Register** final rules adopting capital and financial reporting requirements for SDs and MSPs.[1] The Final Rules accomplished the Congressional mandate [2] directing the Commission to adopt rules imposing both capital requirements and initial and variation margin requirements on SDs and MSPs that are not subject to a prudential regulator (''nonbank SDs'' and ''nonbank MSPs'', respectively).[3] The Final Rules included amendments to existing capital rules for futures commission merchants (''FCMs'') to provide explicit additional capital requirements for proprietary positions in swaps and security-based swaps that are not cleared by a clearing organization. The Final Rules also included a detailed capital model application process whereby eligible nonbank SDs and nonbank MSPs could apply to the Commission or a registered futures association (''RFA'') of which they are a member for approval. Further, the Final Rules adopted a capital comparability determination process for certain eligible foreign domiciled nonbank SDs and nonbank MSPs to seek substituted compliance for the Commission's capital and financial reporting requirements.[4] Finally, the Final Rules adopted detailed financial reporting, recordkeeping and notification requirements, including limited financial reporting requirements for SDs and MSPs subject to the capital requirements of prudential regulators (''bank SDs'' and ''bank MSPs'', respectively).

The Commission initially proposed capital and financial reporting requirements for nonbank SDs and nonbank MSPs, and financial reporting requirements for bank SDs and bank MSPs, in 2011.[5] After extensive comment, in 2016 the Commission re-proposed the rules for comment.[6] The Commission received numerous comments from a broad spectrum of market participants in response to the re-proposal.[7] In addition, following the 2016 re-proposal, the SEC adopted a final set of capital, margin and financial reporting requirements for security-based swap dealers and major security-

[1] Capital Requirements of Swap Dealers and Major Swap Participants, 85 FR 57462 (Sept. 15, 2020) (the ''Final Rule'' or the ''Final Rules'').

[2] Section 4s(e) of the Commodity Exchange Act (''CEA'' or the ''Act''), 7 U.S.C. 6s(e), which is contained in section 731 of the Dodd-Frank Act, requires the Commission to adopt minimum capital and margin requirements for SDs and MSPs that are not subject to a prudential regulator. Section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (the ''Dodd-Frank Act''). The text of the Dodd-Frank Act is available at *https://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[3] The term ''prudential regulator'' is defined as the Board of Governors of the Federal Reserve System (''Federal Reserve Board''); the Office of the Comptroller of the Currency (''OCC''); the Federal Deposit Insurance Corporation (''FDIC''); the Farm Credit Administration; and the Federal Housing Finance Agency. Section 1a(39) of the CEA, 7 U.S.C. 1a(39).

[4] To date, the Commission has issued proposals for substituted compliance for eligible nonbank SDs domiciled in Japan, Mexico, and the European Union for public comment. Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination From the Financial Services Agency of Japan, 87 FR 48092 (Aug. 8, 2022); Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Subject to Regulation by the Mexican Comision Nacional Bancaria y de Valores, 87 FR 76374 (Dec. 13, 2022); Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Domiciled in the French Republic and Federal Republic of Germany and Subject to Capital and Financial Reporting Requirements of the European Union, 88 FR 41774 (June 27, 2023).

[5] Capital Requirements of Swap Dealers and Major Swap Participants, 76 FR 27802 (May 12, 2011).

[6] Capital Requirements of Swap Dealers and Major Swap Participants, 81 FR 91252 (Dec. 16, 2016) (the ''2016 Capital Proposal'').

[7] The comment letters for the *2016 Capital Proposal* are available at *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1769* (the public comment file).

based swap participants (''SBSDs'' and ''MSBSPs,'' respectively).[8] In December 2019, the Commission re-opened the proposed rules for comment in light of the SEC's final rules, and requested commenters to provide detailed data and information regarding several critical areas of the Commission's proposed approach.[9]

The Final Rules became effective November 16, 2020.[10] To address concerns from commenters that a sufficient period of time would be necessary to develop policies, procedures and systems to implement the new financial reporting requirements and to develop and obtain approval to use capital models, the Commission adopted an extended compliance date of October 6, 2021 (''Extended Compliance Date'').[11] The Extended Compliance Date also corresponded to the SEC's compliance date for SBSDs and MSBSPs, thus permitting better coordination for dually-registered entities.[12]

The Commission's overall capital approach in the Final Rules permits nonbank SDs and MSPs to select one of three methods to calculate their capital requirements.[13] Each method is discussed in detail in the Final Rule and determines the frequency and type of financial reporting information to be provided to the Commission by each nonbank SD and nonbank MSP.[14] Bank SDs, which are not subject to the capital requirements of the Commission, are required to provide the Commission and National Futures Association (''NFA'') with limited financial information regarding the capital and swap positions of the firms. Bank SDs are required to file the limited financial information using CFTC forms that were intended to be comparable with forms required by the prudential regulators and consistent with forms adopted by the SEC for SBSDs subject to the capital rules of a prudential regulator.[15] Together, the financial reporting and notice requirements included in the Final Rules serve as the mechanism for the Commission to monitor capital compliance by nonbank SDs.

In the Final Rule, the Commission also recognized the role of NFA as the only RFA under the CEA. NFA is an integral component of the Commission's registration and oversight program. Specifically, the Commission has authorized NFA to administer the registration process for SDs and MSPs,[16] and to approve the use of capital and initial margin models. NFA also conducts examinations of nonbank SDs and nonbank MSPs to assess compliance with Commission and NFA rules.[17] As such, the Final Rules required that financial reports and notices be filed with both the Commission and the NFA,[18] and explicitly recognized NFA's ability to adopt standardized forms and processes to carry out the Commission's financial reporting and notification requirements for SDs.[19]

During the period leading up to the Extended Compliance Date, Commission, NFA, and SEC staff collaborated to develop a process for the collection of financial reports and to respond to inquiries from industry participants regarding compliance with financial reporting and notice obligations. On January 12, 2021, Commission staff approved NFA's capital model application process.[20] On December 21, 2021, NFA adopted new Financial Requirements Section 18 of its rules, which in addition to including capital rules largely modeled after those adopted by the Commission in the Final Rules, published newly developed standardized financial reporting forms FR–CSE–NLA and FR–CSE–BHC for use by nonbank SDs that are not also registered with the SEC.[21]

Prior to the Extended Compliance Date, Commission staff also received inquiries from market participants regarding compliance with various capital and financial reporting obligations under the Final Rule. In response, Commission staff issued eight no-action and interpretative letters.[22] Two letters, CFTC Letters No. 21–15 and 21–18,[23] are discussed below in detail and inform this proposed rulemaking. In addition, the Commission is proposing several other amendments that are the result of Commission staff's experience implementing the Final Rule. These amendments are intended to provide technical and other clarifying changes necessary to effectuate the Final Rule's purpose.

II. Proposed Amendments to Commission Regulations

A. Codification of the CFTC Letters and Other Amendments

1. Amendments to Tangible Net Worth Capital Approach—CFTC Letter No. 21–15

The Commission is proposing amendments to definitions in Commission regulation § 23.100 [24] to ensure that the Tangible Net Worth Capital Approach may be utilized by eligible nonbank SDs as intended in the Final Rule. Prior to the Final Rules' implementation date, several nonbank SDs intending to elect the Tangible Net Worth Capital Approach raised concerns regarding the application of the eligibility test to different corporate structures. In response to concerns raised, the Market Participants Division (the ''Division'') issued interpretive CFTC Letter No. 21–15 on June 29, 2021.[25] In CFTC Letter No. 21–15, the Division stated that the asset and revenue tests for ''predominantly engaged in non-financial activities'' could be assessed at the nonbank SD's

[8] Capital, Margin and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, 84 FR 43872 (Aug. 22, 2019) (the ''SEC Final Capital Rule'').

[9] Capital Requirements of Swap Dealers and Major Swap Participants, 84 FR 69664 (Dec. 19, 2019).

[10] Final Rules, 85 FR at 57462.

[11] *Id.* at 57525.

[12] *Id.*

[13] *See generally id.* at 57467. The three methods discussed in detail in the Final Rules include the Bank-Based Capital Approach, the Tangible Net Worth Capital Approach, and the Net Liquid Assets Capital Approach.

[14] *See generally id.* at 57480–57502.

[15] *See generally id.* at 57491–57498. This approach is consistent with other Commission rules that permit the acceptance of certain filings under the SEC adopted final rules in lieu of the Commission's own rules. *See e.g.,* 17 CFR 1.10(b)(1), 23.105(d)(3), and (e)(5).

[16] *See generally* Performance of Registration Functions by National Futures Association with Respect to Swap Dealers and Major Swap Participants, 77 FR 2708 (Jan. 19, 2012).

[17] Final Rules, 85 FR 57507–57510.

[18] *Id.* at 57515.

[19] *Id.* at 57518.

[20] CFTC Letter No. 21–03, Jan. 12, 2021, available at *https://www.cftc.gov/csl/21-03/download.*

[21] NFA submitted these rules for Commission review under section 17(j) of the CEA, 7 U.S.C. 21(j), on November 22, 2021, and the rules became effective on December 21, 2021. NFA Notice to Members I–21–45, available at *https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5437.*

[22] CFTC Letter No. 21–15, June 29, 2021, available at *https://www.cftc.gov/csl/21-15/download;* CFTC Letter No. 21–18, Aug. 31, 2021, available at *https://www.cftc.gov/csl/21-18/download;* CFTC Letter No. 21–20, Sept. 30, 2021, available at *https://www.cftc.gov/csl/21-20/download;* CFTC Letter No. 21–21, Sept. 30, 2021, available at *https://www.cftc.gov/csl/21-21/download;* CFTC Letter No. 21–22, Sept. 30, 2021, available at *https://www.cftc.gov/csl/21-22/download;* CFTC Letter No. 21–23, Sept. 30, 2021, available at *https://www.cftc.gov/csl/21-23/download;* CFTC Letter No. 22–01, Jan. 5, 2022, available at *https://www.cftc.gov/csl/22-01/download;* CFTC Letter No. 22–02, Jan. 5, 2022, available at *https://www.cftc.gov/csl/22-02/download.*

[23] CFTC Letter No. 21–18 was time-limited and set to expire on October 23, 2023. To permit time for the Commission to issue a proposed rulemaking and address any comments received, the Market Participants Division extended the expiration of the letter to the earlier of October 6, 2025, or the adoption of any revised financial reporting requirements for bank SDs under regulation § 23.105(p). CFTC Letter No. 23–11, July 10, 2023, available at *https://www.cftc.gov/csl/23-11/download.*

[24] 17 CFR 23.100.

[25] CFTC Letter No. 21–15.

entity level or ultimate parent level and, further, such tests could be computed under International Financial Reporting Standards issued by the International Accounting Standards Board (''IFRS'') in lieu of generally accepted accounting principles (''GAAP'') as adopted in the United States if the entity was permitted to use IFRS for financial reporting.[26] The Division also confirmed that supplemental position reporting for nonbank SDs meeting these qualifications may be filed on a quarterly basis along with the financial reports, as opposed to monthly.[27] In the Commission's experience over the past two years, the interpretation in CFTC Letter No. 21–15 helped eligible nonbank SDs better understand their compliance obligations under the Commission's capital and financial reporting requirements at the implementation date of the Final Rules by pointing out an obvious but inadvertent mistake in the Final Rules. Therefore, the Commission is now proposing to modify the relevant Commission regulations to more fully align the Tangible Net Worth Capital Approach with the Commission's intention as expressed in the preamble to the Final Rules and consistent with the terms of CFTC Letter No. 21–15.

The Commission is proposing to amend the definition in Commission regulation 23.100 of ''predominantly engaged in non-financial activities.''[28] This definition is one of the key components, along with the definition of ''tangible net worth,''[29] in determining the eligibility for electing and the application of the Tangible Net Worth Capital Approach.[30] Eligibility for this approach is conditioned upon a nonbank SD meeting both a revenue and asset-based test to determine if the nonbank SD is predominantly engaged in non-financial activities. The proposed amendment would modify the definition of ''predominantly engaged in non-financial activities'' in Commission regulation § 23.100 to explicitly permit the satisfaction of both the revenue and asset-based tests at the consolidated parent level of the nonbank SD as discussed in the preamble to the Final Rules. That is, the proposed amendments would clarify that the tests may be satisfied either at the level of the nonbank SD or at the level of the nonbank SD's consolidated parent[31] rather than seeming to exclude the consolidated parent of the nonbank SD as questioned by some commenters.[32]

The Commission is also proposing to amend the definition of ''tangible net worth'' in Commission regulation § 23.100.[33] Nonbank SDs electing the Tangible Net Worth Capital Approach are currently permitted to use IFRS for their financial reporting obligations under Commission regulation § 23.105.[34] IFRS is permitted as an acceptable reporting standard for all nonbank SDs provided that they otherwise do not prepare financial statements in accordance with U.S. GAAP.[35] The definition of ''tangible net worth'' in Commission regulation § 23.100, however, only references U.S. GAAP, despite the permissive use of IFRS as part of financial reporting obligations under Commission regulation § 23.105.[36] The proposed amendments to the definition of ''tangible net worth'' in Commission regulation § 23.100 would clarify that ''tangible net worth'' may be determined under either applicable accounting standard, U.S. GAAP or IFRS. This amendment would align and correct the permitted use of IFRS in determining eligibility for the approach with the standard permitted and utilized by the nonbank SD in preparation of its financial statements. As discussed in the Final Rule, the Commission is generally comfortable with both U.S. GAAP and IFRS accounting standards in this context, especially as both standards continue to move towards greater convergence.[37] The Commission has preliminarily determined that nonbank SDs utilizing the same standard as is permitted for their financial reporting comports with the purpose of the eligibility test to determine if a SD is predominantly engaged in non-financial activities.

The Commission is also proposing to amend Commission regulation § 23.105(l)[38] to require that each nonbank SD and nonbank MSP file Appendix B to Subpart E of Part 23 (''Appendix B''),[39] which contains aggregate securities, commodities, and swap position information and certain credit exposure information, with the Commission and NFA on a quarterly rather than a monthly basis. This proposed amendment would align that filing with the periodicity permitted as part of the nonbank SD's or nonbank MSP's routine financial report filings required by Commission regulation § 23.105(d) and would clarify that the information provided should be consistent with those financial report filings. Currently, Commission regulation § 23.105(d) permits nonbank SDs electing the Tangible Net Worth Capital Approach to file required financial reports quarterly, whereas nonbank SDs electing either the Bank Based Capital Approach or the Net Liquid Asset Capital Approach are required to file such information on a monthly basis.[40] The amendment would make clear that all swap position and credit information required in Commission regulation § 23.105(l) and Appendix B must be filed at the same periodicity as routine financial reporting required of the respective nonbank SDs set forth within Commission regulation § 23.105(d), which could be either monthly or quarterly depending on the approach elected by the SD.

The Commission has already determined that nonbank SDs electing the Tangible Net Worth Capital Approach may engage in a wide variety of businesses and not be otherwise subject to any financial reporting. Thus, the Commission determined in the Final Rule that such SDs need only file financial reports quarterly and not monthly and may take a longer period of time to file audited financial reports.[41] Moreover, the Commission intended the swap position and credit information in Commission regulation § 23.105(l) and Appendix B to be filed together with other financial information required by Commission regulation § 23.105(d) as this information is supplementary to the financial statements as a whole and completes the routine financial reporting package. This approach is also consistent with how dually-registered SDs with the SEC complete the SEC's Form X–17A–5 (''FOCUS Report'') Part II.[42] Thus, the proposed amendment is consistent with previous Commission determinations and harmonizes the approach across different nonbank SDs.

[26] *Id.* at 3–6.

[27] *Id. Compare* 17 CFR 23.105(d) *with* 17 CFR 23.105(l), as the former includes monthly or quarterly periodicity as opposed to the latter only referring to monthly.

[28] *See* 17 CFR 23.100 for the definition of the term ''predominantly engaged in non-financial activities.''

[29] *See* 17 CFR 23.100 for the definition of the term ''tangible net worth.''

[30] 84 FR 69664 at 69668.

[31] Final Rules, 85 FR 57480.

[32] *Id.* at 57499.

[33] *See* 17 CFR 23.100 for the definition of the term ''tangible net worth.''

[34] 17 CFR 23.105(d) and (e).

[35] *Id.*

[36] 17 CFR 23.105.

[37] Final Rules, 85 FR 57514.

[38] 17 CFR 23.105(l).

[39] Appendix B to subpart E of part 23.

[40] 17 CFR 23.105(d).

[41] Final Rules, 85 FR 57514–57515.

[42] SEC Form X–17A–5 FOCUS Report Part IIC, available at *https://www.sec.gov/manage-filings/forms-index/form-x-17a-5-2c*.

Request for Comment

Question 1. Do the proposed amendments to Commission regulations §§ 23.100 and 23.105(l) address the compliance matters for entities electing the Tangible Net Worth Capital Approach?

2. Amendments to Bank SD Financial Reporting Requirements—CFTC Letter No. 21–18

The Commission is also proposing to amend the financial reporting requirements for bank SDs and bank MSPs set forth in Commission regulation § 23.105(p).[43] The Commission intended the bank SD and bank MSP reporting requirements contained in the Final Rules to be consistent with the SEC requirements for bank SBSDs and bank MSBSPs, to maintain equivalent financial reporting requirements for dually-registered firms.[44] Several bank SDs, however, did not register as SBSDs, and therefore are subject only to limited financial reporting under the Commission's rules.[45] In certain instances, the financial reporting required by the prudential regulators for these bank SDs permit a longer period of time and utilize a different format than that adopted by the Commission.[46] In addition, some of these bank SDs are not required to file financial reports with a prudential regulator if the bank SDs are domiciled outside the United States, and may instead be subject only to financial reporting of a home country supervisor.

Following the adoption of Commission regulation 23.105(p), bank SDs requested relief from this provision's requirements.[47] Bank SDs indicated that the financial reporting filing deadline adopted by the Commission preceded the financial reporting filing deadline imposed by prudential regulators.[48] In addition, although Appendix C to Subpart E of Part 23 (''Appendix C'')[49] was intended to capture line items on existing Federal Financial Institutions Examination Council (''FFEIC'')[50] Form 031 (''Call Report'') provided to prudential regulators, line items on the Call Report had either been removed, added or otherwise changed since the Commission adopted Appendix C.[51] As a result, on August 31, 2021, the Division issued a time-limited no-action letter to bank SDs regarding compliance with financial reporting requirements under Commission regulation § 23.105(p).[52] On July 11, 2023, the Division extended the expiration date to the earlier of October 6, 2025 or the adoption of any revised financial reporting and notification requirements applicable to bank SDs.[53]

CFTC Letter No. 21–18, as extended under CFTC Letter No. 23–11,[54] articulates a position by the Division that it would not recommend that the Commission engage in an enforcement action against bank SDs providing the Commission with copies of financial reports that are required by, and filed with, their respective prudential or home country regulators, in lieu of complying with the substantive requirements of Appendix C, subject to certain conditions.[55] CFTC Letter No. 21–18 also contains a no-action position with respect to bank SDs filing comparable Call Report schedules with the Commission in lieu of Appendix C in accordance with and within the timeframe permitted by the prudential regulators.[56] CFTC Letter No. 21–18 further provides that the Division would not recommend enforcement action against certain foreign-domiciled bank SDs (''Non-U.S. bank SDs'') that do not provide financial reports to a prudential regulator if they file with the Commission balance sheet and statement of regulatory capital information in accordance with applicable home country requirements, so long as the financial information is in English, with balances converted to U.S. dollars, and the financial information is filed within 15 days of the earlier of the date such financial information is filed or required to be filed with the Non-U.S. bank SDs' applicable home country regulator.[57] Finally, the Division stated that it would not recommend enforcement action against dually-registered foreign bank SDs filing comparable SEC-required financial reports and schedules with the Commission.[58]

The Commission is proposing to amend Commission regulation § 23.105(p) to add an exception to the financial reporting requirements for Non-U.S. bank SDs that do not submit financial reports to a prudential regulator. These Non-U.S. bank SDs would be permitted to file with the Commission financial reports that are submitted to their respective home country regulator, provided the financial reports submitted to the Commission are translated into English with balances converted to U.S. dollars. These Non-U.S. bank SDs, however, would continue to be required to file specific swap position information set forth in Schedule 1 to Appendix C. Finally, these Non-U.S. bank SDs would be required to file with the Commission such reports no later than 90 calendar days following quarter-end.

The Commission is not proposing to include the restriction in CFTC Letter No. 21–18 that Non-U.S. bank SDs be subject to home country capital standards in a G–20 jurisdiction.[59] The Commission preliminarily believes that such a requirement is moot at this time, as to date, all registered Non-U.S. bank SDs have met this criterion. Moreover, this approach will provide greater regulatory flexibility and permit Commission staff the ability to evaluate on a case-by-case basis each bank SD.

The Commission preliminary believes that the required information in the manner proposed will permit it to assess the Non-U.S. bank SDs' financial position. Extending the time period to 90 days should permit these Non-U.S. bank SDs to file financial reports with the Commission no earlier than such Non-U.S. bank SDs are required to

[43] 17 CFR 23.105(p).

[44] Final Rules, 85 FR 57463–57465.

[45] 17 CFR 23.105(p).

[46] Commission regulation § 23.105(p) requires bank SDs to report financial information within 30 calendar days of quarter-end. 17 CFR 23.105(p)(2). The Instructions for Preparation of Consolidated Reports of Condition and Income, Schedule RC–D, available at *https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_202303_i.pdf,* however, permit a bank with more than one foreign office to submit its FFIEC 031 forms within 35 calendar days following quarter-end. Additionally, the SEC extended the filing deadline of FOCUS Report Part IIC for non-U.S. SBSDs subject to a prudential regulator from 30 to 35 days following quarter end, noting that ''U.S. prudential regulators permit certain U.S. banks to file their financial reports 35 days after the quarter end.'' Order Specifying the Manner and Format of Filing Unaudited Financial and Operational Information by Security-Based Swap Dealers and Major Security-Based Swap Participants That Are Not U.S. Persons and Are Relying on Substituted Compliance Determinations With Respect to Rule 18a–7, 86 FR 59208 (October 26, 2021) at 59210.

[47] ISDA–SIFMA Joint Letter, Aug. 20, 2021, available at *https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm/.*

[48] *Id.* at 3–4.

[49] Appendix C to subpart E of part 23.

[50] Federal Financial Institutions Examination Council, Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices—FFIEC 031, available at *https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_202203_f.pdf.*

[51] ISDA–SIFMA Joint Letter at 3–4.

[52] *See generally* CFTC Letter No. 21–18.

[53] CFTC Letter No. 23–11.

[54] *See supra* note 23.

[55] CFTC Letter No. 21–18 at 4–5.

[56] *Id.* at 4–5, Condition 1.

[57] *Id.* at 5, Conditions 2–4.

[58] *Id.,* Condition 5. In comparison to the SEC's approach to similarly situated bank SBSDs, the Commission's capital comparability process adopted in Commission regulation § 23.106 does not extend to bank SDs. *See* 17 CFR 23.106.

[59] Letter No. 21–18 is limited to eligible Non-U.S. bank SDs subject to home country capital standards in a G–20 jurisdiction or to capital standards consistent with the Capital Accord of the Basel Committee on Banking Supervision. CFTC Letter No. 21–18 at 3–5.

prepare such reports under home country requirements. The Commission proposes to adopt this approach because the Commission is collecting such reports in order to maintain the ability to monitor the capital condition across all SDs, although the Commission does not establish the capital or margin requirements of bank SDs.[60]

The Commission is further proposing to amend Commission regulation § 23.105(p) to permit bank SDs to file the relevant schedules under the Call Report (Schedule RC and Schedule RC–R), rather than replicating various line items from within those reports on a separately constructed balance sheet and statement of regulatory capital currently maintained in Appendix C.[61] Schedule 1 of Appendix C, which contains relevant swap, mixed swap and security-based swaps position information, would remain a required schedule to be provided by all bank SDs. This approach would permit the Commission to collect necessary financial information prepared in accordance with prudential regulators' guidance, while eliminating the necessity that bank SDs familiarize themselves with a new reporting form and prevent the Commission from having to routinely monitor and update its form when prudential regulators amend their schedules. These proposed changes are consistent with the terms of CFTC Letter No. 21–18, which have resulted in the Commission and its staff receiving the requisite information to meaningfully oversee its population of bank SDs since 2021. In addition, and as mentioned above, the Commission proposes to adopt this approach because the Commission is collecting such reports in order to maintain the ability to monitor the capital condition across all SDs.

Request for Comment

Question 2. Do the proposed amendments to Commission regulations in § 23.105(p) address compliance matters identified in CFTC Letter No. 21–18 for bank SDs?

Question 3. Do the financial reporting requirements as proposed to be amended for Non-U.S. bank SDs permit the Commission to monitor these entities at timely intervals?

3. Amendments Regarding Financial Reporting and Computation Requirements of Swap Dealers

a. Amendments to Schedules in Financial Reporting and Frequency of Filings

The Commission is proposing to amend the scope of Commission regulation § 23.105(k)[62] and the heading and scope of Commission regulation § 23.105(l), as well as the titles of certain schedules included in Appendix B,[63] to further clarify that these reporting obligations are applicable to all nonbank SDs and nonbank MSPs. Commission regulation § 23.105(k) lists both model-specific information that nonbank SDs must report as well as a description of the same type of exposure information as reflected in the schedules to Appendix B. Commission regulation § 23.105(l), however, requires all nonbank SDs, including those not approved to use models, to complete the Appendix B schedules on a monthly basis. As a result, several nonbank SDs have filed each of the schedules to Appendix B without having received capital model approval. Thus, in current form, Commission regulations § 23.105(k) and (l), as well as, the titles of Schedules 2–4 of Appendix B, could more explicitly indicate that all of the information within the schedules included in Appendix B is required of all nonbank SDs, including those not authorized to use models.[64] In addition, as proposed to be amended, nonbank SDs electing the Tangible Net Worth Capital Approach and all MSPs must submit quarterly rather than monthly financial reporting as Commission regulation § 23.105(l) currently requires.

Each of the schedules included in Appendix B is identical to corresponding schedules found in SEC's FOCUS Report required to be completed by both SBSDs and certain broker dealers (''BDs'').[65] To the extent practicable, the Commission intends to align financial reporting requirements, including those listed in textual form in Commission regulation § 23.105(k) and in the finalized schedules part of Appendix B, with the reporting requirements finalized by the SEC pertaining to SBSDs, MSBSPs, and BDs.[66] The information required under Appendix B is nearly identical in all material respects to corresponding forms found in the SEC Form FOCUS Report Part II and was intended to ensure harmonization of the reporting schedules across several registrants, including those that are dually-registered.[67] This is also consistent with the Commission's general approach permitting dually-registered BDs and SBSDs to file SEC Form FOCUS Report Part II in lieu of their requirements under Commission regulations § 23.105(d) and (e), and for those dually-registered SBSDs subject to the capital rules of a prudential regulator under Commission regulation § 23.105(p).[68]

In addition, NFA has adopted nearly identical capital and financial reporting requirements for its member nonbank SDs and nonbank MSPs.[69] The finalized NFA rules also mandate the use of comprehensive standardized forms for financial reporting by member nonbank SDs and nonbank MSPs that are not otherwise able to file an SEC Form FOCUS Report Part II.[70] These new NFA forms, FR–CSE–NLA and FR–CSE–BHC, include each of the required schedules found in Appendix B. Moreover, all the information listed in textual form in paragraph (k)(1)(v) of Commission regulation § 23.105 can be found in specific schedules found in Appendix B.[71] As such, the Commission has

[60] Section 4s(f) of the CEA requires SDs and MPSs, including those for which there is a prudential regulator, to make any reports regarding transactions and positions, as well as any reports regarding financial condition, that the Commission adopts by rule or regulation. 7 U.S.C. 6s(f).

[61] As adopted, Appendix C contains three schedules: 1. Statement of Financial Condition (balance sheet); 2. Statement of Regulatory Capital; and 3. Schedule 1. Both the Statement of Financial Condition and Statement of Regulatory Capital schedules within Appendix C are modeled off the FOCUS Report Part IIC as adopted by the SEC for bank SBSDs and contain specific line item references corresponding to the Call Report. *See* Final Rules, 85 FR at 57566–57569. Following adoption of these schedules, changes were made to the underlying Call Reports making the schedules obsolete. The SEC has since proposed changes to the FOCUS Report Part IIC to reflect these changes. *See generally* Electronic Submission of Certain Materials Under the Securities Exchange Act of 1934; Amendments Regarding the FOCUS Report, 88 FR 23920 (Apr. 18, 2023).

[62] 17 CFR 23.105(k).

[63] Appendix B is comprised of 4 individual schedules: SCHEDULE 1—AGGREGATE SECURITIES, COMMODITIES AND SWAPS POSITIONS; SCHEDULE 2—CREDIT CONCENTRATION REPORT FOR FIFTEEN LARGEST EXPOSURES IN DERIVATIVES; SCHEDULE 3—PORTFOLIO SUMMARY OF DERIVATIVES EXPOSURES BY INTERNAL CREDIT RATING; and SCHEDULE 4—GEOGRAPHIC DISTRIBUTION OF DERIVATIVES EXPOSURES FOR TEN LARGEST COUNTRIES.

[64] To further complicate matters, the heading and first paragraph to Commission regulation § 23.105(k) both indicate that this provision only applies to SDs approved to use internal models to calculate market risk and credit risk for calculating capital under Commission regulation § 23.102(d).

[65] *See* SEC Form X–17A–5 FOCUS Report Part IIC, available at *https://www.sec.gov/manage-filings/forms-index/form-x-17a-5-2c.*

[66] *See* Final Rules, 85 FR 57519.

[67] *See* 2016 Capital Proposal, 81 FR 91278.

[68] As indicated in the Final Rule, the Commission has a long history of permitting SEC registrants to meet their financial statement filing obligations with the Commission by submitting required SEC forms in lieu of the CFTC's forms, which reduces the burden on dually-registered firms by not requiring two separate financial reporting requirements. *See* Final Rules, 85 FR 57515.

[69] NFA section 18.

[70] NFA section 18(e).

[71] For example, Commission regulation § 23.105(k)(1)(v)(B) requires that all model-

Continued

preliminarily determined that the specific schedules found in Appendix B, which is now part of NFA's adopted forms, should be the mechanism for firms to provide the required information listed in Commission regulation § 23.105(k).[72] In this proposal, the Commission hopes to eliminate any ambiguity that the Final Rule may have caused. As discussed in the Final Rule, the information in Appendix B, which includes credit exposure to swap transactions, is vital to the Commission's regulatory oversight of SDs and the financial system.[73] This information provides valuable insight into the risk exposures of nonbank SDs, which is essential to performing regulatory oversight of SDs. The Commission proposes to make clear that all nonbank SDs must complete all schedules in Appendix B.

The Commission is therefore proposing to amend Commission regulation § 23.105(k) to require that the information listed in Appendix B is completed by all nonbank SDs and nonbank MSPs as was intended, and is consistent with that required by the SEC and NFA. The Commission is further proposing to amend Commission regulation § 23.105(l) and the headings of certain schedules in Appendix B to further clarify that these schedules must be reported at the same periodicity as the financial reporting of each respective nonbank SD, either monthly or quarterly as applicable, and that all of the schedules are required for all nonbank SDs, not just those authorized to use models.

Request for Comment

Question 4. Will the proposed amendments to Commission regulations in § 23.105(k) and (l) and the related changes to the headings of the schedules contained in Appendix B facilitate consistent and comprehensive swaps positions and counterparty reporting for all nonbank SDs under the Final Rules and align with the same reporting requirements of the SEC for dual registrants?

b. Changes to Public Disclosure Requirements

The Commission is proposing to amend Commission regulation § 23.105(i)[74] to align the public disclosure of unaudited financial information with the periodicity permitted by routine financial filings in Commission regulation § 23.105(d), and to remove reference to a statement in both the unaudited and audited information disclosing the amounts of minimum regulatory capital and the amount of its minimum regulatory capital requirement computed in accordance with Commission regulation § 23.101.[75]

Paragraphs (i)(l)(ii) and (i)(2)(ii) of Commission regulation § 23.105 currently require a nonbank SD or nonbank MSP to publicly disclose on its website a statement of the amount of the nonbank SD's or nonbank MSP's regulatory capital and its minimum capital requirement.[76] This information is required to be disclosed as of the nonbank SD's or nonbank MSP's fiscal year end, and as of six months after the firm's fiscal year end. Following adoption of the Final Rule, nonbank SD's requested clarification as to whether the regulatory capital information required by Commission regulations § 23.105(i)(1)(ii) and (i)(2)(ii) must be a schedule or, if the information may be reported in a narrative format, in the footnotes to the financial statements.

The Commission is proposing to revise Commission regulation § 23.105(i)(1)(i)[77] to include the footnotes to the unaudited Statement of Financial Condition in the required disclosures. The Commission is also proposing to revise Commission regulations § 23.105(i)(1)(ii) and (i)(2)(ii) to replace the word ''statement'' with ''amounts'' to indicate that required capital information does not need to exist in a standalone statement or form. This is consistent with the Commission's intent, to the extent practicable, to align its requirements with those required of BDs and SBSDs by the SEC.[78] The Commission has preliminarily determined that the information contained in the footnotes accompanying the financial statements should ordinarily satisfy the requirements for disclosing minimum regulatory capital. However, the Commission recognizes that not all accounting standards permit, nor do the respective reporting formats utilized by firms always provide for, such disclosure in footnote form. Some disclosures may be presented in either narrative or graphical formats. The Commission's sole intention is to ensure that the public has the requisite information, not to prescribe the format of such disclosures made by the firm on its website. Therefore, the Commission is proposing to permit nonbank SDs and their auditors to determine the format for disclosure of this information.

Request for Comment

Question 5. The Commission requests comment on whether nonbank SDs and their auditors should be able to determine the reporting format of the requisite information in their public disclosure? Should the Commission instead specify a particular format? If yes, which format and why?

c. Changes to Form 1–FR–FCM

The Commission is proposing to amend Form 1–FR–FCM to add new lines to the form to include the 2 percent of uncleared swap margin capital requirement under Commission regulation § 1.17(a)(1)(i)(B)(2).[79] The proposed capital requirement based on 2 percent of the uncleared swaps margin would be added as new lines 22.A.vi through vii. of the Statement of the Computation of the Minimum Capital Requirements (''CFTC Minimum Net Capital Requirements'') on the Form 1–FR–FCM.

The Commission is also proposing to amend the Form 1–FR–FCM to add swaps and security-based swaps haircuts to the computation of net capital. The specific market risk charges for swaps and security-based swaps would appear as new lines 16.D. of the CFTC Minimum Net Capital Requirements.

Under Commission regulation § 1.10, all FCMs must submit a Form 1–FR–FCM when they file for registration as an FCM and periodically following registration.[80] The Form 1–FR–FCM includes, among other things, the computation of CFTC Minimum Net Capital Requirements supplementary schedule.[81] In the Final Rule, the Commission added a 2 percent of uncleared swap margin capital requirement to the risk-based net capital requirement for FCMs which are also registered as SDs (''FCM–SDs''), and adopted specific market risk charges for uncleared swaps in the FCM net capital requirements in Commission regulation

approved SDs file the current exposure (including commitments) listed by counterparty for the 15 largest exposures, which is also found in Schedule 2 to Appendix B. Similarly, the information listed in textual form in Commission regulations § 23.105(k)(1)(i)–(v) corresponds verbatim to the textual requirements found in SEC rule 18a–7(a)(3). *See* 17 CFR 240.18a–7(a)(3).

[72] As discussed in the Final Rule, the Commission may (and subsequently has) approved additional procedures developed by an RFA, which could include standard forms or procedures necessary to carry out the Commission's filing requirements. *See* Final Rules, 85 FR 57518.

[73] Final Rules, 85 FR 57517.

[74] 17 CFR 23.105(i).

[75] 17 CFR 23.101.

[76] 17 CFR 23.105(i)(1)(ii) and (i)(2)(ii).

[77] 17 CFR 23.105(i)(1)(i).

[78] *See* 17 CFR 240.18a–7(b).

[79] 17 CFR 1.17(a)(1)(i)(B)(2).

[80] 17 CFR 1.10.

[81] CFTC Form 1–FR–FCM at 6–8.

§ 1.17.[82] In addition, FCMs dually-registered as BDs are permitted to file the SEC's FOCUS Report Part II in lieu of the Commission's Form 1–FR–FCM in reporting net capital.[83] The SEC has recently proposed to amend its FOCUS Report Part II to include the Commission's net capital changes adopted for FCM–SDs, including the addition of the 2 percent uncleared swap margin to the risk-based net capital requirement of FCM–SDs.[84] The Commission is proposing to amend its form to more explicitly require disclosure of the 2 percent amount and to conform with the SEC's proposal. This information is important to the Commission in monitoring the Final Rules, as reporting the 2 percent amount enables the Commission to confirm that the FCM–SD is complying with its capital requirement.

Request for Comment

Question 6. Do the proposed changes to the Form 1–FR–FCM address the net capital changes applicable to FCMs that are also registered as SDs as were adopted in the Final Rules?

d. Additional Cross References To Clarify Applicable Market and Credit Risk Charges

The Commission is proposing to add new language to Commission regulations § 23.103(a)(1) and (c)(1) [85] to clarify that the same standardized market and credit risk charges are applicable to nonbank SDs electing the Tangible Net Worth Capital Approach as are applicable to all other nonbank SDs not approved to use models. Nonbank SDs electing the Tangible Net Worth Capital Approach and who have chosen not to apply for approval to use models, have questioned what the applicable standardized credit risk charges are under Commission regulation § 23.103.[86] Commission regulation § 23.103(b) [87] provides that nonbank SDs electing the Tangible Net Worth Capital Approach or Net Liquid Assets Capital Approach are required to compute standardized market risk charges contained in SEC Rule 18a–1 [88] and Commission regulation § 1.17, as applicable. Commission regulation § 23.103(c) [89] also provides that a nonbank SD electing the Net Liquid Assets Capital Approach must compute its standardized credit risk charge in accordance with SEC Rule 18a–1 or Commission regulation § 1.17, as applicable, but fails to provide a reference for nonbank SDs electing the Tangible Net Worth Capital Approach.[90] Because standardized credit risk charges were intended to be the same for nonbank SDs using the Tangible Net Worth Capital Approach or the Net Liquid Assets Capital Approach, the Commission is proposing to amend Commission regulations § 23.103(a)(1) and (c)(1) to correct this omission. Thus, the Commission proposes to amend Commission regulations § 23.103(a)(1) and (c)(1) to direct nonbank SDs electing the Tangible Net Worth Capital Approach to compute standardized credit risk charges in accordance with SEC Rule 18a–1 or Commission regulation § 1.17, as applicable.

Similarly, nonbank SDs electing the Bank-Based Capital Approach indicated after the adoption of the Final Rules that a cross reference in Commission regulation § 23.102(d) [91] to the calculation of market risk exposure and credit risk exposure using internal models, seems to be intended to reflect the requirements applicable to such nonbank SDs in the application to use models in Commission regulation § 23.102(c).[92] The Commission agrees that this was the intention, and thus is proposing to amend Commission regulation § 23.102(d) to correct the applicable cross reference in order to make it clearer that either 12 CFR part 217 or Appendix A to Subpart E of Part 23 (''Appendix A'') [93] should be utilized as applicable by the nonbank SD depending on the respective capital approach elected.[94]

Request for Comment

Question 7. Do the proposed amendments to Commission regulations § 23.103(a)(1) and (c)(1) clarify the applicable standardized credit risk charge to be added to the $20 million minimum requirement under Commission regulation § 23.103(c)(3)? [95]

Question 8. Does the proposed amendment to Commission regulation § 23.102(d) clarify the applicable model-based market and credit risk charges applicable to nonbank SDs which have applied to use such models under the Bank-Based Capital Approach?

B. Other Amendments

1. Notice of Substantial Reduction in Capital

The Commission adopted specific notice requirements for nonbank SDs and MSPs related to capital compliance in the Final Rules. However, one of the notice requirements contained in Commission regulation § 23.105(c)(4), which requires notice of a substantial reduction in capital as compared to the last reported in a financial report, did not specify a timeframe for the notice filing.[96] The Commission has preliminarily determined that registrants should be able to file such a notice within two business days after the date of occurrence. Further, such an approach is also consistent with that applied to FCMs, which must notify the Commission within two business days following a substantial reduction in capital.[97] The Commission is proposing to amend Commission regulation § 23.105(c)(4) to add a two-business day reporting timeframe to the requirement for a nonbank SD to file notice of a substantial reduction in capital. The Commission has preliminarily determined that adding a reporting timeframe to the notice requirement will enhance compliance by providing regulatory certainty to nonbank SDs regarding when such a filing is due.

2. Subordinated Debt Approval

The nonbank SD capital requirements for both the Bank-Based Capital Approach and the Net Liquid Assets Capital Approach permit the use of subordinated debt as capital in order to align with the permitted use of subordinated debt under the FCM net capital requirements.[98] The requirements for qualifying subordinated debt were adopted by the SEC in its capital rule for SBSDs and were included by reference by the Commission for other nonbank SDs in the Bank-Based Capital Approach.[99] Commission staff received questions regarding the process for approving subordinated debt for nonbank SDs not

[82] 17 CFR 1.17(a)(1)(i)(B)(2) and (c)(5)(iii). *See generally* Final Rules, 85 FR 57473–57476 and 57562.

[83] 17 CFR 1.10(h).

[84] *See generally* Electronic Filing of Certain Forms and Other Filings Under the Securities Exchange Act of 1934; Technical Amendments Regarding the FOCUS Report, SEC Proposed Rule (Undated), available at *https://www.sec.gov/news/press-release/2023-58.*

[85] 17 CFR 23.103(a)(1) and (c)(1).

[86] 17 CFR 23.103.

[87] 17 CFR 23.103(b).

[88] 17 CFR 240.18a–1.

[89] 17 CFR 23.103(c).

[90] SDs electing to use the Tangible Net Worth Capital Approach are required to meet a minimum capital requirement which includes, among other things, $20 million plus the amount of the SD's market risk exposure requirement and its *credit risk exposure* requirement associated with the SD's swap and related hedge positions that are part of the SD's swap dealing activities. 17 CFR 23.101(a)(2)(ii)(A).

[91] 17 CFR 23.102(d).

[92] 17 CFR 23.102(c).

[93] Appendix A to subpart E of part 23.

[94] Final Rules, 85 FR 57506.

[95] 17 CFR 23.103(c)(3).

[96] 17 CFR 23.105(c)(4).

[97] 17 CFR 1.12(g)(1).

[98] 17 CFR 1.17(h).

[99] 17 CFR 23.101(a)(1).

also registered with the SEC because the Final Rule did not articulate a process. To address this omission, NFA adopted Financial Requirements Rule Section 18(d).[100] Under the existing framework, NFA already approves subordinated loan agreements for net capital agreements for nonbank SDs that are not dually-registered with the SEC. Similarly, although nonbank SDs that are dually-registered with the SEC are able to obtain SEC approval on subordinated debt,[101] nonbank SDs that elect either the Bank-Based Capital Approach or the Net Liquid Assets Capital Approach but are not registered with the SEC, do not have an approval process for the use of subordinated debt under the Commission's rules. As discussed in the Final Rule,[102] when adopting the permissive use of subordinated debt in establishing minimum regulatory capital, the Commission has long approved a process for FCMs to obtain subordinated debt approval from their Designated Self-Regulatory Organizations (''DSROs''), including the NFA.[103]

The Commission has preliminarily determined to permit NFA to administer the approval process for nonbank SDs because of the NFA's extensive history and experience as a DSRO administering a subordinated debt approval program for FCMs. This would also make the subordinated debt approval process for nonbank SDs consistent with the subordinated debt approval process for FCMs. In addition, NFA has already devoted substantial efforts to obtain the personnel and other resources necessary to perform the review, approval and ongoing assessment of nonbank SDs' permitted use of subordinated debt following the adoption by NFA of Financial Requirements Rule Section 18(d).[104] Codifying that subordinated debt will be approved for net capital requirements either through the Commission or by an RFA should remedy this omission from the Final Rules and will sanction a process that is consistent with the current practice. The Commission proposes to amend Commission regulations § 23.101(a)(1)(i)(B) and (a)(1)(ii)(C) [105] to establish that using subordinated debt as regulatory capital is subject to the approval of either an RFA of which the nonbank SD is a member or the Commission.

3. Statement of No Material Difference

The Commission proposes to amend Commission regulation § 23.105(e)(4)(v) [106] for nonbank SDs and nonbank MSPs to explicitly require a statement, if applicable, that there are no material differences between the audited annual report and the unaudited annual report of the same date. Commission regulation § 23.105(e) requires nonbank SDs and nonbank MSPs to submit an annual audited financial report with the Commission and with NFA.[107] Included with the financial report is, among other things, a reconciliation of any material differences from the unaudited financial reports prepared as of the nonbank SD's or nonbank MSP's year-end date.[108]

For instances in which no material differences exist between the unaudited and audited year-end financial statements, however, Commission regulation § 1.10(d)(2)(vi) [109] requires FCMs to include a statement indicating that no such differences exist. Commission regulation § 23.105(e) does not currently provide for such a statement in this parallel provision for audits of nonbank SDs or nonbank MSPs. The Commission is proposing to amend Commission regulation § 23.105(e)(4)(v) so that when nonbank SDs and nonbank MSPs file their audited annual report, a statement that there are no material differences between the audited annual report and the unaudited annual report is included, if no such differences exist. This will align the filing approach for auditors of nonbank SDs and nonbank MSPs with that of FCMs. Requiring an affirmative statement that no material differences exist when none are otherwise reported should enhance the reliability of the annual reports filed by nonbank SDs and nonbank MSPs and should encourage auditors to more rigorously assess the materiality of reporting any discovered audit findings.

Request for Comment

Question 9. Are the regulations as proposed to be amended fit for purpose? If not, what changes would be necessary to achieve the Commission's objective in obtaining timely financial reporting of the capital position of nonbank SDs and MSPs?

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RF Act'') requires that Federal agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities, and if so, provide a regulatory flexibility analysis respecting the impact.[110] Whenever an agency publishes a general notice of proposed rulemaking for any rule, pursuant to the notice-and-comment provisions of the Administrative Procedure Act,[111] a regulatory flexibility analysis or certification typically is required.[112] This proposed rulemaking would affect the obligations of SDs, MSPs, and FCMs. The Commission has previously determined that SDs, MSPs, and FCMs are not small entities for purposes of the RF Act.[113] Therefore, the requirements of the RF Act do not apply to those entities.

Accordingly, for the reasons stated above, the Commission has preliminarily determined that this proposed rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed Commission regulations being published today by this **Federal Register** release will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

1. Background

The Paperwork Reduction Act of 1995 (''PRA'') [114] imposes certain

[100] *See generally* NFA Interpretative Notice 9078 (Feb. 18, 2021), available at *https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=9&RuleID=9078#:~:text=In%20order%20to%20permit%20these%20non-SEC%20registered%20SD,NFA%27s%20pre-approval%20of%20the%20subordinated%20debt%20loan%20agreement.*

[101] Nonbanks SDs that are duly-registered as SBSDs typically elect under Commission regulation § 23.101(a)(1)(ii) to maintain net capital by complying with § 240.18a–1d, and are independently subject to such requirements, including the subordinated-debt approval process, by their registration as a SBSD with the SEC. 17 CFR 240.18a–1d.

[102] Final Rules, 85 FR 57495.

[103] *See* Miscellaneous Rule Deletions, Amendments or Clarifications, 57 FR 20633, 20634 (May 14, 1992). The subordinated debt approval program for FCMs administered by NFA has been in place for over 30 years. In addition, the NFA, as the only registered futures association under the CEA, is specifically required to adopt capital requirements on its members, including SDs, and to implement a program to audit and enforce the compliance with such requirements in accordance with section 17(p)(2) of the CEA, 7 U.S.C. 21(p)(2).

[104] NFA section 18(d).

[105] 17 CFR 23.101(a)(1)(i)(B) and (a)(1)(ii)(C).

[106] 17 CFR 23.105(e)(4)(v).

[107] 17 CFR 23.105(e).

[108] 17 CFR 23.105(e)(4)(v).

[109] 17 CFR 1.10(d)(2)(vi).

[110] 5 U.S.C. 601 *et seq.*

[111] 5 U.S.C. 553. The Administrative Procedure Act is found at 5 U.S.C. 500 *et seq.*

[112] *See* 5 U.S.C. 601(2), 603, 604 and 605.

[113] Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982) (FCMs) and Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2620 (Jan. 19, 2012) (SDs and MSPs).

[114] 44 U.S.C. 3501 *et seq.*

requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. These proposed rule amendments would result in an amendment to existing collection of information ''Regulations and Forms Pertaining to Financial Integrity of the Market Place; Margin Requirements for SDs/MSPs'' [115] as discussed below. The Commission, therefore, is submitting this proposed amendment to the Office of Management and Budget (''OMB'') for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The responses to this collection of information are mandatory. 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 issued by OMB.

The Commission has preliminarily determined that the rule amendments as proposed do not impose any other new collections of information that require approval of OMB under the PRA.

2. Amended Information Collection Requirements and Related Burden Estimates [116]

Currently, there are approximately 106 SDs and no MSPs registered with the Commission that may be impacted by this proposed rulemaking and, in particular, the collection of information discussed below.

Commission regulation § 23.105 requires that each SD and MSP maintain certain specified records, report certain financial information and notify or request permission from the Commission under certain specified circumstances, in each case, as provided in the Commission regulation. For example, the Commission regulation requires generally that SDs and MSPs maintain current books and records, provide notice to the Commission of regulatory capital deficiencies and related documentation, provide notice of certain other events specified in the rule, and file financial reports and related materials with the Commission (including the information in Appendices B and C, as applicable). Commission regulation § 23.105 also requires the SD or MSP to furnish information about its custodians that hold margin for uncleared swap

[115] OMB Control No. 3038–0024, available at *http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3038-0024*.

[116] This discussion does not include information collection requirements that are included under other Commission regulations and related OMB control numbers.

transactions and the amounts of margin so held, and for SDs approved to use models (as discussed above), provide additional information regarding such models, as further described in Commission regulation § 23.105(k).

The Commission estimates that there are 31 SD firms which are required to fulfill their financial reporting, recordkeeping and notification obligations under Commission regulations § 23.105(a)–(n) [117] because they are not subject to a prudential regulator, not already registered as an FCM, and not dually-registered as a SBSD. The Commission does not anticipate that its estimates of burden associated with these obligations will change as a result of any the amendments to Commission regulation § 23.105 proposed herein.

Commission regulation § 23.105(p) and its accompanying Appendix C impose quarterly financial reporting and notification obligations on SDs subject to a prudential regulator. Approximately 55 of the 106 registered SDs are subject to a prudential regulator. The Commission has previously estimated that these reporting and notification requirements impose an on-going burden of 33 hours annually. This results in a total aggregate burden of 1,815 hours annually. The Commission estimates this burden will remain unchanged by the proposed amendments to Commission regulation § 23.105(p), as the burden associated with requirements to file quarterly financial reporting and notifications previously were based on these entities filing their existing information contained in Call Reports along with Schedule 1 information, and under the proposed amendments those remain the obligations for bank SDs, except for Non-U.S. bank SDs who will also still file existing financial reporting information as reported to their home country supervisor, along with Appendix C Schedule 1 information.

C. 15(b) Antitrust Laws

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.[118]

[117] 17 CFR 23.105(a) through (n).

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether the proposed rule implicates any other specific public interest to be protected by the antitrust laws.

The Commission has considered the proposed rule to determine whether it is anticompetitive and has preliminarily identified no anticompetitive effects. The Commission requests comment on whether the proposed rule is anticompetitive and, if it is, what the anticompetitive effects are.

Because the Commission has preliminarily determined that the proposed rule is not anticompetitive and has no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the Act. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the Act that would otherwise be served by adopting the proposed rule.

IV. Cost Benefit Considerations

A. Background

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its discretionary actions before promulgating a regulation under the CEA or issuing certain orders.[119] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations (collectively, the ''Section 15(a) Factors''). In this cost benefit section, the Commission discusses the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) Factors.[120]

Section 4s(e) of the CEA, added by section 731 of the Dodd-Frank Act, provides the Commission with mandatory and discretionary rulemaking authority to adopt capital requirements for nonbank SDs and

[118] 7 U.S.C. 19(b).

[119] 7 U.S.C. 19(a).

[120] The Commission notes that the costs and benefits considered in this proposed rulemaking, and highlighted below, have informed the policy choices described throughout this release.

nonbank MSPs,[121] as well as financial reporting requirements for SDs and MSPs.[122] Section 4s(e) of the CEA requires the Commission to adopt minimum capital requirements for nonbank SDs and nonbank MSPs that are designed to help ensure their safety and soundness and are appropriate for the risk associated with the uncleared swaps held by such nonbank SD or nonbank MSP. In addition, section 4s(e)(2)(C) of the CEA, requires the Commission to establish capital requirements for nonbank SDs or nonbank MSPs that account for the risks associated with their entire swaps portfolio and all other activities conducted. Lastly, section 4s(e)(3)(D) of the CEA provides that the Commission, the prudential regulators, and the SEC, must ''to the maximum extent practicable'' establish and maintain comparable capital rules. Accordingly, this proposed rulemaking includes certain capital and financial reporting requirements related to SDs and MSPs.

The baseline for the Commission's consideration of the costs and benefits of this proposed rulemaking is the existing statutory and regulatory framework applicable to SDs and MSPs, including the capital and margin requirements for SDs and MSPs under subpart E of part 23. The Commission recognizes, however, that to the extent that SDs [123] have arranged their business in reliance on Division interpretations and no-action positions in CFTC Letters No. 21–15 and 21–18, as extended under CFTC Letter No. 23–11, the actual costs and benefits of this proposed rulemaking may be mitigated.

The Commission recognizes that the proposed amendments may impose costs. The Commission has endeavored to assess the expected costs and benefits of the proposed amendments in quantitative terms, including PRA-related costs, where possible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the proposed rules in qualitative terms. The lack of data and information to estimate those costs and benefits is attributable in part to the nature of the proposed amendments, which are tailored financial reporting requirements based on the specific businesses and types of SDs registered with the Commission. Further, SDs represent a wide diversity of business models catering towards different swap counterparties, from financial end users to commercial enterprises. As a result, the Commission expects each SD to have developed its corporate entity in a unique manner by employing different corporate cost structures, making it particularly difficult to estimate the quantitative impacts of both costs and benefits on each SD.

B. Codification of the CFTC Letters and Other Amendments

The Commission is proposing technical amendments to its definitions in Commission regulation § 23.100 for ''predominantly engaged in non-financial activities'' and ''tangible net worth.'' Further, the Commission is proposing to amend Commission regulation § 23.105(p) to add exceptions to the financial reporting requirements for Non-U.S. bank SDs, and permitting bank SDs to file the relevant schedules under the Call Report (Schedule RC and Schedule RC–R) instead of as required by Appendix C. In addition, the Commission is making a number of clarifying amendments including: (1) amending the heading and scope provisions of Commission regulation § 23.105(k) and the titles of certain schedules included in Appendix B; (2) changing public disclosure requirements under Commission regulation § 23.105(i); (3) amending Form 1–FR–FCM to more accurately address net capital changes; (4) adding language to Commission regulation § 23.103(a) and (c)(1) to clarify that standardized charges are the same as applicable to all SDs not using the Bank-Based Capital Approach; and (5) amending the cross reference in Commission regulation § 23.102(d) to make clear that either 12 CFR part 217 or Appendix A should be utilized as applicable by the nonbank SD depending on the respective capital approach elected.

1. Benefits

a. Amendments to Tangible Net Worth Capital Approach—CFTC Letter No. 21–15

The amendments to definitions of ''predominantly engaged in non-financial activities'' and ''tangible net worth'' codifying CFTC Letter No. 21–15 are intended to ensure that the Tangible Net Worth Capital Approach can be utilized by certain nonbank SDs as was originally intended in the Final Rule. These amendments are expected to benefit certain nonbank SDs by ensuring clear and effective compliance with regulatory requirements under the Tangible Net Worth Capital Approach as amended, ultimately reducing operational costs for such nonbank SDs. In particular, nonbank SDs would no longer be required to calculate asset and revenue tests separately between the entity and the ultimate parent level or compute such tests under U.S. GAAP even if such entity was permitted to use IFRS. Further, these amendments would allow nonbank SDs meeting such qualifications to file their supplemental position reports at the same time as routine financial reporting for all nonbank SDs set forth within Commission regulation § 23.105(d).

b. Amendments to Bank SD Financial Reporting Requirements—CFTC Letter No. 21–18

Similarly, the amendments to Commission regulation § 23.105(p) codifying CFTC Letter No. 21–18, as extended under CFTC Letter No. 23–11, are expected to benefit bank SDs by permitting: (1) Non-U.S. bank SDs to file reports by their home country regulators subject to certain conditions; (2) bank SDs to file comparable Call Report schedules in accordance with, and within the timeframe permitted by, the prudential regulators; (3) Non-U.S. bank SDs to file balance sheet and statement of regulatory capital information in accordance with home country requirements provided they are in English, converted to U.S. dollars and filed within 90 calendar days following quarter-end; and (4) dually-registered Non-U.S. bank SDs to file comparable SEC-approved financial reports and schedules. The Commission anticipates that these amendments will eliminate duplicative and superfluous reporting and streamline financial reporting for both Non-U.S. and dually-registered bank SDs.

c. Amendments Regarding Financial Reporting and Computation Requirements of Swap Dealers

Lastly, the amendments regarding financial reporting and computation include: (1) amendments to the heading and scope provision of Commission regulation § 23.105(k) and (l); (2) titles of certain schedules included in Appendix B; (3) alignment of the public disclosure of unaudited financial information with the periodicity permitted by routine financial filings in Commission regulation § 23.105(d), and to remove reference to a statement disclosing the amounts of minimum regulatory capital; (4) amending Form

[121] Section 4s(e)(2)(B) of the CEA, 7 U.S.C. 6s(e)(2)(B).

[122] Section 4s(f) of the CEA, 7 U.S.C. 6s(f).

[123] Currently, there are no MSPs registered with the Commission and there have not been any MSPs registered with the Commission for several years. Thus, this section regarding the Commission's consideration of the costs and benefits of this proposed rulemaking will only refer to SDs that may have relied on CFTC Letters No. 21–15 and 21–18 and may benefit from the compliance exceptions set forth herein.

1–FR–FCM to add the 2 percent of uncleared swap margin capital requirement and swaps and security-based swaps haircuts; and (5) addition of clarifying language to Commission regulations § 23.103(a)(1) and (c)(1) to provide additional clarity to registrants that the same standardized market and credit risk charges are applicable to nonbank SDs utilizing the Tangible Net Worth Capital Approach as are applicable to all other nonbank SDs if not approved to use models. These amendments are meant to clarify what was originally intended in the Final Rule or what is already included within the existing Commission regulations, as well as align the schedules as currently required by the SEC and the NFA. The Commission anticipates that these amendments will remove uncertainty amongst SDs about the type of form and the extent of detail that they should be reporting.

2. Costs

The Commission generally does not anticipate any costs associated with the above amendments as they are intended to streamline and clarify existing financial reporting and capital requirements. Of the above, only the amendments to Commission regulation § 23.105(l) would impose additional financial reporting requirements on nonbank SDs and nonbank MSPs not approved to use models to file Schedules 2–4 of Appendix B.

Currently, there are 8 nonbank SDs not approved to use models that are not currently filing Schedules 2–4 of Appendix B but would be required to do so under the amendments to Commission regulation § 23.105(l). The information required under Appendix B is nearly identical in all material respects to corresponding forms found in the SEC Form FOCUS Report Part II, as well as the capital and financial reporting requirements by the NFA for its member nonbank SDs and nonbank MSPs. Thus, the Commission has preliminarily determined that these nonbank SDs already have developed policies, procedures and systems to aggregate, monitor, and track their swap activities and risks as is required under Schedules 2–4 of Appendix B. This should mitigate some of the burdens of the additional reporting and recordkeeping requirements. Finally, the amendments to Commission regulation § 23.105(k) clarify that nonbank SDs and nonbank MSPs approved to use models may comply with the requirements to provide specific financial information required by Commission regulation § 23.105(k) by filing Appendix B. Such nonbank SDs and nonbank MSPs have already been filing Appendix B with the Commission, and thus the Commission has preliminarily determined that the amendments to Commission regulation § 23.105(k) would not impose any additional burden for such nonbank SDs and nonbank MSPs.

3. Section 15(a) Factors

The following is a discussion of the cost and benefit considerations of this proposed rulemaking, as it relates to the five broad areas of market and public concern identified in section 15(a) of the CEA: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of swaps markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

a. Protection of Market Participants and the Public

The proposed rules are intended to enhance the clarity of financial reporting and computation requirements by revising the language of the regulations with respect to the type of forms and the tests that SDs should be using as part of their financial reporting process. The changes to the computation of Tangible Net Worth are anticipated to benefit the public by allowing investors to monitor tangible net worth at the consolidated parent's level, and the financial reporting requirements for both bank SDs and nonbank SDs set out in this proposed rulemaking should help the Commission and market participants monitor and assess the financial condition of such SDs more accurately and as was intended in the Final Rule. These amendments are also intended to harmonize financial reporting requirements with those of the prudential regulators, and the SEC, through which market participants and the Commission can gain a clearer and more directly comparable understanding of the financial reports received. Clarifying rules should safeguard both market participants and the public by improving transparency and reducing ambiguity.

Request for Comment

Question 10. Do the proposed financial reporting and computation requirements protect market participants and the public? Please explain.

b. Efficiency, Competitiveness, and Financial Integrity of Swaps Markets

In this proposed rulemaking, the Commission seeks to promote efficiency and financial integrity of the swaps market by streamlining many of the financial reporting requirements. For example, the amendments to Commission regulation § 23.105(p) permit certain bank SDs to file with the Commission comparable Call Report schedules in accordance with, and within the timeframe permitted by, the prudential regulators that they currently file with the prudential regulators, or comparable SEC-approved financial reports and schedules, as applicable. The proposed amendments to Commission regulation § 23.105(p) would also allow certain Non-U.S. bank SDs to file with the Commission what they currently file with their respective home country regulators, subject to certain conditions. In addition, the amendments to Commission regulation § 23.105(k) are meant to ensure that the information listed in Appendix B is completed by all nonbank SDs and nonbank MSPs as was intended, and is consistent with that required by the SEC and NFA, and the amendments to Form 1–FR–FCM are meant to harmonize with the SEC's requirements in its FOCUS Report Part II. Harmonizing requirements should foster a more level playing field, ultimately promoting trust and integrity within the market.

The Commission anticipates that these amendments will promote greater operational efficiencies for both bank and nonbank SDs that are already regulated, either prudentially or through comparable foreign regulators, as they may be able to avoid creating duplicative compliance and operational infrastructures. The proposed amendments should allow the Commission to monitor the financial integrity of swaps markets more clearly and efficiently, including in the case of any default or financial contagion.

Request for Comment

Question 11. How might this proposal affect market integrity? Is market integrity adversely affected by the proposed rules? If so, how might the Commission mitigate any harmful impact?

c. Price Discovery

The Commission anticipates that the proposed amendments may enhance price discovery. By clarifying financial reporting and computation requirements and harmonizing reporting practices, a more efficient operating environment would be created for SDs, which are important intermediaries within the swaps markets. This improved data quality reported to regulators has the potential to enhance supervision, leading to improved market quality.

Consequently, this could lead to a more effective and accurate price discovery process.

Request for Comment

Question 12. How might this proposed rulemaking affect price discovery? Please explain.

d. Sound Risk Management Practices

The Commission has preliminarily determined that, as a result of the proposed reporting and recordkeeping requirements, SDs may more effectively track their trading and risk exposure in swaps and other financial activities. To the extent that these SDs can better monitor and track their risks, the Commission anticipates that this should help them better manage risk within the entity.

Request for Comment

Question 13. How might this proposal affect SD's risk management practices? Please explain.

e. Other Public Interest Considerations

The Commission has not identified any additional public interest considerations related to the costs and benefits of the proposed rule.

Request for Comment

Question 14. Are there other public interest considerations that the Commission should consider? Please explain.

C. Other Amendments

The Commission is proposing a number of clarifying amendments intended to align with existing Commission regulations, including: (1) amending Commission regulation § 23.105(c)(4) to add a two business days reporting timeframe to the requirement for nonbank SD notice filing of a substantial reduction in capital; (2) amending Commission regulations § 23.101(a)(1)(i)(B) and (a)(1)(ii)(C) to establish that the use of subordinated debt as regulatory capital is subject to the approval of either an RFA of which the nonbank SD is a member, or the Commission; and (3) amending Commission regulation § 23.105(e)(4)(v) for SDs and MSPs to include an explicit statement, if applicable, that there are no material differences between the audited annual report and the unaudited annual report of the same date.

1. Benefits

a. Notice of Substantial Reduction in Capital

The amendments to the notice requirements in Commission regulation § 23.105(c)(4) would add a two-business days requirement for nonbank SDs for notice of substantial reduction in capital. The Commission has preliminarily determined that adding a reporting timeframe to the notice requirement will enhance compliance by providing regulatory certainty to nonbank SDs of when such a filing is due.

b. Subordinated Debt Approval

The amendments to Commission regulation § 23.101(a)(1)(i)(B) would establish that the use of subordinated debt as regulatory capital is subject to the approval of either an RFA of which the nonbank SD is a member, or the Commission. The amendments should further provide regulatory clarity by establishing the process for approving subordinated debt for nonbank SDs, which was not explicitly articulated in the Final Rule and had led to uncertainty among nonbank SDs.

c. Statement of No Material Difference

Lastly, the amendments to Commission regulation § 23.105(e)(4)(v) would require that the SDs and MSPs include an explicit statement, if applicable, of no material differences between the audited and the unaudited annual report of the same date. Doing so should not only align the filing approach for auditors of SDs with that of FCMs, but also enhance the reliability of such annual reports by encouraging auditors to more rigorously assess the materiality of reporting any discovered audit findings.

2. Costs

The Commission does not anticipate that compliance with the above amendments will lead to any significant costs. The amendments to Commission regulations § 23.105(c)(4) and (e)(4)(v) are meant to align the financial reporting requirements of SDs with that of FCMs, and based on the Commission's experience with existing filings and discussions with registered SDs, the Commission has preliminarily determined that the registrants will be able to file necessary information within the timeframe provided. The amendments to Commission regulation § 23.101(a)(1)(i)(B) are meant to establish a process of approving subordinated debt for nonbank SDs, and as such they would not levy any additional costs to the nonbank SDs.

3. Section 15(a) Factors

The following is a discussion of the cost and benefit considerations of the proposed rulemaking, as it relates to the five broad areas of market and public concern identified in section 15(a) of the CEA: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of swaps markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

a. Protection of Market Participants and the Public

The Commission anticipates that the proposed amendment to Commission regulation § 23.105(c)(4) should protect market participants and the public against possible market disruption by requiring that all SDs file a notice of a substantial reduction in capital within two business days after such an incident has occurred. Similarly, the amendments to Commission regulation § 23.101(a)(1)(i)(B) should provide market clarity on how subordinated debt is approved for consideration as capital, and the amendments to Commission regulation § 23.105(e)(4)(v) should allow the Commission and the public to effectively monitor cases where there are no material differences between the audited and unaudited annual report of the same date filed by nonbank SDs and nonbank MSPs. These amendments should enable market participants to have better insights into SD's capital and financial positions. This, in turn, should enhance the protection of both market participants and the public.

Request for Comment

Question 15. Do the proposed financial reporting requirements protect market participants and the public? Please explain.

b. Efficiency, Competitiveness, and Financial Integrity of Swaps Markets

The proposed amendments should improve the accuracy and completeness of nonbank SDs' and nonbank MSPs' financial reporting by imposing a two-business day deadline for notice of substantial reduction in capital, and an affirmative statement of no material differences between the audited and unaudited annual financial statement, as applicable. The establishment of a process for approving subordinated debt should lead to increased efficiency in how such subordinated debt is monitored. Further, these amendments are also intended to harmonize financial reporting requirements with those of the prudential regulators, as well as the Commission's existing framework regarding FCMs. Harmonizing requirements should foster a more level playing field, ultimately promoting trust and integrity within the market.

Request for Comment

Question 16. Is market integrity adversely affected by the proposed rules? If so, how might the Commission mitigate any harmful impact?

c. Price Discovery

The Commission anticipates that the proposed amendments may enhance price discovery. By improving financial reporting requirements for nonbank SDs and nonbank MSPs, a more efficient operating environment should be created for SDs, which are important intermediaries within the swaps markets. This improved data quality reported to regulators has the potential to enhance supervision, leading to improved market quality. Consequently, this could lead to a more effective and accurate price discovery process.

Request for Comment

Question 17. How might this proposed rulemaking affect price discovery? Please explain.

d. Sound Risk Management Practices

The Commission anticipates that the above amendments will lead to better risk management practices among SDs and MSPs, particularly by requiring them to monitor for potential reduction in capital and material differences between the audited and the unaudited annual financial statements.

Request for Comment

Question 18. How might this proposed rulemaking affect risk management practices of nonbank SDs and nonbank MSPs? Please explain.

e. Other Public Interest Considerations

The Commission has not identified any additional public interest considerations related to the costs and benefits of the proposed rule.

Request for Comment

Question 19. Are there other public interest considerations that the Commission should consider? Please explain.

Note: The following appendix to this preamble pertains to a form that does not appear in the Code of Federal Regulations.

BILLING CODE 6351–01–P

Appendix to the Preamble—Proposed Revisions to Selected Section of Form 1–FR–FCM: Statement of the Computation of the Minimum Capital Requirements

Appendix to the Preamble – Proposed Revisions to Selected Section of Form 1-FR-FCM:

Statement of the Computation of the Minimum Capital Requirements<PHOTO>

CFTC FORM 1-FR-FCM
STATEMENT OF THE COMPUTATION OF THE MINIMUM CAPITAL REQUIREMENTS
AS OF

Net Capital

1.	Current assets (page 3, line 20)			3000
2.	Increase/(decrease) to U.S. clearing organization stock to reflect margin value			3010
3.	Net current assets			3020
4.	Total liabilities (page 5, line 32)		3030	
5.	Deductions from total liabilities			
	A. Liabilities subject to satisfactory subordination agreements (page 5, line 31.A)	3040		
	B. Certain deferred income tax liability (see regulation 1.17(c)(4)(iv))	3050		
	C. Certain current income tax liability (see regulation 1.17(c)(4)(v))	3060		
	D. Long term debt pursuant to regulation 1.17(c)(4)(vi)	3070		
	E. Total deductions (add lines 5.A. - 5.D.)		3080	
	F. Adjusted liabilities (subtract line 5.E from line 4)			3090
6.	Net capital (subtract line 5.F. from line 3)			3100

Charges Against Net Capital (see regulation 1.17(c)(5))

7.	Excess of advances paid on cash commodity contracts over 95% of the market value of commodities covered by such contracts	3110
8.	Five percent (5%) of the market value of inventories covered by open futures contracts or commodity options (no charges applicable to inventories registered as deliverable on a contract market and which are covered by futures contracts)	3120
9.	Twenty percent (20%) of the market value of uncovered inventories or lesser percentage charge for uncovered balances in specified foreign currencies	3130
10.	Ten percent (10%) of the market value of commodities underlying fixed price commitments and forward contracts which are covered by open futures contracts or commodity options	3140
11.	Twenty percent (20%) of the market value of commodities underlying fixed price commitments and forward contracts which are not covered by open futures contracts or commodity options	3150

12. Charges as specified in section 240.15c3-1(c)(2)(vi) and (vii) against securities owned by firm, including securities representing investments of domestic and foreign customers' funds:

	Market Value		Charge			
A. U.S. and Canadian government obligations	______	3160	______	3170		
B. State and Municipal government obligations	______	3180	______	3190		
C. Certificates of deposit, commercial paper and bankers' acceptances	______	3200	______	3210		
D. Corporate obligations	______	3220	______	3230		
E. Stocks and warrants	______	3240	______	3250		
F. Other securities	______	3260	______	3270		
G. Total charges (add lines 12.A. - 12.F.)					______	3280

13. Charges as specified in section 240.15c3-1(c)(2)(iv)(F)		
A. Against securities purchased under agreements to resell	______	3290
B. Against securities sold under agreements to repurchase	______	3300
14. Charges on securities options as specified in section 240.15c3-1, Appendix A	______	3310
15. Undermargined commodity futures and commodity options accounts - amount in each account required to meet maintenance margin requirements, less the amount of current margin calls in that account and the amount of any noncurrent deficit in the account		
A. Customer accounts	______	3320
B. Noncustomer accounts	______	3330
C. Omnibus accounts	______	3340

16. Charges against open commodity and cleared OTC derivatives positions in proprietary accounts and swaps

A. Uncovered exchange-traded futures, cleared OTC derivatives positions and granted options contracts				
i percentage of margin requirements applicable to such contracts	______	3350		
ii Less: equity in proprietary accounts included in liabilities	______	3360	______	3370
B. Ten percent (10%) of the market value of commodities which underlie commodity options not traded on a contract market carried long by the applicant or registrant which has value and such value increased adjusted net capital (this charge is limited to the value attributed to such options)			______	3380
C. Commodity options which are traded on contract markets and carried long in proprietary accounts. Charge is the same as would be applied if the applicant or registrant was the grantor of the options (this charge is limited to the value attributed to such options)			______	3390
D. Haircuts on swaps and security-based swaps pursuant to 1.17(c)(5)(iii), (iv), (xv), and (xvi) (itemize to the subparagraph level on separate page)			______	XXXX
17. Five percent (5%) of all unsecured receivables from foreign brokers			______	3410
18. Deficiency in collateral for secured demand notes			______	3420
19. Adjustment to eliminate benefits of consolidation (explain on separate page)			______	3430
20. Total charges (add lines 7 through 19)			______	3440

Adjusted Net Capital Computation

21. Adjusted net capital (subtract line 20 from line 6)			______ 3500
22. Adjusted Net capital required			
A. Risk Based Capital Requirement			
i Amount of Customer Risk Maintenance Margin	______ 3515		
ii Enter 8% of line 22.A.i		______ 3525	
iii Amount of Non-Customer Risk Maintenance Margin	______ 3535		
iv Enter 8% of line 22.A.iii		______ 3545	
v Enter the sum of 22.A.ii and 22.A.iv		______ 3555	
vi Total Uncleared Swap Margin, as applicable		______ XXXX	
vii Enter 2% of line 22.A.vi		______ XXXX	
viii Enter the sum of 22.A.v and 22.A.vii		______ XXXX	
B. Minimum Dollar Amount Requirement		______ 3565	
C. Other NFA Requirement		______ 3575	
D. Adjusted Net Capital Requirement Enter the greater of lines 22.A.viii, 22.B. or 22.C			______ 3600
23. Excess adjusted net capital (line 21 less line 22.D.)			______ 3610

Computation of Early Warning Level

24. If the Minimum Adjusted Net Capital Requirement computed on line 22.D (Box 3600) is: 3620 ______

- The Risk Based Requirement, enter 110% of line 22.A.viii. (XXXX), or
- The Minimum Dollar Requirement of $1,000,000, for FCMs, or $20,000,000 for FCMs registered as SDs, enter 150% of line 22.B. (3565), or
- The Minimum Dollar Requirement of $20,000,000 for FCMs offering or engaging in retail forex transactions or Retail Foreign Exchange Dealers ("RFED"), enter 110% of line 22.B. (3565), or
- Other NFA Requirement of $20,000,000 plus five percent of the FCM's offering or engaging in retail forex transactions or RFED's total retail forex obligations in excess of $10,000,000, enter 110% of line 22.C. (3575), or
- Any other NFA Requirement, enter 150% of line 22.C. (3575)

This is your early warning capital level. If this amount is greater than the amount on line 21, you must immediately notify your DSRO and the Commission pursuant to section 1.12 of the regulations.

Guaranteed Introducing Brokers

25. List all IBs with which guarantee agreements have been entered into by the FCM and which are currently in effect. 3650
See Attached.

BILLING CODE 6351–01–C

List of Subjects in 17 CFR Part 23

Reporting and recordkeeping requirements, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR part 23 as follows:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

■ 1. The authority citation for part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

Section 23.160 also issued under 7 U.S.C. 2(i); Sec. 721(b), Pub. L. 111–203, 124 Stat. 1641 (2010).

■ 2. Amend § 23.100 by adding, in alphabetical order, a definition of the term ''Call Report'' and revising the definitions of the terms ''Predominantly engaged in non-financial activities'' and ''Tangible net worth'' to read as follows:

§ 23.100 Definitions applicable to capital requirements.

* * * * *

Call Report. This term means the Federal Financial Institutions Examination Council Form 031 that a swap dealer or major swap participant for which there is a prudential regulator is required to file with its applicable prudential regulator.

* * * * *

Predominantly engaged in non-financial activities. A swap dealer is predominantly engaged in non-financial activities if:

(1) The swap dealer's consolidated annual gross financial revenues, or if the swap dealer is a wholly owned subsidiary, then the swap dealer's consolidated parent's annual gross financial revenues, in either of its two most recently completed fiscal years represents less than 15 percent of the swap dealer's or the swap dealer's

consolidated parent's consolidated gross revenue in that fiscal year (''15% revenue test''), and

(2) The consolidated total financial assets of the swap dealer, or if the swap dealer is wholly owned subsidiary, then the consolidated total financial assets of the swap dealer's parent, at the end of its two most recently completed fiscal years represents less than 15 percent of the swap dealer's or the swap dealer's consolidated parent's consolidated total assets as of the end of the fiscal year (''15% asset test'').

(3) For purpose of computing the 15% revenue test or the 15% asset test, a swap dealer's activities or swap dealer's parent's activities shall be deemed financial activities if such activities are defined as financial activities under 12 CFR 242.3 and Appendix A to 12 CFR 242, including lending, investing for others, safeguarding money or securities for others, providing financial or investment advisory services, underwriting or making markets in securities, providing securities brokerage services, and engaging as principal in investing and trading activities; *Provided, however,* a swap dealer or a swap dealer's consolidated parent may exclude from its financial activities accounts receivable resulting from non-financial activities.

* * * * *

Tangible net worth. This term means the net worth of a swap dealer or major swap participant as determined in accordance with U.S. generally accepted accounting principles, or International Financial Reporting Standards issued by the International Accounting Standards Board if the swap dealer or major swap participant is permitted under § 23.105(b) to prepare and maintain books and records in accordance with such standards, but in either case, excluding goodwill and other intangible assets. In determining net worth, all long and short positions in swaps, security-based swaps and related positions must be marked to their market value. A swap dealer or major swap participant must include in its computation of tangible net worth all liabilities or obligations of a subsidiary or affiliate that the swap dealer or major swap participant guarantees, endorses, or assumes either directly or indirectly.

* * * * *

■ 3. Amend § 23.101 by revising paragraphs (a)(1)(i)(B), (a)(1)(ii)(B), and (a)(1)(ii)(C), and adding paragraph (a)(1)(ii)(D) to read as follows:

§ 23.101 Minimum financial requirements for swap dealers and major swap participants.

(a)(1) * * *

(i) * * *

(B) An aggregate of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital, all as defined under the bank holding company regulations in 12 CFR 217.20, equal to or greater than eight percent of the swap dealer's BHC equivalent risk-weighted assets; *provided, however,* that the swap dealer must maintain a minimum of common equity tier 1 capital equal to six point five percent of its BHC equivalent risk-weighted assets; *provided further,* that any capital that is subordinated debt under 12 CFR 217.20 and that is included in the swap dealer's capital for purposes of this paragraph (a)(1)(i)(B) must qualify as subordinated debt under § 240.18a–1d of this title in accordance with a qualification determination of the Commission or a registered futures association of which the swap dealer is a member;

* * * * *

(ii) * * *

(B) A swap dealer that uses internal models to compute market risk for its proprietary positions under § 240.18a–1(d) of this title must calculate the total market risk as the sum of the VaR measure, stressed VaR measure, specific risk measure, comprehensive risk measure, and incremental risk measure of the portfolio of proprietary positions in accordance with § 23.102 and Appendix A to subpart E of this part;

(C) A swap dealer may recognize as a current asset, receivables from third-party custodians that maintain the swap dealer's initial margin deposits associated with uncleared swap and security-based swap transactions pursuant to the margin rules of the Commission, the Securities and Exchange Commission, a prudential regulator, as defined in section 1a(39) of the Act, or a foreign jurisdiction that has received a margin Comparability Determination under § 23.160; and

(D) The qualification of any subordinated debt used to meet any capital requirements shall be as determined by the Commission or a registered futures association of which the swap dealer is a member.

* * * * *

■ 4. In § 23.102, revise paragraph (d) to read as follows:

§ 23.102 Calculation of market risk exposure requirement and credit risk exposure requirement using internal models.

* * * * *

(d) The Commission, or registered futures association upon obtaining the Commission's determination that its requirements and model approval process are comparable to the Commission's requirements and process, may approve or deny the application, or approve or deny an amendment to the application, in whole or in part, subject to any conditions or limitations the Commission or registered futures association may require, if the Commission or registered futures association finds the approval to be appropriate in the public interest, after determining, among other things, whether the applicant has met the requirements of this section. A swap dealer that has received Commission or registered futures association approval to compute market risk exposure requirements and credit risk exposure requirements pursuant to internal models must compute such charges in accordance with paragraph (c) of this section.

* * * * *

■ 5. In § 23.103, revise paragraphs (a)(1) and (c)(1) to read as follows:

§ 23.103 Calculation of market risk exposure requirement and credit risk requirement when models are not approved.

(a) * * *

(1) Computes its regulatory capital requirements under § 23.101(a)(1)(ii) or (a)(2), and

* * * * *

(c) * * *

(1) A swap dealer that computes regulatory capital under § 23.101(a)(1)(ii) or (a)(2) shall compute counterparty credit risk charges using the applicable standardized credit risk charges set forth in § 240.18a-1 of this title and § 1.17 of this chapter for such positions.

* * * * *

■ 6. In § 23.105, revise paragraphs (c)(2) and (c)(4), (d)(2) through (d)(4), (e)(4)(v), (e)(6), (i)(1)(i) and (ii), (i)(2)(ii), the introductory text to (k)(1), (l), (p)(2), and (p)(7) to read as follows:

§ 23.105 Financial recordkeeping, reporting and notification requirements for swap dealers and major swap participants.

* * * * *

(c) * * *

(2) A swap dealer or major swap participant who knows or should have known that its regulatory capital at any time is less than 120 percent of its minimum regulatory capital requirement as determined under § 23.101, or less than the amounts identified in § 1.12(b) of this chapter for a swap dealer or major swap participant that is also a futures commission merchant, must provide written notice to the Commission and to the registered futures association of which it is a

member to that effect within 24 hours of such event.

* * * * *

(4) A swap dealer or major swap participant must provide written notice within two business days to the Commission and to the registered futures association of which it is a member of a substantial reduction in capital as compared to that last reported in a financial report filed with the Commission pursuant to this section. The notice shall be provided if the swap dealer or major swap participant experiences a 30 percent or more decrease in the amount of capital that the swap dealer or major swap participant holds in excess of its regulatory capital requirement as computed under § 23.101.

* * * * *

(d) * * *

(2) The financial reports required by this section must be prepared in the English language and be denominated in United States dollars. The financial reports shall include a statement of financial condition, a statement of income/loss, a statement of changes in liabilities subordinated to the claims of general creditors, a statement of changes in ownership equity, a statement demonstrating compliance with and calculation of the applicable regulatory capital requirement under § 23.101, and such further material information as may be necessary to make the required statements not misleading. The monthly or quarterly report and schedules must be prepared in accordance with generally accepted accounting principles as established in the United States; *Provided, however,* that a swap dealer or major swap participant that is not otherwise required to prepare financial statements in accordance with U.S. generally accepted accounting principles, may prepare the monthly or quarterly report and schedules required by this section in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board.

(3) A swap dealer or major swap participant that is also registered with the Securities and Exchange Commission as a broker or dealer, security-based swap dealer, or a major security-based swap participant and files a monthly Form X–17A–5 FOCUS Report Part II with the Securities and Exchange Commission pursuant to § 240.18a–7 or 240.17a–5 of this title, as applicable, must file such Form X–17A–5 FOCUS Report Part II with the Commission and with the registered futures association in lieu of the financial reports required under paragraphs (d)(1) and (2) of the section. The swap dealer or major swap participant must file the form with the Commission and registered futures association when it files the Form X–17A–5 FOCUS Report Part II with the Securities and Exchange Commission, *provided, however,* that the swap dealer or major swap participant must file the Form X–17A–5 FOCUS Report Part II with the Commission and registered futures association no later than 17 business days after the end of each month.

(4) A swap dealer or major swap participant that is also registered with the Commission as a futures commission merchant must file a Form 1–FR–FCM or such other form as the futures commission merchant is permitted to file under § 1.10 of this chapter, in lieu of the monthly financial reports required under paragraphs (d)(1) and (2) of the section.

(e) * * *

(4) * * *

(v) A reconciliation of any material differences from the unaudited financial report prepared as of the swap dealer's or major swap participant's year-end date under paragraph (d) of this section and the swap dealer's or major swap participant's annual financial report prepared under this paragraph (e) or, if no material differences exist, a statement so indicating; and

* * * * *

(6) A swap dealer or major swap participant that is also registered with the Commission as a futures commission merchant must file an audited Form 1–FR–FCM or such other form as the futures commission merchant is permitted to file under § 1.10 of this chapter, and must comply with the requirements of § 1.16 of this chapter, including filing a supplemental accountant's report on material inadequacies concurrently with the audited annual report, in lieu of the annual financial report required under this paragraph (e).

* * * * *

(i) * * *

(1) * * *

(i) The statement of financial condition including applicable footnotes; and

(ii) The amounts of the swap dealer's or major swap participant's regulatory capital and minimum regulatory capital requirement, computed in accordance with § 23.101.

(2) * * *

(ii) The amounts of the swap dealer's or major swap participant's regulatory capital as of the fiscal year end and its minimum regulatory capital requirement, computed in accordance with § 23.101.

* * * * *

(k) * * *

(1) A swap dealer that has received approval or filed an application for provisional approval under § 23.102(d) from the Commission, or from a registered futures association of which the swap dealer is a member, to use internal models to compute its market risk exposure requirement and credit risk exposure requirement in computing its regulatory capital under § 23.101 must file with the Commission and with the registered futures association of which the swap dealer is a member the specific information contained in Appendix B to subpart E of this part and the following information within 17 business days of the end of each month or quarter as applicable:

* * * * *

(l) *Additional position and counterparty reporting requirements for swap dealers and major swap participants not approved to use models.* A swap dealer or major swap participant which is not subject to paragraph (k) of this section must provide the Commission and the registered futures association of which the swap dealer or major swap participant is a member, the additional specific information contained in Appendix B to subpart E of this part on a monthly or quarterly basis as applicable to its required frequency of financial reporting under paragraph (d) of this section.

* * * * *

(p) * * *

(2) *Financial report and position information.* (i) A swap dealer or major swap participant that files a Call Report with its applicable prudential regulator shall file Schedule RC—Balance Sheet and Schedule RC—R Regulatory Capital from its Call Report filed with the prudential regulator, and Schedule 1 of Appendix C to subpart E of this part, with the Commission on a quarterly basis. The swap dealer or major swap participant shall file the schedules with the Commission on the date the Call Report is due to be filed with the swap dealer's or major swap participant's prudential regulator.

(ii) A swap dealer or major swap participant domiciled in a non-U.S. jurisdiction that is not required to file a Call Report by its applicable prudential regulator shall file a statement of financial condition and regulatory capital information containing comparable financial information as required by Schedule RC—Balance Sheet and Schedule RC—R Regulatory

Capital of the Call Report, and shall file Schedule 1 of Appendix C to subpart E of this part, with the Commission on a quarterly basis. The statement of financial condition, regulatory capital information, and Schedule 1 of Appendix C to subpart E of this part shall be prepared and presented in accordance with the accounting standards approved by the swap dealer's or major swap participant's home country regulatory authorities, *provided, however,* that the schedules and information must be in the English language with balances converted to U.S. dollars. The swap dealer or major swap participant shall file the statement of financial condition, regulatory capital information, and Schedule 1 of Appendix C to subpart E of this part with the Commission no later than 90 calendar days after the end of the swap dealer's or major swap participant's fiscal quarter.

* * * * *

(7) A swap dealer or major swap participant that is subject to the capital requirements of a prudential regulator and is also registered with the Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant and files a quarterly Form X–17A–5 FOCUS Report Part IIC with the Securities and Exchange Commission pursuant to § 240.18a–7 of this title, must file such Form X–17A–5 FOCUS Report Part IIC with the Commission in lieu of the financial reports required under paragraphs (p)(2) of this section. The swap dealer or major swap participant must file the form with the Commission when it files the Form X–17A–5 FOCUS Report Part IIC with the Securities and Exchange Commission, *provided, however,* that the swap dealer or major swap participant must file the Form X–17A–5 FOCUS Report Part IIC with the Commission no later than 30 calendar days from the date the report is made.

■ 7. In Appendix B to subpart E of part 23, revise the schedule headings of Schedules 1, 2, 3, and 4, and republish the schedules, to read as follows:

Appendix B to Subpart E of Part 23—Swap Dealer and Major Swap Participant Position Information

BILLING CODE 6351–01–P

Reg. 23.105(k) and (l) Appendix B	SCHEDULE 1 – AGGREGATE SECURITIES, COMMODITIES, AND SWAPS POSITIONS
	Items on this page to be reported by: Swap Dealers (Authorized and not authorized to use models) Major Swap Participants (Authorized and not authorized to use models)

Aggregate Securities, Commodities, and Swaps Positions	LONG/BOUGHT	SHORT/SOLD
1. U.S. treasury securities	$ ____ 8200	$ ____ 8201
2. U.S. government agency and U.S. government-sponsored enterprises	$ ____ 8210	$ ____ 8211
A. Mortgage-backed securities issued by U.S. government agency and U.S. government-sponsored enterprises	$ ____ 18001	$ ____ 18002
B. Debt securities issued by U.S. government agency and U.S. government-sponsored enterprises	$ ____ 18003	$ ____ 18004
3. Securities issued by states and political subdivisions in the U.S	$ ____ 8220	$ ____ 8221
4. Foreign securities		
A. Debt securities	$ ____ 8230	$ ____ 8231
B. Equity securities	$ ____ 8235	$ ____ 8236
5. Money market instruments	$ ____ 8240	$ ____ 8241
6. Private label mortgage backed securities	$ ____ 8250	$ ____ 8251
7. Other asset-backed securities	$ ____ 8260	$ ____ 8261
8. Corporate obligations	$ ____ 8270	$ ____ 8271
9. Stocks and warrants (other than arbitrage positions)	$ ____ 8280	$ ____ 8281
10. Arbitrage	$ ____ 8290	$ ____ 8291
11. Spot commodities	$ ____ 8330	$ ____ 8331
12. Other securities and commodities	$ ____ 8360	$ ____ 8361
13. Securities with no ready market		
A. Equity	$ ____ 8340	$ ____ 8341
B. Debt	$ ____ 8345	$ ____ 8346
C. Other	$ ____ 8350	$ ____ 8351
D. Total securities with no ready market	$ ____ 12777	$ ____ 12782
14. Total net securities and spot commodities (sum of Lines 1-12 and 13D)	$ ____ 12778	$ ____ 12783
15. Security-based swaps		
A. Cleared	$ ____ 12106	$ ____ 12114
B. Non-cleared	$ ____ 12107	$ ____ 12115
16. Mixed swaps		
A. Cleared	$ ____ 12108	$ ____ 12116
B. Non-cleared	$ ____ 12109	$ ____ 12117
17. Swaps		
A. Cleared	$ ____ 12110	$ ____ 12118
B. Non-cleared	$ ____ 12111	$ ____ 12119
18. Other derivatives and options	$ ____ 8295	$ ____ 8296
19. Counterparty netting	$ ____ 12779	$ ____ 12784
20. Cash collateral netting	$ ____ 12780	$ ____ 12785
21. Total derivative receivables and payables (sum of Lines 15-20)	$ ____ 12781	$ ____ 12786
22. Total net securities, commodities, and swaps positions (sum of Lines 14 and 21)	$ ____ 8370	$ ____ 8371

Name of firm: ____________
As of: ________________

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

Reg. 23.105(k) and (l) Appendix B	SCHEDULE 2 – CREDIT CONCENTRATION REPORT FOR FIFTEEN LARGEST EXPOSURES IN DERIVATIVES
	Items on this page to be reported by: Swap Dealers (Authorized and not authorized to use models) Major Swap Participants (Authorized and not authorized to use models)

I. **By Current Net Exposure**

Counterparty Identifier	Gross Replacement Value Receivable (Gross Gain)	Payable (Gross Loss)	Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
1. 12120	$ 12135	$ 12151	$ 12167	$ 12183	$ 12199	$ 12215
2. 12121	$ 12136	$ 12152	$ 12168	$ 12184	$ 12200	$ 12216
3. 12122	$ 12137	$ 12153	$ 12169	$ 12185	$ 12201	$ 12217
4. 12123	$ 12138	$ 12154	$ 12170	$ 12186	$ 12202	$ 12218
5. 12124	$ 12139	$ 12155	$ 12171	$ 12187	$ 12203	$ 12219
6. 12125	$ 12140	$ 12156	$ 12172	$ 12188	$ 12204	$ 12220
7. 12126	$ 12141	$ 12157	$ 12173	$ 12189	$ 12205	$ 12221
8. 12127	$ 12142	$ 12158	$ 12174	$ 12190	$ 12206	$ 12222
9. 12128	$ 12143	$ 12159	$ 12175	$ 12191	$ 12207	$ 12223
10. 12129	$ 12144	$ 12160	$ 12176	$ 12192	$ 12208	$ 12224
11. 12130	$ 12145	$ 12161	$ 12177	$ 12193	$ 12209	$ 12225
12. 12131	$ 12146	$ 12162	$ 12178	$ 12194	$ 12210	$ 12226
13. 12132	$ 12147	$ 12163	$ 12179	$ 12195	$ 12211	$ 12227
14. 12133	$ 12148	$ 12164	$ 12180	$ 12196	$ 12212	$ 12228
15. 12134	$ 12149	$ 12165	$ 12181	$ 12197	$ 12213	$ 12229
All other counterparties	$ 12150	$ 12166	$ 12182	$ 12198	$ 12214	$ 12230
Totals:	$ 7810	$ 7811	$ 7812	$ 7813	$ 7814	$ 12231

II. **By Current Net and Potential Exposure**

Counterparty Identifier	Gross Replacement Value Receivable (Gross Gain)	Payable (Gross Loss)	Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
1. 12232	$ 12247	$ 12264	$ 12281	$ 12298	$ 12315	$ 12332
2. 12233	$ 12248	$ 12265	$ 12282	$ 12299	$ 12316	$ 12333
3. 12234	$ 12249	$ 12266	$ 12283	$ 12300	$ 12317	$ 12334
4. 12235	$ 12250	$ 12267	$ 12284	$ 12301	$ 12318	$ 12335
5. 12236	$ 12251	$ 12268	$ 12285	$ 12302	$ 12319	$ 12336
6. 12237	$ 12252	$ 12269	$ 12286	$ 12303	$ 12320	$ 12337
7. 12238	$ 12253	$ 12270	$ 12287	$ 12304	$ 12321	$ 12338
8. 12239	$ 12254	$ 12271	$ 12288	$ 12305	$ 12322	$ 12339
9. 12240	$ 12255	$ 12272	$ 12289	$ 12306	$ 12323	$ 12340
10. 12241	$ 12256	$ 12273	$ 12290	$ 12307	$ 12324	$ 12341
11. 12242	$ 12257	$ 12274	$ 12291	$ 12308	$ 12325	$ 12342
12. 12243	$ 12258	$ 12275	$ 12292	$ 12309	$ 12326	$ 12343
13. 12244	$ 12259	$ 12276	$ 12293	$ 12310	$ 12327	$ 12344
14. 12245	$ 12260	$ 12277	$ 12294	$ 12311	$ 12328	$ 12345
15. 12246	$ 12261	$ 12278	$ 12295	$ 12312	$ 12329	$ 12346
All other counterparties	$ 12262	$ 12279	$ 12296	$ 12313	$ 12330	$ 12347

Totals:	$ 12263	$ 12280	$ 12297	$ 12314	$ 12331	$ 12348

Name of firm: ____________
As of: _________________

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

Reg. 23.105(k) and (l) Appendix B

SCHEDULE 3 – PORTFOLIO SUMMARY OF DERIVATIVES EXPOSURES BY INTERNAL CREDIT RATING

Items on this page to be reported by: Swap Dealers (Authorized and not authorized to use models)
Major Swap Participants (Authorized and not authorized to use models)

Internal Credit Rating	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
	Receivable	Payable				
1. 12349	$ 12386	$ 12423	$ 12460	$ 12497	$ 12534	$ 12572
2. 12350	$ 12387	$ 12424	$ 12461	$ 12498	$ 12535	$ 12573
3. 12351	$ 12388	$ 12425	$ 12462	$ 12499	$ 12536	$ 12574
4. 12352	$ 12389	$ 12426	$ 12463	$ 12500	$ 12537	$ 12575
5. 12353	$ 12390	$ 12427	$ 12464	$ 12501	$ 12538	$ 12576
6. 12354	$ 12391	$ 12428	$ 12465	$ 12502	$ 12539	$ 12577
7. 12355	$ 12392	$ 12429	$ 12466	$ 12503	$ 12540	$ 12578
8. 12356	$ 12393	$ 12430	$ 12467	$ 12504	$ 12541	$ 12579
9. 12357	$ 12394	$ 12431	$ 12468	$ 12505	$ 12542	$ 12580
10. 12358	$ 12395	$ 12432	$ 12469	$ 12506	$ 12543	$ 12581
11. 12359	$ 12396	$ 12433	$ 12470	$ 12507	$ 12544	$ 12582
12. 12360	$ 12397	$ 12434	$ 12471	$ 12508	$ 12545	$ 12583
13. 12361	$ 12398	$ 12435	$ 12472	$ 12509	$ 12546	$ 12584
14. 12362	$ 12399	$ 12436	$ 12473	$ 12510	$ 12547	$ 12585
15. 12363	$ 12400	$ 12437	$ 12474	$ 12511	$ 12548	$ 12586
16. 12364	$ 12401	$ 12438	$ 12475	$ 12512	$ 12549	$ 12587
17. 12365	$ 12402	$ 12439	$ 12476	$ 12513	$ 12550	$ 12588
18. 12366	$ 12403	$ 12440	$ 12477	$ 12514	$ 12551	$ 12589
19. 12367	$ 12404	$ 12441	$ 12478	$ 12515	$ 12552	$ 12590
20. 12368	$ 12405	$ 12442	$ 12479	$ 12516	$ 12553	$ 12591
21. 12369	$ 12406	$ 12443	$ 12480	$ 12517	$ 12554	$ 12592
22. 12370	$ 12407	$ 12444	$ 12481	$ 12518	$ 12555	$ 12593
23. 12371	$ 12408	$ 12445	$ 12482	$ 12519	$ 12556	$ 12594
24. 12372	$ 12409	$ 12446	$ 12483	$ 12520	$ 12557	$ 12595
25. 12373	$ 12410	$ 12447	$ 12484	$ 12521	$ 12558	$ 12596
26. 12374	$ 12411	$ 12448	$ 12485	$ 12522	$ 12559	$ 12597
27. 12375	$ 12412	$ 12449	$ 12486	$ 12523	$ 12560	$ 12598
28. 12376	$ 12413	$ 12450	$ 12487	$ 12524	$ 12561	$ 12599
29. 12377	$ 12414	$ 12451	$ 12488	$ 12525	$ 12562	$ 12600
30. 12378	$ 12415	$ 12452	$ 12489	$ 12526	$ 12563	$ 12601
31. 12379	$ 12416	$ 12453	$ 12490	$ 12527	$ 12564	$ 12602
32. 12380	$ 12417	$ 12454	$ 12491	$ 12528	$ 12565	$ 12603
33. 12381	$ 12418	$ 12455	$ 12492	$ 12529	$ 12566	$ 12604
34. 12382	$ 12419	$ 12456	$ 12493	$ 12530	$ 12567	$ 12605
35. 12383	$ 12420	$ 12457	$ 12494	$ 12531	$ 12568	$ 12606

36.	12384	$ 12421	$ 12458	$ 12495	$ 12532	$ 12569	$ 12607
Unrated	12385	$ 12422	$ 12459	$ 12496	$ 12533	$ 12570	$ 12608
Totals:		$ 7822	$ 7823	$ 7821	$ 7820	$ 12571	$ 12609

Name of firm: ____________
As of: _________________

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

Reg. 23.105(k) and (l) Appendix B	SCHEDULE 4 – GEOGRAPHIC DISTRIBUTION OF DERIVATIVES EXPOSURES FOR TEN LARGEST COUNTRIES	
	Items on this page to be reported by:	Swap Dealers (Authorized and not authorized to use models) Major Swap Participants (Authorized and not authorized to use models)

I. By Current Net Exposure

Country		Gross Replacement Value Receivable	Gross Replacement Value Payable	Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
1.	12610	$ 12620	$ 12630	$ 12640	$ 12650	$ 12661	$ 12671
2.	12611	$ 12621	$ 12631	$ 12641	$ 12651	$ 12662	$ 12672
3.	12612	$ 12622	$ 12632	$ 12642	$ 12652	$ 12663	$ 12673
4.	12613	$ 12623	$ 12633	$ 12643	$ 12653	$ 12664	$ 12674
5.	12614	$ 12624	$ 12634	$ 12644	$ 12654	$ 12665	$ 12675
6.	12615	$ 12625	$ 12635	$ 12645	$ 12655	$ 12666	$ 12676
7.	12616	$ 12626	$ 12636	$ 12646	$ 12656	$ 12667	$ 12677
8.	12617	$ 12627	$ 12637	$ 12647	$ 12657	$ 12668	$ 12678
9.	12618	$ 12628	$ 12638	$ 12648	$ 12658	$ 12669	$ 12679
10.	12619	$ 12629	$ 12639	$ 12649	$ 12659	$ 12670	$ 12680
Totals:		$ 7803	$ 7804	$ 7802	$ 12660	$ 7801	$ 12681

II. By Current Net and Potential Exposure

Country		Gross Replacement Value Receivable	Gross Replacement Value Payable	Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
1.	12682	$ 12692	$ 12703	$ 12714	$ 12725	$ 12736	$ 12747
2.	12683	$ 12693	$ 12704	$ 12715	$ 12726	$ 12737	$ 12748
3.	12684	$ 12694	$ 12705	$ 12716	$ 12727	$ 12738	$ 12749
4.	12685	$ 12695	$ 12706	$ 12717	$ 12728	$ 12739	$ 12750
5.	12686	$ 12696	$ 12707	$ 12718	$ 12729	$ 12740	$ 12751
6.	12687	$ 12697	$ 12708	$ 12719	$ 12730	$ 12741	$ 12752
7.	12688	$ 12698	$ 12709	$ 12720	$ 12731	$ 12742	$ 12753
8.	12689	$ 12699	$ 12710	$ 12721	$ 12732	$ 12743	$ 12754
9.	12690	$ 12700	$ 12711	$ 12722	$ 12733	$ 12744	$ 12755
10.	12691	$ 12701	$ 12712	$ 12723	$ 12734	$ 12745	$ 12756
Totals:		$ 12702	$ 12713	$ 12724	$ 12735	$ 12746	$ 12757

Name of firm: ____________
As of: _________________

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

■ 8. Amend Appendix C to subpart E of part 23 by removing the Balance Sheet and Regulatory Capital forms and revising the Schedule 1—Aggregate Security-Based Swap and Swap Positions form to read as follows:

Appendix C to Subpart E of Part 23—Specific Position Information for Swap Dealers and Major Swap Participants Subject to the Capital Requirements of a Prudential Regulator

Reg. 23.105(p) Appendix C	SCHEDULE 1 – AGGREGATE SECURITY-BASED SWAP AND SWAP POSITIONS
	Items on this page to be reported by: Bank SDs, Bank MSPs

Aggregate Positions	LONG/BOUGHT	SHORT/SOLD
1. Security-based swaps		
A. Cleared	$________ 12801	$________ 12809
B. Non-cleared	$________ 12802	$________ 12810
2. Mixed swaps		
A. Cleared	$________ 12803	$________ 12811
B. Non-cleared	$________ 12804	$________ 12812
3. Swaps		
A. Cleared	$________ 12805	$________ 12813
B. Non-cleared	$________ 12806	$________ 12814
4. Other derivatives	$________ 12807	$________ 12815
5. Total (sum of Lines 1-4)	$________ 12808	$________ 12816

Name of firm: ____________________

As of: ____________________

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17A-5 FOCUS Report Part IIC. Please refer to FOCUS REPORT PART IIC INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

BILLING CODE 6351–01–C

Issued in Washington, DC, on December 22, 2023, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Appendices to Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

Appendix 1—Commission Voting Summary

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

Appendix 2—Statement of Support of Chairman Rostin Behnam

I support the proposed rule to amend certain requirements in part 23 of the Commission's regulations to address specific issues identified during the implementation of the Commission's 2020 final rule on capital and financial reporting requirements for swap dealers (SDs) and major swap participants (MSPs).[1] The proposed rule would codify interpretive CFTC Letter No. 21–15 [2] regarding capital and financial reporting requirements for nonbank SDs and nonbank MSPs electing the tangible net worth capital approach; [3] codify the time-limited no-action position in CFTC Letter No. 21–18 [4] regarding financial reporting requirements for bank SDs; clarify technical aspects of the reporting requirements; and update an FCM reporting form consistent with net capital requirements previously adopted by the Commission for FCMs. The proposed amendments are not intended to change the Commission's capital approach.

This proposal is a testament to the commitment I previously made for the Commission to consider the codification of various forms of relief previously provided by CFTC Division staff through no-action position letters.[5] As staff letters only bind the staff of the issuing Division with respect to the specific facts, situations, and persons addressed by the respective staff letters,[6] it is good government for the Commission to clean-up its rule set where the Commission determines that compliance with certain regulations is impossible. Such Commission action not only provides regulatory certainty and clarity to our registrants with the benefit of notice and public comment, but also ensures the efficient use of staff resources to fix an issue once instead of allocating time to a series of no-action positions for the same matter.

I look forward to hearing the public's comments on the proposed amendments to the regulations and the relevant appendices in part 23 of the Commission's regulations. I thank staff in the Market Participants Division, Office of the General Counsel, and the Office of the Chief Economist for all of their work on the proposal.

[1] Capital Requirements of Swap Dealers and Major Swap Participants, 85 FR 57462 (Sept. 15, 2020).

[2] CFTC Letter No. 21–15, Jun. 29, 2021, available at *https://www.cftc.gov/csl/21-15/download.*

[3] *See* 17 CFR 23.101.

[4] CFTC Letter No. 21–18, Aug. 31, 2021, available at *https://www.cftc.gov/csl/21-18/download.*

[5] Keynote Address of Chairman Rostin Behnam at the ABA Business Law Section Derivatives & Futures Law Committee Winter Meeting, (Feb. 3. 2023), *https://www.cftc.gov/PressRoom/Speeches Testimony/opabehnam31.*

[6] *See, e.g.,* 17 CFR 140.99.

Appendix 3—Statement of Commissioner Kristin N. Johnson

The Commodity Futures Trading Commission (Commission or CFTC) adopted a proposal to amend certain of the Commission's part 23 regulations that impose minimum capital requirements and financial reporting obligations on swap dealers (SDs) and major swap participants (MSPs) (Proposed Amendments).[1] I support the amendments advanced by the Market Participants Division (MPD).

Minimum capital requirements serve as a cushion during times of severe market stress to ensure our registrants' safety and soundness, protect the financial stability of our financial system, and prevent a run on our financial institutions. Financial condition reporting provides the Commission with visibility and insight into the business and financial health of our registrants and enables us to require corrective action and prevent a failure of a single entity or group of entities or segment of the derivatives market, which could raise system risk concerns.

Dodd-Frank Act Reforms

The Commission introduced new capital and financial reporting requirements for SDs in 2020, as mandated by the Dodd-Frank Act (2020 Capital Rule).[2] Title VII of the Dodd-Frank Act amended the Commodity Exchange Act (CEA) to establish a new regulatory framework for swaps, regulated by the Commission, and security-based swaps, regulated by the Securities and Exchange Commission (SEC), to reduce risk, increase transparency, and promote market integrity within the financial system. Section 4s(e) of the CEA introduced minimum capital requirements for SDs,[3] and section 4s(f) of the CEA created financial reporting and recordkeeping requirements for all SDs.[4]

In the United States, the capital framework is divided into three parallel regimes. SDs subject to regulation by a prudential regulator are required to comply with the minimum capital requirements adopted by the applicable prudential regulator,[5] while SDs not subject to regulation by a prudential regulator are required to meet the minimum capital requirements of the Commission, and security-based swap dealers (SBSDs) and major security-based swap participants (MSBSPs) that do not have a prudential regulator are required to comply with the minimum capital requirements of the SEC.[6] The prudential regulators or banking agencies and the SEC have adopted capital rules for swaps and security-based swaps.

In the adopting release for the 2020 Capital Rule, the Commission indicated that it would consult with the prudential regulators and the SEC to assess the capital adequacy of SDs, MSPs, SBSDs, and MSBSPs, monitor the implementation of the rule and data, and consider modifications to the capital and financial reporting requirements.[7]

With the Proposed Amendments, the Commission seeks to make surgical changes to the 2020 Capital Rule, including a number of technical corrections, based on consultation with the prudential regulators and SEC, and based on market feedback on the adoption and implementation of the 2020 Capital Rule. While the Proposed Amendments are not adjusting the capital components of the 2020 Capital Rule, all regulations designed to mitigate known systemic risk concerns in the swaps market must be subject to careful evaluation.

I commend the Commission for taking formal steps to engage in a rulemaking process that invites Commission discussion and public notice and comment on these regulations, which ensure compliance with the Dodd-Frank Act while remaining practical and solutions-oriented. I strongly encourage the Commission, however, to begin a formal rulemaking process to address several unresolved issues necessary to ensure compliance with the Dodd-Frank Act and these requirements.

Clarifying Capital Requirements for Commercials

The Proposed Amendments codify Interpretive Letter 21–15, which applies to commercial non-bank SDs—typically entities that primarily engage in agricultural and energy swaps and provide services that are important to the U.S. economy. The Commission's overall capital approach permits non-bank SDs to select one of three methods to calculate their capital requirements, as permitted under the rule: the net liquid assets capital approach;[8] the bank-based capital requirements;[9] or the tangible net worth capital approach.[10]

The Commission proposes to revise the 2020 Capital Rule so that the test to determine tangible net worth may be applied at the entity level or ultimate consolidated parent level; so that International Financial Reporting Standards (IFRS) accounting standards or GAAP may be used; and so that position and financial exposure reporting occur at the same frequency as financial reporting, which for SDs is quarterly.

The Proposed Rule minimizes disruption, and clarifies the interpretation and implementation of the tangible net worth test for commercial non-bank SDs.

Refining Financial Reporting Requirements

The Proposed Amendments address issues presented in No-Action Letter (NAL) 21–18, which was extended under NAL 23–11 and applies to bank SDs, including non-U.S. bank SDs. Non-U.S. bank SDs can file the applicable financial reporting within 90 days of the end of the financial reporting period and the same forms (*e.g.,* relating to balance sheet and regulatory capital schedules) in the same format as provided to home country regulators (but in English and U.S. dollars). Additionally, U.S. bank SDs can file the same forms (*e.g.,* relating to balance sheet and regulatory capital schedules) under bank regulators' Call Report and within the same timeframe as when filing with their prudential regulator.

The Proposed Amendments allow the Commission to collect information from bank SDs as a comparative tool. Also, all SDs must use Schedule 1 for position information, which is similar to the SEC's FOCUS report—duplicative forms are eliminated.

MPD has demonstrated collaboration working with the prudential regulators and SEC in developing and harmonizing processes, procedures, and forms for financial reports and notifications—some of which are adopted the Proposed Amendments. Further, the 2020 Capital Rule was an important initiative that demonstrated the Commission's recognition of the complexity and interconnectedness of the derivatives markets.

Technical Corrections

SD Exposure Reporting

The Proposed Amendments amend Commission regulation to clarify that certain supplemental schedules used to report SD exposure are intended to be provided by all non-bank SDs. These amendments are necessary to align the reporting of similar information collected by the SEC from SBSDs and to provide the Commission and National Futures Association with important information regarding SD exposure across several geographical locations and counterparties. This information provides valuable insight into the risk exposure of non-bank SDs, which is essential to performing the regulatory oversight of SDs.

Notice Requirements for Substantial Reduction in Capital

The Commission should begin to review notice requirements comprehensively in light of greater, faster capabilities to comply, notwithstanding the potential existence of challenges for non-U.S. SDs in light of time zone differences. The Proposed Amendments require notification of a substantial reduction of capital within two business days. The 2020 Capital Rule did not specify a timeframe, and the Proposed Amendments are consistent with the timeframe applicable to FCMs.

Conclusion

In order to prevent the market instability witnessed during the period when swaps traded in bespoke, bilateral markets, the Commission imposes capital requirements on non-bank SDs, and imposes financial reporting requirements on bank SDs as well

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[1] Since no MSP is currently registered with the Commission, in this statement, I will refer to SDs only.

[2] Capital Requirements of Swap Dealers and Major Swap Participants (Capital Requirements), 85 FR 57462 (Sept. 15, 2020); Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[3] 7 U.S.C. 6s(e).

[4] 7 U.S.C. 6s(f).

[5] 7 U.S.C. 6s(e)(1)(A).

[6] Section 15F of the Exchange Act addresses capital requirements for SBSDs/MSBSPs.

[7] Capital Requirements, 85 FR at 57465.

[8] A capital requirement that is consistent with the SEC's final capital regulations for SBSDs, as well as the existing CFTC's capital rules for FCMs, and the existing SEC's capital rules for broker-dealers.

[9] A capital requirement that is consistent with the prudential regulators' capital requirements for bank SDs and that is based on the existing Federal Reserve Board capital requirements for bank holding companies.

[10] A capital requirement that is based on the SD's tangible net worth, if the SD or parent is predominantly engaged in non-financial activities.

as non-bank SDs. These regulations are critical to the oversight of the swaps market.

I want to thank MPD and the Office of the Chief Economist (OCE) for their excellent work bringing forth this proposed rulemaking, in particular Jennifer Bauer, Maria Aguilar-Rocha, Andrew Pai, Joshua Beale, Thomas Smith, and Amanda L. Olear of MPD, and Lihong McPhail of OCE.

Appendix 4—Statement of Support of Commissioner Caroline D. Pham

I support the Notice of Proposed Rulemaking on Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants (Proposal) because it addresses issues left outstanding from implementing a rule by offering pragmatic solutions that not only rectify the problem at hand, but do so without imposing unnecessary burdens or complications. I would like to thank Andrew Pai, Maria Aguilar-Rocha, Josh Beale, Tom Smith, and Amanda Olear in the Market Participants Division for their work on the Proposal. I greatly appreciate the time staff took to discuss my questions and concerns.

It is important to remember that most of the CFTC's provisionally-registered swap dealers are subject to three or more regulatory regimes.[1] Of the CFTC's 106 currently provisionally registered swap dealers, most are also registered with and supervised by another agency or authority, such as a prudential, functional, or market regulator. This awareness must inform the Commission's approach when considering any rule impacting swap dealers.[2] Otherwise, we risk missing the nuances associated with the complex interplay or conflict that arises between the various regulations.

Capital, the subject of today's Proposal, is one area in which the CFTC's provisionally-registered swap dealers are subject to multiple regulatory regimes. By this point, we know that the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) mandated the Commission establish capital requirements for swap dealers and major swap participants,[3] and that the Commission adopted capital requirements for nonbank swap dealers and major swap participants,[4] as well as financial reporting requirements for bank swap dealers and major swap participants, together with nonbank swap dealers and major swap participants.[5]

Therefore, when considering solutions to challenges that have arisen while implementing the capital rules, we must remember that we are not a prudential banking regulator like the Fed, OCC, or FDIC, nor are we a primarily disclosures-based market regulator like the SEC.[6] Today's proposal offers a pragmatic solution to challenges faced by our market participants that respects the differences among the financial regulators.

The extent of capitalization and reach of financial reporting were decided years ago and are not the subject of today's Proposal. Rather, today we consider, primarily, fixing issues that arose when implementing the capital and financial reporting rules,[7] and secondarily, miscellaneous technical changes to make the rules more workable.

I support the entire Proposal, but will focus my comments on the codification of: (1) CFTC Staff Interpretative Letter No. 21–15 for commercial swap dealers and major swap participants electing the Tangible Net Worth Capital Approach;[8] and (2) the time-limited, no-action relief in CFTC Letter No. 21–18[9] regarding financial reporting requirements for bank swap dealers and major swap participants.[10]

Before I begin, I want to draw attention to a bigger issue relating to capital for the coming year. The broad impacts of the Basel III Endgame are being widely reported and discussed,[11] including impact to CFTC swap dealers and major swap participants.[12] I am deeply concerned about this issue for our markets, which is why I expect that under my sponsorship, the Global Markets Advisory Committee (GMAC) will work on offering actionable recommendations for the Commission in this area. I encourage everyone to watch the presentation made on the subject at the recent November 6th meeting via the meeting's archived webcast,[13] and look forward to working with the GMAC and all of you on the issue in 2024.

A. Codifying CFTC Letter No. 21–15

Nonbank swap dealers and major swap participants can elect one of three approaches to calculating their regulatory capital.[14] One option allows certain qualifying nonbank swap dealers and major swap participants to use a regulatory capital approach that is based on the firm's tangible net worth.[15] Generally, these nonbank swap dealers and major swap participants have to be "predominantly engaged in non-financial activities" and maintain positive tangible net worth according to U.S. generally accepted accounting practices (GAAP) at all times.[16]

When the rules were being implemented, nonbank swap dealers identified three problems: (1) the rule's preamble expanded the definition of "predominantly engaged in financial activities" to permit these nonbank swap dealers and major swap participants to meet the regulation's tangible net worth test directly or through its ultimate consolidated parent entity, but the text of regulation § 23.100 was unclear about it; (2) regulation § 23.105(b) allowed books and records to be maintained in accordance with International Financial Reporting Standards (IFRS) but the "tangible net worth" definition in regulation § 23.100 only referenced U.S. GAAP; and (3) there was an inconsistency in the timelines of certain financial reports required by regulation § 23.105(l).[17]

To fix these issues, the Commission is proposing to adopt the remedies provided in Letter No. 21–15: revise the definitions of "tangible net worth" and "predominantly engaged in non-financial activities" and regulation § 23.105 to clarify the test can be applied at the parent or entity level, as well as using U.S. GAAP or IFRS; and amend regulation § 23.105(l) to clarify that position and other related exposure reporting must be

[1] Statement of Commissioner Caroline D. Pham on Risk Management Program for Swap Dealers and Futures Commission Merchants Advance Notice of Proposed Rulemaking (June 1, 2023).

[2] *See* Concurring Statement of Commissioner Caroline D. Pham Regarding Proposed Order and Request for Comment on an Application for a Capital Comparability Determination (June 2, 2022).

[3] Section 731 of the Dodd-Frank Act added a new section 4s to the Commodity Exchange Act (CEA) to require the CFTC adopt rules establishing minimum initial margin, variation margin and capital requirements for swap dealers and major swap participants. Under CEA section 4s(e), the CFTC is required to adopt capital requirements for swap dealers and major swap participants that are not subject to the capital rules of the prudential regulators, which include nonbank subsidiaries of bank holding companies.

[4] *I.e.,* swap dealers and major swap participants that are not subject to the capital requirements of a prudential regulator, as opposed to swap dealers and major swap participants for which there is a prudential regulator.

[5] *I.e.,* swap dealers and major swap participants that are not subject to the capital requirements of a prudential regulator, along with the swap dealers and major swap participants for which there is a prudential regulator. *See* Capital Requirements of Swap Dealers and Major Swap Participants, 85 FR 57462 (Sept. 15, 2020).

[6] Concurring Statement of Commissioner Caroline D. Pham Regarding the CFTC Request for Information on Climate-Related Financial Risk (June 2, 2022). I reiterate the importance of keeping our focus on our markets, products, and purpose to avoid the risk of diluting our limited resources and potentially straying from our core expertise and responsibilities into areas already tasked to others.

[7] During that time, staff worked to develop processes, procedures, and forms to accept the financial reports and notifications required by the capital and financial reporting rules. In so doing, CFTC staff received several compliance related questions, and as a result, issued eight staff letters, all available at the Commission's website, *www.cftc.gov:* CFTC Letter Numbers 21–15 (June 29, 2021); 21–18 (Aug. 31, 2021); 21–20 (Sept. 30, 2021); 21–21 (Sept. 30, 2021); 21–22 (Sept. 30, 2021); 21–23 (Sept. 30, 2021); 22–01 (Jan. 5, 2022); 22–02 (Jan. 5, 2022).

[8] CFTC Letter No. 21–15 (June 29, 2021), *https://www.cftc.gov/csl/21-15/download.*

[9] Staff extended the relief in CFTC Letter No. 21–18 until the earlier of October 6, 2025 or the adoption of any revised financial reporting requirements for bank swap dealers and major swap participants under Regulation 23.105(p). CFTC Letter No. 23–11 (July 10, 2023), available at *https://www.cftc.gov/csl/23-11/download.*

[10] CFTC Letter No. 21–18 (Aug. 31, 2021), *https://www.cftc.gov/csl/21-18/download.* Bank swap dealers and major swap participants have limited financial reporting obligations, recognizing that prudential regulators have an obligation to impose their capital requirements and are primarily responsible for monitoring bank swap dealer and major swap participant capital under the CEA. 7 U.S.C. 6s(e)(2)(i).

[11] Recent coverage has focused on what the Federal Reserve Board supports and could look to do. Victoria Guida, "Fed's Waller: Support for Final Basel Rule 'a Possibility' " PoliticoPro (Nov. 28, 2023).

[12] Luke Clancy, "US Basel Endgame Hits Clearing with Op Risk Capital Charges" *Risk.net* (Sept. 25, 2023), *https://www.risk.net/regulation/7957815/us-basel-endgame-hits-clearing-with-op-risk-capital-charges.*

[13] The CFTC maintains the archived webcast at: *https://www.cftc.gov/PressRoom/Events/opaevent gmac110623.*

[14] 17 CFR 23.101.

[15] 17 CFR 23.101(a)(2).

[16] *Id.*

[17] CFTC Letter No. 21–15.

made at the same frequency as financial reporting, which in this instance is quarterly.

B. Codifying CFTC Letter No. 21–18

Bank swap dealers and major swap participants must file unaudited quarterly financial information with the CFTC within 30 calendar days of the end of their fiscal quarter.[18] The information should be submitted via the specific forms in Appendix C to subpart E of part 23. The Commission intended that these forms would be identical to those filed by banks with their prudential regulator. However, when the capital and financial reporting rules were being implemented, it became evident that there were some differences in the forms, as well as with the timelines for filing.

[18] 17 CFR 23.105(p)(2). The required financial information consists of a statement of financial condition, a statement of regulatory capital, and a schedule of the aggregate positions in security-based swaps, mixed swaps, swaps, and other derivatives.

Therefore, CFTC Letter No. 21–18 let bank swap dealers and major swap participants provide home country regulator reports and comparable schedules on the prudential regulators' timeline; foreign bank swap dealers and major swap participants provide home country regulator balance sheets and statements of regulatory capital information as long as they are in English, USD, and within 15 days of filing with home country regulator; and SEC dually-registered foreign bank swap dealers and major swap participants file comparable SEC approved financial reports and schedules.

To fix these issues, the Commission is proposing to adopt the remedies provided in CFTC Letter No. 21–18: amend regulation § 23.105(p) to allow foreign bank swap dealers and major swap participants to file the applicable financial reporting within 90 days of the end of the financial reporting period; accept balance sheet and regulatory capital schedules under prudential regulator reports for U.S. bank swap dealers and major swap participants; and to accept the filing of such schedules at the same time as filed with prudential regulators. For foreign swap dealers, the Commission is proposing to permit the filing of a balance sheet and statement of regulatory capital schedules in the format provided to their home country regulator, as long as they are in English and converted to USD, and filed no later than 90 days following the reporting period end date.

I support this rule because codifying well-tailored relief helps provide market certainty while avoiding imposing unnecessary burdens and creating compliance complications. I also support this rule because the Commission does so while also continuing to respect the differences between our rules and those of the other regulators overseeing swap dealers on capital. It is a laudable achievement. I again commend staff in the Market Participants Division for their hard work on this rule, and look forward to reviewing the comments.

[FR Doc. 2023–28649 Filed 1–11–24; 8:45 am]

BILLING CODE 6351–01–P

Notices

Federal Register

Vol. 89, No. 10

Tuesday, January 16, 2024

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

Sunshine Act Meeting Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Commission public business meeting.

DATES: Friday, January 19, 2024, 10 a.m. EST.

ADDRESSES: Meeting to take place virtually and is open to the public via livestream on the Commission's YouTube page: *https://www.youtube.com/user/USCCR/videos.*

FOR FURTHER INFORMATION CONTACT: Angelia Rorison: 202–376–8371; *publicaffairs@usccr.gov*.

SUPPLEMENTARY INFORMATION: In accordance with the Government in Sunshine Act (5 U.S.C. 552b), the Commission on Civil Rights is holding a meeting to discuss the Commission's business for the month. This business meeting is open to the public. Computer assisted real-time transcription (CART) will be provided. The web link to access CART (in English) on Friday, January 19, 2024, is *https://www.streamtext.net/player?event=USCCR.* Please note that CART is text-only translation that occurs in real time during the meeting and is not an exact transcript.

Meeting Agenda

I. Approval of Agenda

II. Business Meeting

A. Presentation by State Advisory Committee Chairs on Reports and related Memorandum

B. Management and Operations

- Staff Director's Report

III. Adjourn Meeting

Dated: January 11, 2024.

Angelia Rorison,

USCCR Media and Communications Director.

[FR Doc. 2024–00808 Filed 1–11–24; 4:15 pm]

BILLING CODE 6335–01–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; Quarterly Survey of Plant Capacity Utilization

AGENCY: U.S. Census Bureau, Department of Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act (PRA) of 1995, invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment on the proposed extension of the Quarterly Survey of Plant Capacity Utilization prior to the submission of the information collection request (ICR) to OMB for approval.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before March 18, 2024.

ADDRESSES: Interested persons are invited to submit written comments by email to *Thomas.J.Smith@census.gov.* Please reference Quarterly Survey of Plant Capacity Utilization in the subject line of your comments. You may also submit comments, identified by Docket Number USBC–2023–0019, to the Federal e-Rulemaking Portal: *http://www.regulations.gov.* All comments received are part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Mary Susan Bucci, Chief Special Reimbursable Surveys Branch, (301) 763–4639, and *Mary.Susan.Bucci@census.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau plans to request an extension of the current OMB clearance for the Quarterly Survey of Plant Capacity Utilization (SPC). The SPC is conducted quarterly, collecting from manufacturing plants and publishers, the value of actual production, the value of production that could have been achieved if operating at ''full production'' levels, and the value of production that could have been achieved if operating at ''national emergency'' levels. The survey also collects data on work patterns by shift. These data include hours in operation, production workers, and plant hours worked.

The primary sponsors of this collection and users of these data are the Federal Reserve Board (FRB) and the Defense Logistics Agency (DLA). The FRB uses these data in several ways. First, the capital workweek data is used as an indicator of capital use in the estimation of monthly output (industrial production). Second, the workweek data is used to improve the projections of labor productivity that are used to align industrial production (IP) with comprehensive benchmark information in the Manufacturing Sector of the Economic Census and the Annual Integrated Economic Survey. Third, the utilization rate data assists in the assessment of recent changes in IP, as most of the high-frequency movement in utilization rates reflect production changes rather than capacity changes. Fourth, the time series of utilization rate data for each industry, in combination with the FRB IP data, is used to estimate current and historical measures of capacity consistent with the FRB production measures. The DLA uses these data to assess readiness to meet demand for goods under selected national emergency scenarios.

II. Method of Collection

The Census Bureau mails letters to respondents instructing them how to report electronically, as well as sends an email announcing the opening of the survey. Companies are asked to respond within 20 days of the initial mailing. The due date will be imprinted at the top of the letter and in the email notification. A reminder email is sent a week before the due date to delinquent respondents. Letters encouraging participation are mailed to companies that have not responded by the designated due date. A final email is sent to delinquent respondents with information for reporting online. Lastly, we conduct a telephone follow-up.

III. Data

OMB Control Number: 0607–0175.

Form Number(s): MQ–C2.

Type of Review: Regular submission, Request for an Extension, without Change, of a Currently Approved Collection.

Affected Public: Manufacturing and publishing plants.

Estimated Number of Respondents: 7,500 per quarter.

Estimated Time per Response: 20 to 40 minutes, with an average of 30 minutes.

Estimated Total Annual Burden Hours: 15,000.

Estimated Total Annual Cost to Public: $0. (This is not the cost of respondents' time, but the indirect costs respondents may incur for such things as purchases of specialized software or hardware needed to report, or expenditures for accounting or records maintenance services required specifically by the collection.)

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C. 8(b); 50 U.S.C. 98, et. seq; 12 U.S.C. 244.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include, or summarize, each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment—including your personally identifiable information—may be made publicly available at any time. While you may ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–00619 Filed 1–12–24; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–122–858]

Certain Softwood Lumber From Canada: Preliminary Results of Changed Circumstances Review

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

SUMMARY: The U.S. Department of Commerce (Commerce) preliminary determines that four producers/exporters subject to the countervailing duty (CVD) order on certain softwood lumber from Canada, Interfor Corporation, EACOM Timber Corporation, Chaleur Forest Products Inc., and Chaleur Forest Products LP, are cross-owned entities. Interested parties are invited to comment on these preliminary results.

DATES: Applicable January 16, 2024.

FOR FURTHER INFORMATION CONTACT: Samuel Brummitt, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–7851.

SUPPLEMENTARY INFORMATION:

Background

On January 3, 2018, Commerce published the CVD order on certain softwood lumber from Canada.[1] On May 11, 2023, the petitioner [2] requested that Commerce initiate a changed circumstances review (CCR) of the *Order,* pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), 19 CFR 351.216, and 19 CFR 251.221(c)(3).[3] Specifically, the petitioner requested that Commerce determine that Interfor Corporation, EACOM Timber Corporation, Chaleur Forest Products Inc., and Chaleur Forest Products LP are cross-owned entities.[4] On July 27, 2023, Commerce initiated the requested CCR.[5]

Scope of the Order

The merchandise covered by this *Order* is softwood lumber, siding, flooring, and certain other coniferous wood (softwood lumber products). For a complete description of the scope, *see* the Preliminary Decision Memorandum.[6]

Preliminary Results of Changed Circumstances Review

Pursuant to section 751(b) of the Act, Commerce is conducting a CCR based on a request from an interested party [7] that shows changed circumstances sufficient to warrant a review of an order. In accordance with 19 CFR 351.221(b)(4) and (c)(3)(i), we preliminary find that the record contains information indicating that Interfor Corporation, EACOM Timber Corporation, Chaleur Forest Products Inc., and Chaleur Forest Products LP meet the definition of cross-ownership under 19 CFR 351.525(b)(6).

For a complete discussion of the information that Interfor Corporation and the petitioner provided and the complete cross-ownership analysis, *see* the Preliminary Decision Memorandum. A list of topics discussed in the Preliminary Decision Memorandum is included as the appendix to this notice. The Preliminary Decision Memorandum

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[1] *See Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 83 FR 347 (January 3, 2018) (*Order*).

[2] The petitioner is the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations, an *ad hoc* association whose members are: U.S. Lumber Coalition, Inc.; Collum's Lumber Products, L.L.C.; Fox Lumber Sales, Inc.; Hankins, Inc.; Pleasant River Lumber Company; PotlatchDeltic; S.I. Storey Lumber Co., Inc.; Stimson Lumber Company; Swanson Group; Weyerhaeuser Company; Giustina Land and Timber Company; and Sullivan Forestry Consultants, Inc.

[3] *See* Petitioner's Letter, ''Request for Changed Circumstances Review,'' dated May 11, 2023.

[4] *Id.*

[5] *See Certain Softwood Lumber from Canada: Notice of Initiation of Changed Circumstances Review,* 88 FR 48440 (July 27, 2023) (*Initiation Notice*).

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Changed Circumstances Review of the Countervailing Duty Order on Softwood Lumber Products from Canada,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] The petitioner is an *ad hoc* association and the majority the members of the association are composed of interested parties as described in section 771(9)(C), (D), and (E) of the Act, with respect to a domestic like product.

is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Public Comment

Interested parties are invited to comment on the preliminary results of this CCR in accordance with 19 CFR 351.309(c)(1)(ii). Comments may be submitted to Commerce no later than 10 days after the date of publication of this notice.[8] Rebuttal comments may be filed with Commerce no later than five days after the comments are filed. Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[9]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this CCR, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[10] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this CCR. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[11] All submissions must be filed electronically using the Enforcement and Compliance's ACCESS. An electronically filed document must be received successfully in its entirety in ACCESS by 5:00 p.m. Eastern Time on the due date set forth in this notice.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS, within ten days of publication of this notice in the **Federal Register**. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm the date and the time of the hearing two days before the scheduled date.

Final Results of the Changed Circumstances Review

Commerce will issue the final results of this CCR, which will include its analysis of any written comments, no later than 270 days after the date on which this review was initiated.[12] The current requirement for cash deposits of estimated antidumping and countervailing duties on all entries of subject merchandise will not change as the result of this preliminary CCR determination. As noted in the *Initiation Notice* and Preliminary Decision Memorandum, the purpose of this CCR does not include identifying the applicable cash deposit rates, but rather making determinations of cross-ownership. Furthermore, we note that Interfor Corporation, EACOM Timber Corporation, Chaleur Forest Products Inc., and Chaleur Forest Products LP are all already receiving the same cash deposit rate assigned to non-selected companies.[13]

Notification to Interested Parties

These preliminary results of a CCR and this notice are published in accordance with sections 751(b) and 777(i) of the Act and 19 CFR 351.216, and 19 CFR 351.221(c)(3).

Dated: January 9, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Preliminary Determination of Cross-Ownership
V. Recommendation

[FR Doc. 2024–00660 Filed 1–12–24; 8:45 am]

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[8] Commerce is exercising its discretion under 19 CFR 351.309(c)(1)(ii) to alter the time limit for the filing of case briefs. *See* 19 CFR 351.309(d)(1).

[9] *See* 19 CFR 351.309(c)(2) and (d)(2).

[10] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[11] *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule,* 88 FR 67069 (September 29, 2023).

[12] *See* 19 CFR 351.216(e).

[13] *See Certain Softwood Lumber Products from Canada: Final Results and Final Rescission, in Part, of the Countervailing Duty Administrative Review; 2021,* 88 FR 50103 (August 1, 2023).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC959]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Pile Driving and Removal To Improve the Auke Bay East Ferry Terminal

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to Alaska Department of Transportation and Public Facilities (ADOT&PF) to incidentally harass, by Level A and Level B harassment, marine mammals during construction activities associated with a pile driving project for improvements to the Auke Bay East Ferry Terminal in Juneau, Alaska.

DATES: This authorization is effective from October 1, 2024 through September 30, 2025.

ADDRESSES: Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-alaska-department-transportation-pile-driving-and-removal.* In case of problems accessing these documents, please call the contact listed above.

FOR FURTHER INFORMATION CONTACT: Craig Cockrell, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations or, if the taking is limited to harassment, a notice of a issued IHA is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On September 13, 2022, NMFS received a request from ADOT&PF for an IHA to take marine mammals incidental to vibratory and impact pile driving to improve the Auke Bay East Ferry Terminal. Following NMFS' review of the application, ADOT&PF submitted a revised version on January 11, 2023. The application was deemed adequate and complete on February 14, 2023. NMFS published the proposed IHA on April 13, 2023 (88 FR 22411). The ADOT&PF's request is for the incidental take of small numbers of 11 species or stocks of marine mammals, in the form of Level B harassment and, for harbor seals (*Phoca vitulina*) and harbor porpoise (*Phocoena phocoena*), including take by Level A harassment. Neither ADOT&PF nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

Description of Activity

Overview

ADOT&PF is completing improvements to the existing Alaska Marine Highway System (AMHS) Auke Bay East Berth marine terminal. The activity includes removal of existing piles and the installation of both temporary and permanent piles of various sizes and materials. A total of 143 piles will be either removed or installed. Takes of marine mammals by Level A and Level B harassment will occur due to both impact installation and vibratory pile installation and removal. The project will occur in Auke Bay, Alaska which is located in southeast Alaska in close proximity to the city of Juneau. Construction activities are expected to over a four month period in fall 2023. It is expected to take up to 61 nonconsecutive days to complete the in-water pile driving activities.

A detailed description of the planned construction project is provided in the **Federal Register** notice for the proposed IHA (88 FR 22411, April 13, 2023). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specific activity.

Comments and Response

A notice of NMFS' proposal to issue an IHA to ADOT&PF was published in the **Federal Register** on April 13, 2023 (88 FR 22411). That notice described, in detail, ADOT&PF's activities, the marine mammal species that may be affected by the activities, and the anticipated effects on marine mammals. In that notice, we requested public input on the request for authorization described therein, our analyses, the proposed authorization, and any other aspect of the notice of proposed IHA, and requested that interested persons submit relevant information, suggestions, and comments. This proposed notice was available for a 30-day public comment period.

NMFS received one comment from the general public. This comment was not related to the activity described in the notice and is not discussed further.

Changes From Proposed IHA to Final IHA

Several changes have been made to the Final IHA. These changes are summarized below and also identified, and expanded upon as necessary, in the associated sections of the notice below. In the Proposed IHA the extent of the Level B harassment zone for vibratory installation and removal of 24 in. steel piles was inadvertently combined with 18 in. steel pipe piles. Table 6 has been modified to include the correct size of the Level B harassment zone size for the vibratory installation and removal of 24 in. steel piles. The Level A and Level B harassment zones for 18 in. steel pipe piles were not calculated correctly in the Proposed IHA. Table 6 has been updated, and Level A and Level B harassment zones for vibratory installation and removal of the existing 18 in. steel pipe piles have been corrected.

As a result of our consultation under Section 7 of the ESA with the NMFS Alaska Regional Office, NMFS has revised the source levels for vibratory driving of 24 in. and 30 inch steel piles. In the Proposed IHA, 159 and 154 dB RMS re 1μPa were the selected source values for 30 in. and 24 in. steel pipe pile driving, respectively (Caltrans 2020). During the comment period for the Proposed IHA, NFMS determined that measured values from a previous project in Auke Bay and other sites with similar geology were more appropriate than the proposed values. Based on this information NMFS has revised our analysis to use source proxy values of 168.8 from Denes *et al.* (2016) and 163 dB RMS re 1μPa (NMFS 2023 analysis [1]) for vibratory driving of 30 in. and 24 in. steel pipe piles, respectively. Denes *et al.* (2016) measured a spreading loss coefficient (TL) of 16.4 for 30 in. piles, which NMFS has applied in the harassment zone calculations. These values increase the size of the harassment zones, shutdown zones, and monitoring zones for this project (table 6, 8, and 9). Due to the larger estimated harassment zones, NMFS has increased the level of take by Level B harassment for some marine mammal species (table 7). No increase in Level A take occurred based on this new analysis because the ADOT&PF has agreed to implement shut down zones larger than the expected Level A harassment zones. The larger shutdown and monitoring zones do not require any changes to the other subsequent mitigation, monitoring, or reporting measures from Proposed IHA, and thus there have been no changes to the mitigation, monitoring, and reporting sections in this Notice.

Since the **Federal Register** notice of the proposed IHA was published (April 13, 2023, 88 FR 22411), NMFS published the final 2022 Alaska and Pacific Stock Assessment Reports (SARs), which describe revised stock structures under the MMPA for humpback whales and southeast Alaska harbor porpoise (Carretta et al., 2023; Young et al., 2023). In the notice of proposed IHA, we explained that although we typically consider updated peer-reviewed data provided in draft SARs to be the best available science, and use the information accordingly, we make exception for proposed revised stock structures. Upon finalization of these revised stock structures, we have

[1] Averaged values from Navy (2012, 2013) and Miner (2020).

made appropriate updates, including description of the potentially affected stocks (see table 1), attribution of take numbers to stock (see Estimated Take), and by updating our analyses to ensure the necessary determinations are made for the new stocks (see Negligible Impact Analysis and Determination and Small Numbers).

There was also a clerical error in the calculation of the percentage of humpback whales from each respective DPS. The Proposed IHA used 2.4 percent as the estimated percentage of Mexico DPS humpback whales present in Southeast Alaska. This was revised to 2 percent in this notice and the numbers of take from each DPS were revised accordingly (see Estimated Take).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the IHA application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, incorporated here by reference, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' SARs; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments* and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

All values presented in table 1 are the most recent available at the time of publication (including from the draft 2022 SARs) and are available online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*).

TABLE 1—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Family Balaenopteridae (rorquals):						
Humpback whale	*Megaptera novaeangliae*	Hawai'i	-, -, N	11,278 (0.56, 7,265, 2020).	127	27.09
		Mexico-North Pacific	T, D, Y	918 (0.217, UNK, 2006).	UND	0.57
Minke whale	*Balaenoptera acutorostrada*	Alaska	-/-; N	N/A (N/A, N/A, N/A)	UND	0
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Killer whale	*Orcinus orca*	Alaska Resident	-/-; N	1,920 (N/A, 1,920, 2019).	19	1.3
		West Coast Transient	-/-; N	349 (N/A, 349, 2018)	3.5	0.4
Pacific white-sided dolphin.	*Lagenorhynchus obliquidens*	North Pacific	-/-; N	26,880 (N/A, N/A, 1990).	UND	0
Family Phocoenidae (porpoises):						
Harbor Porpoise	*Phocoena phocoena*	Northern Southeast Alaska Inland Waters.	-, -, N	1,619 (0.26, 1,250, 2019).	13	5.6
Dall's porpoise	*Phocoenoides dalli*	Alaska	-/-; N	UND (UND, UND, 2015).	UND	37
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						
Steller sea lion	*Eumetopias jubatus*	Eastern DPS	-/-; N	43,201 (N/A, 43,201, 2017).	2,592	112
		Western DPS	E/D; Y	52,932 (N/A, 53,932, 2019).	318	254
California sea lion	*Zalophus californianus*	U.S.	-/-; N	257,606 (N/A, 233,515, 2014).	14,011	>321
Northern fur seal	*Callorhinus ursinus*	Eastern Pacific	-/-; Y	626,618 (0.2, 530,376, 2019).	11,403	373
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	Lynn Canal/Stephens Passage.	-/-; N	13,388 (N/A, 11,867, 2016).	214	50
Northern Elephant Seal	*Mirounga angustirostris*	California	-/-; N	187,386 (N/A, 85,369, 2013).	5,122	13.7

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *www.nmfs.noaa.gov/pr/sars/*. CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from ADOT&PF's construction activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the survey area. The notice of proposed IHA (88 FR 22411, April 13, 2023) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from ADOT&PF's on marine mammals and their habitat. That information and analysis is incorporated by reference into this final IHA determination and is not repeated here; please refer to the notice of proposed IHA (88 FR 22411, April 13, 2023).

Estimated Take

This section provides an estimate of the number of incidental takes for the authorization through this IHA, which will inform both NMFS' consideration of ''small numbers,'' and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Authorized takes will primarily be by Level B harassment, as use of the acoustic sources (*i.e.,* impact and vibratory pile driving) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for high frequency cetaceans and phocids because predicted auditory injury zones are larger than for other hearing groups. Auditory injury is unlikely to occur for other groups. The mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

As described in the proposed notice (88 FR 22411, April 13, 2023), no serious injury or mortality is anticipated or authorized for this activity. Below we describe how the take numbers are estimated. As noted in the Changes from Proposed IHA to Final IHA section some of the harassment and monitoring zones have changed as well as the estimated take number for some marine mammal species.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals will be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur permanent threshold shift (PTS) of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (root mean square (RMS) sound pressure level (SPL)) of 120 dB (referenced to 1 micropascal (re 1 microPascal (μPa)) for continuous (*e.g.,* vibratory pile-driving) and above RMS SPL 160 dB re 1 μPa for non-explosive impulsive (*e.g.,* seismic airguns, impact pile driving) or intermittent (*e.g.,* scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by temporary threshold shifts (TTS) as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that will not otherwise occur.

ADOT&PF's activity includes the use of continuous (vibratory pile installation and removal) and impulsive (impact pile driving) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1 μPa are applicable.

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). ADOT&PF's activity includes the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving and removal) sources.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 3—ONSET OF PERMANENT THRESHOLD SHIFT (PTS)

[NMFS 2018]

Hearing group	PTS onset thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{p,0\text{-pk,flat}}$: 219 dB; $L_{E,p,\text{ LF,24h}}$: 183 dB	*Cell 2:* $L_{E,p,\text{ LF,24h}}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{p,0\text{-pk,flat}}$: 230 dB; $L_{E,p,\text{ MF,24h}}$: 185 dB	*Cell 4:* $L_{E,p,\text{ MF,24h}}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{p,0\text{-pk,flat}}$: 202 dB; $L_{E,p,\text{HF,24h}}$: 155 dB	*Cell 6:* $L_{E,p,\text{ HF,24h}}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{p,0\text{-pk.flat}}$: 218 dB; $L_{E,p,\text{PW,24h}}$: 185 dB	*Cell 8:* $L_{E,p,\text{PW,24h}}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{p,0\text{-pk,flat}}$: 232 dB; $L_{E,p,\text{OW,24h}}$: 203 dB	*Cell 10:* $L_{E,p,\text{OW,24h}}$: 219 dB.

* Dual metric thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds are recommended for consideration.

Note: Peak sound pressure level ($L_{p,0\text{-pk}}$) has a reference value of 1 μPa, and weighted cumulative sound exposure level ($L_{E,p}$) has a reference value of 1μPa²s. In this table, thresholds are abbreviated to be more reflective of International Organization for Standardization standards (ISO 2017). The subscript "flat" is being included to indicate peak sound pressure are flat weighted or unweighted within the generalized hearing range of marine mammals (*i.e.,* 7 Hz to 160 kHz). The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The weighted cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving, vibratory pile driving and removal). The maximum (underwater) area ensonified above the thresholds for behavioral harassment referenced above is 30.7 km² (11.9 mi²), and is governed by the topography of Auke Bay and the various islands located within and around the bay. This underwater area has increased from the proposed IHA due to the higher source level for 30 inch piles (168.8 dB RMS re 1μPa) anticipated in Auke Bay. The eastern part of Auke Bay is acoustically shadowed by Auke Cape, Coghlan Island, and Suedla Island, and will inhibit sound transmission from reaching the more open waters toward Spuhn Island (see Figure 6–2 in the IHA application). Additionally, vessel traffic and other commercial and industrial activities in the project area may contribute to elevated background noise levels which may mask sounds produced by the project.

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

$$TL = B * \text{Log}_{10} (R_1/R_2),$$

where:

TL = transmission loss in dB
B = transmission loss coefficient
R_1 = the distance of the modeled SPL from the driven pile, and
R_2 = the distance from the driven pile of the initial measurement

This formula neglects loss due to scattering and absorption, which is assumed to be zero here. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6 dB reduction in sound level for each doubling of distance from the source ($20*\log_{10}$[range]). Cylindrical spreading occurs in an environment in which sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source ($10*\log_{10}$[range]). A practical spreading value of 15 is often used under conditions, such as the project site, where water increases with depth as the receiver moves away from the shoreline, resulting in an expected propagation environment that will lie between spherical and cylindrical spreading loss conditions. Transmission loss can be measured in the field for specific sites and activities.

Since the proposed IHA was published, NMFS identified site-specific spreading loss data that are applicable to Auke Bay. Specifically, Denes *et al.* (2016) measured a spreading loss coefficient of 16.4 during the previous monitoring of vibratory installation of 30-in steel pipe piles in Auke Bay. This value is applicable for the current analysis, and we have therefore used TL = 16.4 for determining the harassment zones for vibratory installation of 30 inch steel pipe piles. For all other planned pile types and driving methods, there are no available site-specific TL measurements. NMFS has therefore used the default practical spreading model (TL = 15) in analysis of all other pile types for this project.

The intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment in which the activity takes place. In order to calculate the distances to the Level A harassment and the Level B harassment thresholds for the methods and piles being used in this project, NMFS used acoustic monitoring data from other locations to develop proxy source levels for the various pile types, sizes and methods. The project includes vibratory and impact pile installation and vibratory removal of steel pipe piles. Proxy source levels for each pile size and driving method are presented in table 4. The source levels for vibratory and impact installation of all pile sizes are based on measured values from similar types of piles reported in the following sources: California Department of Transportation (Caltrans) in pile driving source level compendium documents (Caltrans, 2015 and 2020); Denes *et al.* (2016), and mean values for other regionally relevant reports compiled by NMFS (table 4).

TABLE 4—PROXY SOUND SOURCE LEVELS FOR PILE SIZES AND DRIVING METHODS

Pile size	Method	Proxy source level			Literature source
		dB RMS re 1μPa	dB SEL re 1μPa²sec	dB peak re 1μPa	
30 in	Vibratory	*168.8	N/A	N/A	Denes *et al.* 2016.
24 in	Vibratory	*163	N/A	N/A	NMFS 2023 analysis.**
18 in	Vibratory	158	N/A	N/A	Caltrans 2020.
30 in	Impact	190	177	210	Caltrans 2015, 2020.
24 in	Impact	190	177	203	Caltrans 2015, 2020.
18 in	Impact	185	175	200	Caltrans 2015, 2020.

* Source levels for vibratory pile installation and removal from the proposed IHA for 30 in. and 24 in. piles were 159 dB RMS re 1μPa and 154 dB RMS re 1μPa respectively.

** Navy (2012, 2013) and Miner (2020); averaging methodology followed Navy (2015).

The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources such as impact or vibratory pile driving and removal, the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it will be expected to incur PTS. Inputs used in the optional User Spreadsheet tool (table 5), and the resulting estimated isopleths and the calculated Level B harassment isopleth (table 6), are reported below. For source levels of each pile please refer to table 4.

For impact installation of piles, the harassment zones were calculated based on the number of piles to be installed per day. ADOT&PF provided a range of one to four piles per day for impact installation for all pile sizes. This was done to account for more efficient days of pile installation as not to limit construction activity on those days. If more piles per day are installed it is likely to reduce the number of days impact installation will occur.

TABLE 5—USER SPREADSHEET INPUT PARAMETERS USED FOR CALCULATING LEVEL A HARASSMENT ISOPLETHS

Pile size and installation method	Spreadsheet tab used	Weighting factor adjustment (kHz)	Number of strikes per pile	Number of piles per day	Activity duration (minutes)
30 in vibratory installation	A.1 Vibratory pile driving	2.5	N/A	3	60
24 in vibratory installation	A.1 Vibratory pile driving	2.5	N/A	3	60
24 in vibratory installation (temporary).	A.1 Vibratory pile driving	2.5	N/A	3	30
24 in vibratory removal (temporary)	A.1 Vibratory pile driving	2.5	N/A	3	60
18 in vibratory installation	A.1 Vibratory pile driving	2.5	N/A	3	60
18 in vibratory removal (existing)	A.1 Vibratory pile driving	2.5	N/A	3	30
30 in impact installation	E.1 Impact pile driving	2	1,000	1–4	N/A
24 in impact installation	E.1 Impact pile driving	2	1,000	1–4	N/A
24 in impact installation	E.1 Impact pile driving	2	500	1–4	N/A
18 in impact installation	E.1 Impact pile driving	2	800	1–4	N/A

TABLE 6—CALCULATED LEVEL A AND LEVEL B HARASSMENT ISOPLETHS

Activity	Level A harassment zone (m)					Level B harassment zone (m)
	LF-cetaceans	MF-cetaceans	HF-cetaceans	Phocids	Otariids	
30 in vibratory installation	41 (11)	5 (1)	59 (16)	26 (7)	2 (1)	*9,454
24 in vibratory installation	19 (5)	2 (1)	29 (8)	12 (3)	1 (1)	*7,356
24 in vibratory installation (temporary)	12 (4)	1 (1)	18 (5)	7 (2)	1 (1)	
24 in vibratory removal (temporary)	19 (5)	2 (1)	29 (8)	12 (3)	1 (1)	
18 in vibratory installation	9	1	14	6	1	*3,415
18 in vibratory removal (existing)	6 (9)	1 (1)	8 (14)	3 (6)	1 (1)	
30 in impact installation (4 piles per day; 1,000 strikes per pile)	1,002	36	1,194	537	39	1,000
30 in impact installation (3 piles per day; 1,000 strikes per pile)	827	30	985	443	33	
30 in impact installation (2 piles per day; 1,000 strikes per pile)	632	23	752	338	25	
30 in impact installation (1 pile per day; 1,000 strikes per pile)	398	15	474	213	16	
24 in impact installation (4 piles per day; 1,000 strikes per pile)	1,002	36	1,194	537	39	1,000
24 in impact installation (3 piles per day; 1,000 strikes per pile)	827	30	985	443	33	
24 in impact installation (2 piles per day; 1,000 strikes per pile)	632	23	752	338	25	
24 in impact installation (1 pile per day; 1,000 strikes per pile)	398	15	474	213	16	
24 in impact installation (4 piles per day; 500 strikes per pile)	632	23	752	338	25	
24 in impact installation (3 piles per day; 500 strikes per pile)	521	19	621	279	21	
24 in impact installation (2 piles per day; 500 strikes per pile)	398	15	474	213	16	
24 in impact installation (1 pile per day; 500 strikes per pile)	251	9	299	134	10	
18 in impact installation (4 piles per day; 800 strikes per pile)	636	23	757	340	25	464
18 in impact installation (3 piles per day; 800 strikes per pile)	525	19	625	281	21	
18 in impact installation (2 piles per day; 800 strikes per pile)	401	15	477	215	16	
18 in impact installation (1 pile per day; 800 strikes per pile)	252	9	301	135	10	

* The Proposed IHA ((88 FR 22411, April 13, 2023) harassment zones for vibratory installation and removal for 30 in., 24 in., and 18 in. steel pipe piles were 3,981, 1,848, and 1,848 respectively.

Marine Mammal Occurrence and Take Estimation

In this section, we provide information about the occurrence of marine mammals, including density or other relevant information that will inform the take calculations. As described above, since the proposed IHA, changes have been made to some of the harassment zones. These changes have resulted in changes to the amount of Level B harassment authorized for all species, with the exception of the four species that are rarely encountered (minke whales, California sea lions, Northern fur seals, and Northern elephant seals). The changes are described in the sections below and reflected in table 7.

When available, peer-reviewed scientific publications were used to estimate marine mammal abundance in the project area. Data from monitoring reports from previous projects on the Auke Bay Ferry Terminal were used as well as reports from other projects in Juneau, Alaska. However, scientific surveys and resulting data, such as population estimates, densities, and other quantitative information, are lacking for some marine mammal populations and most areas of southeast Alaska, including Auke Bay. Therefore, AKDOT&PF gathered qualitative information from discussions with knowledgeable local people in the Auke Bay area.

Here we describe how the information provided is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and authorized for authorization. Since reliable densities are not available, the applicant requests take based on the maximum number of animals that may occur in the harbor in a specified measure of time multiplied by the total duration of the activity.

Humpback Whale

Use of Auke Bay by humpback whales is intermittent and irregular year-round. During winter, researchers have documented 1 to 19 individual humpback whales per month in waters close to the project area, including Lynn Canal (Moran *et al.,* 2018a; Straley *et al.,* 2018). Group sizes in southeast Alaska generally range from one to four individuals (Dahlheim *et al.,* 2009). In the Proposed IHA NMFS predicted that two groups of two humpback whales could be exposed to Level B harassment during each day of the 61 days of work for a total of 244 animals. After revising the Level B harassment zones for 30 inch and 24 inch steel pipe piles, NMFS noted that the entrance to Fritz Cove is part of the new ensonified area during vibratory driving of 24-in and 30-in. piles. During winter, Fritz Cove is a known aggregation area for humpback whales. Thus, NMFS expects that an additional two groups of two could occur during pile driving activities for a total of 488 animals (Wright, S., pers. comm.). As described previously, 2 percent of the humpback whales in Southeast Alaska are members of the Mexico distinct population segment (DPS), and therefore 10 animals will be Mexico DPS individuals and the remaining 478 animals will be Hawaii DPS individuals.

The largest Level A shutdown zone for humpback whales extends 1,002 meters from the noise source (table 6), and will occur only on days when impact driving of four 30 in. or 24 in. piles are expected. All construction work will be shut down prior to a humpback whale entering the Level A zone specific to the in-water activity underway at the time. No take by Level A harassment was requested and none is authorized for humpback whales.

Minke Whales

Dedicated surveys for cetaceans in southeast Alaska found that minke whales were scattered throughout inland waters from Glacier Bay and Icy Strait to Clarence Strait, with small concentrations near the entrance of Glacier Bay. All sightings were of single minke whales, except for a single sighting of multiple minke whales. Surveys took place in spring, summer, and fall, and minke whales were present in low numbers in all seasons and years (Dahlheim *et al.,* 2009). Although minke whales are rarely occur in the project area NMFS is authorizing take of one minke whale per month by Level B harassment for a total of four takes over the course of the project.

The Level A harassment zones and shutdown protocols for minke whales are the same as for humpback whales. Therefore, given the low occurrence of minke whales combined with the mitigation, takes by Level A harassment have not been requested and are not authorized.

Killer Whale

Killer whales are observed occasionally during summer throughout Lynn Canal, but their presence in Auke Bay is unlikely. In the Proposed IHA NMFS expected one killer whale resident pod and one transient pod to be taken by Level B harassment. Since the expansion of the new Level B harassment zone for vibratory pile driving activities now extends out into the open waters of the Stephens Passage, NMFS is authorizing two killer whale resident pods and two transient pods to be taken by Level B harassment. Group sizes for resident and transient pods are likely to be 14 and 44 animals, respectively, which will result in 28 and 88 animals taken by level B harassment over the course of the project (Dahlheim *et al.,* 2009).

ADOT&PF will implement shutdown zones that encompass the largest Level A harassment zones for killer whales during all pile driving activities. Killer whales are generally conspicuous and protected species observers (PSOs) are expected to detect killer whales and implement a shutdown before the animals enter the Level A harassment zone. Therefore, takes by Level A harassment have not been requested and are not authorized.

Pacific White-Sided Dolphins

Based on occurrence data ADOT&PF requested a total of 92 takes by Level B harassment (the median group size observed in aerial surveys; range from 20 to 164 individuals) (Muto *et al.* 2022). NMFS proposed this take level by Level B harassment based on one group of Pacific white-sided dolphins to occur over the duration of the project. Similar to killer whales, NMFS is authorizing higher take levels of Pacific white-sided dolphins by Level B harassment due to the larger harassment zone. NMFS expects two groups of 92 to occur during construction activities resulting in a total of 184 takes by Level B harassment.

The largest Level A harassment zone for Pacific white-sided dolphins extends 36 m from the source during impact installation of 30-in piles (table 6). Pacific white-sided dolphins are expected to be seen by PSOs before entering this zone and shutdown of activity will occur. No take by Level A harassment is authorized or anticipated.

Harbor Porpoise

Initially ADOT&PF requested a total of 122 takes of harbor porpoise over the course of the 61 day project. ADOT&PF estimated that 25 percent of those takes could be Level A exposures which would equate to 30 over the project duration. After further review of previous monitoring results, including unpublished data (Wright, S., pers. comm.), NMFS proposed authorization of four animals per day in the Proposed IHA, equating to 244 takes of harbor porpoise by Level A and Level B harassment.

Given the larger Level B harassment zone, NMFS now expects an additional 56 takes by Level B harassment. This was calculated by doubling the estimated abundance of this species for the 14 days of vibratory driving of 30 inch piles. NMFS determined that increasing the take in proportion to the increased area ensonified was not justified because harbor porpoise tend to inhabit coastal shallow water and the new harassment zone does not encompass a substantial amount of new shoreline compared to the initial proposed harassment zone. The total number of takes by Level B harassment authorized is 300. NMFS has not increased the authorized takes by Level A harassment because the increases in Level A harassment zones expected during vibratory driving of 24-in and 30-in steel pipe piles are minimal and the applicant has agreed to increase the size of the shutdown zone for this species during these activities to encompass the increased Level A isopleths.

Harbor porpoises are known to be an inconspicuous species and are challenging for protected species observers (PSOs) to sight, making any approach to a specific area potentially difficult to detect. Because harbor porpoises move quickly and elusively, it is possible that they may enter the Level A harassment zone without detection. The largest Level A harassment zone results from impact driving of 30-in piles, and extends 1,194 m from the source for high frequency cetaceans (table 6). ADOT&PF will implement a shutdown zone for harbor porpoises that encompasses the largest Level A harassment zone (see Mitigation section) but given the sighting challenges for PSOs some take by Level A harassment is expected during impact pile driving.

Dall's Porpoise

No systematic studies of Dall's porpoise abundance or distribution have occurred in Auke Bay; however, Dall's porpoises have been consistently observed in Lynn Canal, Stephens Passage, upper Chatham Strait, Frederick Sound, and Clarence Strait (Dalheim *et al.,* 2000). ADOT&PF initially requested take of one group of 20 animals per month in the project area for a total of 80 takes by Level B harassment. After reviewing ADOT&PF's monitoring results from Auke Bay in 2021, one lone Dall's porpoise was sighted. Thus, the Proposed IHA included a conservative estimate of two groups of five animals per month, giving a maximum of 30 takes by Level B harassment throughout the course of the project. With the increase in the Level B harassment zones NMFS expects one additional group of 5 for a total of 35 takes by Level B harassment.

ADOT&PF will implement shutdown zones for porpoises that encompass the largest Level A harassment zones for each pile driving activity (see Mitigation section). The largest Level A harassment zone for Dall's porpoise extends 1,194 m from the source during impact installation of 30-in piles (table 6). Given the more conspicuous rooster-tail generated by swimming Dall's porpoises, which makes them more noticeable than harbor porpoises, PSOs are expected to detect Dall's porpoises prior to them entering the Level A harassment zone (Jefferson 2009). Therefore, takes of Dall's porpoises by Level A harassment have not been requested and are not authorized.

Steller Sea Lion

Based on recent monitoring reports for Auke Bay Ferry Terminal and Statter Harbor projects (2021 and 2019) it is estimated that groups of up to 50 animals per day could be exposed to underwater noise. The Proposed IHA predicted a total of 3,050 exposures to sound levels at or above the Level B harassment threshold could occur over the 61 days of construction. Steller sea lions have similar habitat usage pattern as humpback whales in Fritz Cove. Therefore, NMFS is increasing the number of takes to 6,100. Given the 1.4 percent of Steller sea lions belong to the western DPS (wDPS) in Auke Bay, 86 total exposures are expected from the wDPS and the remaining 6,015 exposures of eastern DPS Steller sea lions.

The largest Level A harassment zone for otariid pinnipeds extends 39 m from the source (table 6). ADOT&PF is planning to implement a larger shutdown zones than the Level A harassment zones during all pile installation and removal activities (see Mitigation section), which is expected to eliminate the potential for take by Level A harassment of Steller sea lions. Therefore, no takes of Steller sea lions by Level A harassment were requested or are authorized.

California Sea Lion

California sea lions rarely occur in the project area. In 2017, a lone California sea lion was spotted in the harbor. Recently, monitoring reports from similar construction projects did not observe any California sea lions in Auke Bay. Based on the sighting from 2017, ADOT&PF is estimating one animal per day of construction which will equate to 61 takes by Level B harassment.

The largest Level A harassment zone for otariid pinnipeds extends 39 m from the source (table 6). ADOT&PF is planning to implement larger shutdown zones than the Level A harassment zones during all pile installation and removal activities (see Mitigation section), which is expected to eliminate the potential for take by Level A harassment of California sea lions. Therefore, no takes of California sea lions by Level A harassment were requested or are authorized.

Northern Fur Seal

Although take of Northern fur seal was not requested by ADOT&PF, NMFS recommended the inclusion of Northern fur seals in the take estimation. We estimate that up to five northern fur seals may be present in the action area per month which may result in 15 takes by Level B harassment over the course of the project.

The largest Level A harassment zone for otariid pinnipeds extends 39 m from the source (table 6). ADOT&PF is planning to implement larger shutdown zones than the Level A harassment zones during all pile installation and removal activities (see Mitigation section), which is expected to eliminate the potential for take by Level A harassment of Northern fur seals. Therefore, no takes of Northern fur seals by Level A harassment were requested or are authorized.

Harbor Seal

In the Proposed IHA, NMFS based take estimates on the monitoring results of ADOT&PF's 2021 project in Auke Bay. It was expected that 50 harbor seals per day could be taken during the 61 days of construction (AKDOT&PF, 2021). NMFS proposed 3,050 takes of harbor seals by Level B harassment for the duration of the project. Similar to harbor porpoise, harbor seals typically inhabit costal inland waters. Given the larger Level B harassment zones NMFS expects, an additional 447 takes by Level B harassment over the 14 day of vibratory installation of 30-in piles are estimated. NMFS is authorizing 3,752 takes by Level B harassment for the duration of the project. NMFS has not increased the authorized takes by Level A harassment because the increases in Level A harassment zones expected during vibratory driving of 24-in and 30-in steel pipe piles are minimal and the applicant has agreed to increase the size of the shutdown zones for this species during these activities to encompass the increased Level A isopleths.

The largest Level A harassment zone for phocid pinnipeds results from impact pile driving of 30-in piles and extends 537 m from the source (table 6). There are no haulouts located within the Level A harassment zone and although it is unlikely, it is possible that harbor seals may approach and enter the Level A harassment zone undetected. Two harbor seals are estimated to approach the site within 537 m of the source each day. Impact pile driving may occur on up to 34 days (table 1). For this reason, we propose take by Level A harassment of two harbor seals daily on the 34 days of impact pile driving for a total of 68 takes by Level A harassment. The largest Level A harassment zone for phocid pinnipeds from vibratory pile driving extends 30 m from the source (table 6). ADOT&PF is planning to implement larger shutdown zones than the Level A harassment zones during all pile installation and removal activities (see Mitigation section), which is expected to eliminate the potential for Level A harassment of harbor seals from vibratory pile driving.

Northern Elephant Seal

Given the increase in population size and sightings throughout Southeast Alaska ADOT&PF requested one elephant seal take per week. The project is expected to take up to 16 weeks to complete which will equate to 16 takes by Level B harassment.

The largest Level A harassment zone for phocid pinnipeds extends 537 m from the source (table 6). ADOT&PF is planning to implement larger shutdown zones than the Level A harassment zones during all pile installation and removal activities (see Mitigation section), which is expected to eliminate the potential for take by Level A harassment of elephant seals. Therefore, no takes of elephant seals by Level A harassment were requested or are authorized.

TABLE 7—AUTHORIZED TAKE BY LEVEL A AND LEVEL B HARASSMENT, BY SPECIES AND STOCK

Common name	Stock	Stock abundance [a]	Proposed IHA	Final IHA authorized take			
			Total proposed take	Level A harassment	Level B harassment	Total take	Take as percentage of stock
Humpback whale	Hawai'i	11,278	238	0	476	476	4.2
	Mexico-North Pacific	918	6	0	10	10	1.1
Minke whale	Alaska	N/A	4	0	4	4	N/A
Killer Whale	Alaska Resident	1,920	41	0	82	82	4.3
	West Coast Transient	349	14	0	28	28	8.0
Pacific white-sided dolphin	North Pacific	931,000	92	0	184	184	0.02
Harbor porpoise	Northern Southeast Alaska	1,619	244	61	300	361	22.3
Dall's porpoise	Alaska	83,400	30	0	35	35	0.04
Steller sea lion	Eastern U.S.	43,201	3,008	0	6,015	6,015	13.9
	Western U.S.	52,932	43	0	86	86	0.16
California sea lion	U.S.	257,606	61	0	61	61	0.02
Northern fur seal	Eastern Pacific	626,618	15	0	15	15	<0.01
Harbor seal	Lynn Canal/Stephens Passage	13,388	3,050	68	3,752	3,820	28.5
Northern Elephant Seal	California	187,386	16	0	16	16	<0.01

[a] Stock or DPS size is Nbest according to NMFS 2022 Final Stock Assessment Reports.

Mitigation Measures

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance. NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations.

In addition to the measures described later in this section, ADOT&PF will employ the following standard mitigation measures:

- At the start of each day, the Contractor(s) will hold a briefing with the Lead PSO to outline the activities planned for that day.
- If poor weather conditions restrict the PSO's ability to make observations within the Level A and B harassment zone of pile driving (*e.g.,* if there is excessive wind or fog), pile installation and removal will be halted.

The following measures will apply to ADOT&PF's mitigation requirements:

Implementation of Shutdown Zones for Level A Harassment—For all pile driving/removal activities, ADOT&PF will implement shutdowns within designated zones. The purpose of a shutdown zone is generally to define an area within which shutdown of activity will occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Implementation of shutdowns will be used to avoid or minimize incidental Level A harassment exposures from vibratory and impact pile driving for all 11 species for which take may occur (see table 7). ADOT&PF has voluntarily implemented a minimum shutdown zone of 30 m during all pile driving and removal activities (table 8). Shutdown zones for impact pile driving activities are based on the Level A harassment zones and therefore vary by pile size, number of piles installed per day, and marine mammal hearing group (table 8). Shutdown zones for impact pile driving will be established each day for the greatest number of piles that are expected to be installed that day. The placement of PSOs during all pile driving activities (described in detail in the Monitoring and Reporting Section) will ensure the full extent of shutdown zones are visible to PSOs.

TABLE 8—SHUTDOWN ZONES DURING PILE INSTALLATION AND REMOVAL

Activity	Piles per day *	Shutdown zones (m)				
		LF cetaceans	MF cetaceans	HF cetaceans	Phocids	Otariids
All vibratory installation and removal	N/A	** 75	30	** 75	30	30
30-in impact (1,000 strikes)	4	1,100	40	1,200	540	40
	3	830	30	990	450	
	2	640		760	340	30
	1	400		480	220	
24-in impact (1,000 strikes)	4	1,100	40	1,200	540	40
	3	830	30	990	450	
	2	640		760	340	30
	1	400		480	220	
24-in impact (500 strikes)	4	640	30	760	340	30
	3	530		630	280	
	2	400		480	220	
	1	260		300	140	
18-in impact (800 strikes)	4	640	30	760	340	30
	3	530		630	280	
	2	400		480	220	
	1	260		300	140	

* The applicant will chose the number of piles to be driven in any given day (and therefore the maximum associated shutdown zone to be implemented that day) before work begins. Shutdown zones may not change for a given day once implemented.

** Zones that have increased from the Proposed IHA (88 FR 22411, April 13, 2023).

Establishment of Monitoring Zones—ADOT&PF has identified monitoring zones correlated with the larger of the Level B harassment or Level A harassment zones. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside the shutdown zone and thus prepare for a potential cease of activity should the animal enter the shutdown zone. PSOs will monitor the entire visible area to maintain the best sense of where animals are moving relative to the zone boundaries defined in tables 8 and 9. Placement of PSOs on the shorelines around Auke Bay allow PSOs to observe marine mammals within and near Auke Bay.

TABLE 9—MARINE MAMMAL MONITORING ZONE

Activity	Monitoring zone (m)
30-in vibratory installation	* 9,454
24-in 18-in vibratory installation and removal	* 7,356
18-in vibratory installation and removal	* 3,415
30-in and 24 in impact installation	1,200
18-in impact installation	760

* Zones that have increased from the Proposed IHA (88 FR 22411, April 13, 2023).

Soft Start—The use of soft-start procedures are believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to provide an initial set of strikes from the hammer at reduced energy, with each strike followed by a 30-second waiting period. This procedure will be conducted a total of three times before impact pile driving begins. Soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer. Soft start is not required during vibratory pile driving and removal activities.

Pre-Activity Monitoring—Prior to the start of daily in-water construction activity, or whenever a break in pile driving/removal of 30 minutes or longer occurs, PSOs will observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone will be considered cleared when a marine mammal has not been observed within the zone for that 30-minute period. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. If the monitoring zone has been observed for 30 minutes and marine mammals are not present within the zone, soft-start procedures can commence and work can continue even if visibility becomes impaired within the monitoring zone. When a marine mammal permitted for take by Level B harassment is present in the Level B harassment zone, activities may begin. No work may begin unless the entire shutdown zone is visible to the PSOs. If work ceases for more than 30 minutes, the pre-activity monitoring of both the monitoring zone and shutdown zone will commence.

Based on our evaluation of the applicant's mitigation measures, NMFS has determined that the measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through

better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);

• Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;

• How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

• Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,

• Mitigation and monitoring effectiveness.

Visual Monitoring

Monitoring shall be conducted by NMFS-approved observers in accordance with the monitoring plan and Section 5 of the IHA. Trained observers shall be placed from the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. Observer training must be provided prior to project start, and shall include instruction on species identification (sufficient to distinguish the species in the project area), description and categorization of observed behaviors and interpretation of behaviors that may be construed as being reactions to the specified activity, proper completion of data forms, and other basic components of biological monitoring, including tracking of observed animals or groups of animals such that repeat sound exposures may be attributed to individuals (to the extent possible).

Monitoring will be conducted 30 minutes before, during, and 30 minutes after pile driving/removal activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving/removal activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

A minimum of two PSOs will be on duty during all impact installation and a minimum of three PSOs during vibratory installation/removal. Locations from which PSOs will be able to monitor for marine mammals are readily available from publicly accessible shoreside areas at the Auke Bay East Ferry Terminal and, if necessary, other public and private points along the Glacier and Douglas highways. Monitoring locations will be selected by the Contractor during pre-construction. PSOs will monitor for marine mammals entering the Level B harassment zones; the position(s) may vary based on construction activity and location of piles or equipment.

PSOs will scan the waters using binoculars, and/or spotting scopes, and will use a handheld range-finder device to verify the distance to each sighting from the project site. All PSOs will be trained in marine mammal identification and behaviors and are required to have no other project-related tasks while conducting monitoring. In addition, monitoring will be conducted by qualified observers, who will be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown/delay procedures when applicable by calling for the shutdown to the hammer operator via a radio. ADOT&PF will adhere to the following observer qualifications:

(i) Independent observers (*i.e.,* not construction personnel) are required;

(ii) One PSO will be designated as the lead PSO or monitoring coordinator and that observer must have prior experience working as an observer;

(iii) Other observers may substitute education (degree in biological science or related field) or training for experience; and

(iv) ADOT&PF must submit observer Curriculum Vitaes for approval by NMFS.

Additional standard observer qualifications include:

• Ability to conduct field observations and collect data according to assigned protocols;

• Experience or training in the field identification of marine mammals, including the identification of behaviors;

• Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

• Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates and times when in-water construction activities were suspended to avoid potential incidental injury from construction sound of marine mammals observed within a defined shutdown zone; and marine mammal behavior; and

• Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

Reporting

A draft marine mammal monitoring report will be submitted to NMFS within 90 days after the completion of pile driving and removal activities. It will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:

• Dates and times (begin and end) of all marine mammal monitoring.

• Construction activities occurring during each daily observation period, including the number and type of piles driven or removed and by what method (*i.e.,* impact driving) and the total equipment duration for cutting for each pile or total number of strikes for each pile (impact driving).

• PSO locations during marine mammal monitoring.

• Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;

• Upon observation of a marine mammal, the following information: Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; Time of sighting; Identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; Distance and bearing of each marine mammal observed relative to the pile being driven for each sighting (if pile driving was occurring at time of sighting); Estimated number of animals (min/max/best estimate); Estimated number of animals by cohort (adults, juveniles, neonates, group composition, etc.); Animal's closest point of approach and estimated time spent within the harassment zone; Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);

- Number of marine mammals detected within the harassment zones, by species.
- Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

Reporting Injured or Dead Marine Mammals

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA (if issued), such as an injury, serious injury or mortality, ADOT&PF will immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Alaska Regional Stranding Coordinator. The report will include the following information:

- Description of the incident;
- Environmental conditions (*e.g.,* Beaufort sea state, visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities will not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with ADOT&PF to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. ADOT&PF will not be able to resume their activities until notified by NMFS via letter, email, or telephone.

In the event that ADOT&PF discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.,* in less than a moderate state of decomposition as described in the next paragraph), ADOT&PF will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinator. The report will include the same information identified in the paragraph above. Activities will be able to continue while NMFS reviews the circumstances of the incident. NMFS will work with ADOT&PF to determine whether modifications in the activities are appropriate.

In the event that ADOT&PF discovers an injured or dead marine mammal and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), ADOT&PF will report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinator, within 24 hours of the discovery. ADOT&PF will provide photographs, video footage (if available), or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact 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 (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the majority of our analysis applies to all the species listed in table 7, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Pile driving and removal activities associated with the project as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level A harassment and Level B harassment from underwater sounds generated from pile driving and removal. Potential takes could occur if individuals of these species are present in zones ensonified above the thresholds for Level A or Level B harassment identified above when these activities are underway.

Take by Level A and Level B harassment will be due to potential behavioral disturbance, TTS, and PTS. No serious injury or mortality is anticipated or authorized given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. Take by Level A harassment is only anticipated for harbor porpoise and harbor seal. The potential for harassment is minimized through the construction method and the implementation of the mitigation measures (see Mitigation section).

Based on reports in the literature as well as monitoring from other similar activities, behavioral disturbance (*i.e.,* Level B harassment) will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.,* Thorson and Reyff, 2006; HDR, Inc. 2012; Lerma, 2014; ABR, 2016). Most likely for pile driving, individuals will simply move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily in association with impact pile driving. The pile driving activities analyzed here are similar to, or less impactful than, numerous other construction activities conducted in southeast Alaska, which have taken place with no observed severe responses of any individuals or known long-term adverse consequences. Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring. While vibratory driving associated with the project may produce sound at distances of many kilometers from the project site, thus overlapping with some likely less-disturbed habitat, the project site itself is located in a busy harbor and the majority of sound fields produced by the specified activities are close to the harbor. Animals disturbed by project sound would be expected to avoid the area and use nearby higher-quality habitats.

In addition to the expected effects resulting from authorized Level B harassment, we anticipate that harbor porpoises and harbor seals may sustain some limited Level A harassment in the form of auditory injury. However, animals in these locations that experience PTS will likely only receive slight PTS, *i.e.,* minor degradation of hearing capabilities within regions of hearing that align most completely with the energy produced by pile driving, not severe hearing impairment or impairment in the regions of greatest hearing sensitivity. If hearing impairment occurs, it is most likely that the affected animal will lose a few decibels in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics. As described above, we expect that marine mammals will be likely to move away from a sound source that represents an aversive stimulus, especially at levels that would be expected to result in PTS, given sufficient notice through use of soft start.

The project also is not expected to have significant adverse effects on affected marine mammals' habitat. The project activities will not modify existing marine mammal habitat for a significant amount of time. The activities may cause some fish or invertebrates to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities, the relatively small area of the habitat that may be affected, and the availability of nearby habitat of similar or higher value, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Nearly all inland waters of southeast Alaska, including Auke Bay, are considered Biological Important Areas (BIA) for feeding at some time of the year (Wild *et al.* 2023), and most are considered ephemeral, as humpback whale distribution in southeast Alaska varies by season and waterway (Dahlheim *et al.,* 2009). The BIA that overlaps closest to the project are active from April through October while the project is scheduled to occur between October and March, so overlap with during one month of the active BIA is expected. Additionally, pile driving associated with the project is expected to take only 61 days, further reducing the temporal overlap with the BIA. Therefore, the project is not expected to have significant adverse effects on the foraging of Alaska humpback whales. No areas of specific biological importance (*e.g.,* ESA critical habitat, other BIAs, or other areas) for any other species are known to co-occur with the project area.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- Any Level A harassment exposures (*i.e.,* to harbor porpoises and harbor seals, only) are anticipated to result in slight PTS (*i.e.,* of a few decibels), within the lower frequencies associated with pile driving;
- The anticipated incidents of Level B harassment will consist of, at worst, temporary modifications in behavior that will not result in fitness impacts to individuals;
- The area impacted by the specified activity is very small relative to the overall habitat ranges of all species, does not include ESA-designated critical habitat; and
- The mitigation measures are expected to reduce the effects of the specified activity to the level of least practicable adverse impact.

In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to affect the reproduction or survival of any individual marine mammals and, therefore, will not result in impacts on rates of recruitment or survival for any species or stock.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

Table 7 demonstrates the number of animals that could be exposed to received noise levels that could cause Level A and Level B harassment for the work in Auke Bay. Our analysis shows that less than 28.5 percent of each affected stock could be taken by harassment. The numbers of animals to be taken for these stocks will be considered small relative to the relevant stock's abundances, even if each estimated taking occurred to a new individual—an extremely unlikely scenario.

Based on the analysis contained herein of the activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

In order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

The project is not known to occur in an area important for subsistence hunting. It is a developed area with regular marine vessel traffic. However, ADOT&PF plans to provide advanced public notice of construction activities to reduce construction impacts on local residents, ferry travelers, adjacent businesses, and other users of the Auke Bay ferry terminal and nearby areas. This will include notification to local Alaska Native tribes that may have members who hunt marine mammals for subsistence. Of the marine mammals considered in this IHA application, only harbor seals are known to be used for subsistence in the project area. If any tribes express concerns regarding project impacts to subsistence hunting of marine mammals, further communication between will take place, including provision of any project information, and clarification of any mitigation and minimization measures that may reduce potential impacts to marine mammals.

Based on the description of the specified activity, the measures described to minimize adverse effects on the availability of marine mammals for subsistence purposes, and the mitigation and monitoring measures, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from ADOT&PF's activities.

Endangered Species Act

There are two marine mammal species (western DPS Steller sea lion and Mexico DPS humpback whale) with confirmed occurrence in the project area that is listed as endangered and threatened respectively under the ESA. The NMFS Alaska Regional Office Protected Resources Division issued a Biological Opinion on December 22, 2023 under section 7 of the ESA, on the issuance of an IHA to ADOT&PF under section 101(a)(5)(D) of the MMPA by the NMFS Permits and Conservation Division. The Biological Opinion concluded that this action is not likely to jeopardize the continued existence of western DPS Steller sea lions or Mexico DPS humpback whale, and is not likely to destroy or adversely modify western DPS Steller sea lion or Mexico DPS humpback whale critical habitats.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate our action (*i.e.,* the issuance of an IHA) and alternatives with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NAO 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that will preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of this IHA qualifies to be categorically excluded from further NEPA review.

Authorization

NMFS has issued an IHA to ADOT&PF for the potential harassment of small numbers of 11 marine mammal species incidental to the construction project in Auke Bay, Alaska, that includes the previously explained mitigation, monitoring and reporting requirements. The issued IHA can be found at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-alaska-department-transportation-pile-driving-and-removal.*

Dated: January 9, 2024.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2024–00622 Filed 1–12–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Cooperative Game Fish Tagging Report

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before March 18, 2024.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0247 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Eric Orbesen, Research Fish Biologist, NOAA Southeast Fisheries Science Center, 75 Virginia Beach Dr., Miami, FL 33149, ((800) 437 3936), *Eric.Orbesen@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a current information collection.

The Cooperative Game Fish Tagging Program was initiated in 1971 as part of a comprehensive research program resulting from passage of Public Law 86–359, Study of Migratory Game Fish, and other legislative acts under which the National Marine Fisheries Service (NMFS) operates. The Cooperative Tagging Center attempts to determine the migration patterns of, and other biological information for, billfish, tunas, and swordfish. The Fish Tag Issue Report card is a necessary part of the tagging program. Fishermen volunteer to tag and release their catch. When requested, NMFS provides the volunteers with fish tags for their use when they release their fish. Usually a group of five tags is sent at one time, each attached to a Report card, which is pre-printed with the first and last tag numbers received, and has spaces for the respondent's name, address, date, and club affiliation (if applicable). He/she fills out the card with information when a fish is tagged and mails it to NMFS.

Information on each species is used by NMFS to determine migratory patterns, distance traveled, stock boundaries, age, and growth. These data are necessary input for developing management criteria by regional fishery management councils, states, and NMFS. The tag report cards are necessary to provide tags to the volunteer angler, record when and where the fish was tagged, the species, its estimated length and weight, tag number, and information on the tagger for follow-ups if the tagged fish is recovered. Failure to obtain these data would make management decisions very difficult and would be contrary to the NMFS Marine Recreational Fishing policy objectives. Anglers are made aware of the tagging program through several forms of media: newspaper and magazine articles, through both The Billfish Foundation and the Southeast Fisheries Science Center websites, peer review papers, and by word of mouth.

II. Method of Collection

Information is submitted by mail, and occasionally, international anglers scan the report cards and submit them via email to *tagging@noaa.gov.*

III. Data

OMB Control Number: 0648–0247.
Form Number(s): NOAA form 88–162.
Type of Review: Regular submission, extension of a current information collection.
Affected Public: Individuals or households.
Estimated Number of Respondents: 200.
Estimated Time per Response: 5.63 minutes.
Estimated Total Annual Burden Hours: 292 hours.
Estimated Total Annual Cost to Public: $0.
Respondent's Obligation: Voluntary.
Legal Authority: U.S. Code: 16 U.S.C. 760e; Name of Law: Study of Migratory Game Fish.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–00615 Filed 1–12–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Agency Information Collection Activities; Submission for OMB Review; Comment Request; State Digital Equity Capacity Grant Program

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on November 3, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Telecommunications and Information Administration (NTIA), Commerce.
Title: State Digital Equity Capacity Grant Program (SDECGP).
OMB Control Number: 0660–XXXX.
Form Number(s): None.
Type of Request: New information collection.
Number of Respondents: 56 for the Application Form, Specific Projects Form, and Consolidated Budget Form; 11 for the DE Plan Amendments Form.
Average Hours per Response: 11 hours.
Burden Hours: 571 hours.
Needs and Uses: With this information collection, NTIA will review the proposed applications and budgets of applicants to evaluate alignment to SDECGP requirements and program priorities. Applicants will have more structured questions and guidance for their applications. The forms will ultimately reduce the applicant burden by making the application process clearer and simpler. Additionally, the structured forms will reduce application errors and the number of application updates needed after the applications have been submitted. NTIA will use the information collected in the DE Plan Amendments Form to review changes made to the applicant's Digital Equity Plan after acceptance in order to evaluate alignment to program requirements and between the applicant's Plan and proposed SDECGP activities.

Affected Public: States, Territories, or possessions of the United States applying for Infrastructure Act Broadband Grant Program funding.

Frequency: Annually.

Respondent's Obligation: Mandatory.

Legal Authority: Sections 60304(c) and 60304(d) of the Infrastructure Investment and Jobs Act of 2021, Public Law 117–58, 135 Stat. 429 (November 15, 2021).

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 Under Secretary of Economic Affairs, Commerce Department.

[FR Doc. 2024–00655 Filed 1–12–24; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0130]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Stronger Connections Grant Program Annual Performance Report

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before February 15, 2024.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Sarah Newman, 202–453–6956.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Stronger Connections Grant Program Annual Performance Report.

OMB Control Number: 1810–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 10,053.

Total Estimated Number of Annual Burden Hours: 40,636.

Abstract: The Bipartisan Safer Communities Act (BSCA) provides $1 billion in funding to State educational agencies (SEAs) to be distributed under Title IV, Part A of the Elementary and Secondary Education Act of 1965 (ESEA). The BSCA specifies that SEAs must make competitive subgrants to high-need local educational agencies (LEAs), as determined by the SEA, for activities to support safe and healthy students under section 4108 of the ESEA. The Department of Education has designated BSCA section 4108 funds as the Stronger Connections grant program.

This is a new information collection request for the Stronger Connections grant program annual performance reporting. Under the Education Department's General Administrative Regulations (EDGAR, Section 75.720), grantees shall submit annual performance reports. In addition, in order to receive a Stronger Connections grant award, SEAs were required to submit an assurance that the SEA will submit such other information as the Secretary may later require, such as (1) the identification of the LEAs awarded Stronger Connections grant funds, (2) how the SEA and its LEAs are using Stronger Connections grant funds, and (3) Whether the SEA will evaluate the effectiveness of the SCG program, including the effectiveness of LEA use of SCG funds and, if so, how it will do so.

As part of the public comment period review, ED requests that SEAs and its other stakeholders respond to the directed questions found in Attachment A.

Dated: January 10, 2024.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–00663 Filed 1–12–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Meeting of the National Board for Education Sciences

AGENCY: National Board for Education Sciences, Institute of Education Sciences (IES), U.S. Department of Education.

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the agenda, time, and instructions to access or participate in the National Board for Education Sciences (hereafter referred to as NBES or Board) virtual meeting scheduled for January 29, 2024. This notice provides information about the meeting to members of the public who may be interested in virtually attending the meeting and/or how to provide written comment(s).

ADDRESSES: The virtual meeting will be conducted virtually via Microsoft Teams.

DATES: The NBES meeting will be held on Monday, January 29, 2024, from 10 a.m.–4 p.m. (EST).

FOR FURTHER INFORMATION CONTACT: Ellie Pelaez, DFO for NBES, U.S. Department of Education, IES: 550 12th Street SW, Office 4126–1, Washington, DC 20202, telephone: (202) 987–0359, email: *ellie.pelaez@ed.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is required by section 1009(a)(2) of 5 U.S.C. chapter 10 (Federal Advisory Committees).

Statutory Authority and Function: The Board is authorized by section 116 of the Education Sciences Reform Act of 2002 (20 U.S.C. 9516). The Board is established as part of the U.S. Department of Education, IES, and shall, consistent with 20 U.S.C. 9514, 9515(b)-(c), and 9516 function as a board of directors for IES. The mission of IES is to provide national leadership in expanding fundamental knowledge and understanding of education from early childhood through postsecondary study, in order to provide parents, educators, students, researchers, policymakers, and the general public with reliable information about the condition and progress of education in the United States; educational practices that support learning and improve academic achievement and access to educational opportunities for all students; and the effectiveness of Federal and other education programs.

The Board's responsibilities are: (1) advise and consult with the Director of IES (Director) on the policies of IES; (2) consider and approve priorities proposed by the Director under 20 U.S.C. 9515 to guide the work of IES; (3)

transmit approved priorities to the appropriate congressional committee (20 U.S.C. 9515(b)); (4) ensure that the priorities of IES and the National Education Centers are consistent with the mission of IES (20 U.S.C. 9515(c)); (5) review and approve procedures for technical and scientific peer review of the activities of IES; (6) advise the Director on the establishment of activities to be supported by IES, including the general areas of research to be carried out by the National Center for Education Research (NCER) and the National Center for Special Education Research (NCSER) (20 U.S.C. 9567); (7) present to the Director such recommendations as it may find appropriate for (a) the strengthening of education research, and (b) the funding of IES; (8) advise the Director on the funding of applications for grants, contracts, and cooperative agreements for research, after the completion of peer review; (9) review and regularly evaluate the work of IES, to ensure that scientifically valid research, development, evaluation, and statistical analysis are consistent with the standards for such activities under this title; (10) advise the Director on ensuring that activities conducted or supported by IES are objective, secular, neutral, and non-ideological, and are free of partisan political influence and racial, cultural, gender, or regional bias; (11) solicit advice and information from those in the educational field, particularly practitioners and researchers, to recommend to the Director topics that require long-term, sustained, systematic, programmatic, and integrated research efforts, including knowledge utilization and wide dissemination of research, consistent with the priorities and mission of IES; (12) advise the Director on opportunities for the participation in, and the advancement of, women, minorities, and persons with disabilities in education research, statistics, and evaluation activities of IES; (13) recommend to the Director ways to enhance strategic partnerships and collaborative efforts among other Federal and State research agencies; (14) recommend to the Director individuals to serve as Commissioners of the National Education Centers; and (15) make recommendations to the President with respect to the appointment of the Director.

Meeting Agenda: The agenda for the meeting is as follows: (1) Call to order and welcome remarks by the Chairwoman of the Board; (2) Member roll call; (3) Board member approval of meeting transcript from the December 4–5, 2023 meeting; (4) Board member approval of meeting agenda; (5) discussion of and voting on reports from NBES subcommittees; (6) Discussion of NBES policy priorities; (7) Meeting with a representative from Friends of IES to discuss how they can support NBES efforts; (8) Plan for NBES meetings in upcoming calendar year; (9) Closing remarks and adjournment.

Instructions for Accessing the Meeting: Members of the public interested in virtually attending this meeting may email the DFO listed in this notice no later than 11:59 p.m. eastern time (ET) on Wednesday, January 24, 2024. The DFO will provide a link and instructions on how to access the meeting via Microsoft Teams.

Public Comment: Members of the public interested in submitting written comments related to the work of NBES may do so by emailing the DFO listed in this notice no later than 11:59 p.m. ET on Wednesday, January 24, 2024. Written comments should pertain to the mission and function of NBES.

Reasonable Accommodations: The virtual meeting is accessible to individuals with disabilities. If you will need an auxiliary aid or service for the meeting (*e.g.,* interpreting service, assistive listening device, or materials in an alternate format), notify the DFO listed in this notice no later than January 24th, 2024.

Access to Records of the Meeting: The official transcript of this meeting will be available for public review on the IES website, *https://ies.ed.gov/director/board/index.asp,* no later than 90 days after the meeting. Pursuant to 5 U.S.C. 1009(b), the public may also inspect NBES records at the U.S. Department of Education, IES, 550 12th Street SW, Washington, DC 20202, Monday-Friday, 8:30 a.m. to 5 p.m. ET. Please email *ellie.pelaez@ed.gov* to schedule an appointment.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* 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 Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site. You also may access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Authority: Section 116 of the Education Sciences Reform Act of 2002 (20 U.S.C. 9516).

Mark Schneider,

Director, Institute of Education Sciences.

[FR Doc. 2024–00699 Filed 1–12–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2024–SCC–0010]

Agency Information Collection Activities; Comment Request; Data Collection for the Evaluation of the REL Appalachia Teaching Math to Young Children Toolkit

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before March 18, 2024.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2024–SCC–0010. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Amy Johnson, 202–453–7439.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Data Collection for the Evaluation of the REL Appalachia Teaching Math to Young Children Toolkit.

OMB Control Number: 1850–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 6,720.

Total Estimated Number of Annual Burden Hours: 697.

Abstract: Mathematics knowledge acquired in early childhood provides a critical foundation for long-term student success in math as well as reading (Duncan et al., 2007; Watts et al., 2014), but the professional development (PD) and curricular support for preschool teachers often lack specific content and training on high-quality math instruction delivered by math content experts. To address this problem, the REL Appalachia toolkit development team is developing a toolkit to provide preschool teachers with support in implementing core teaching practices essential to promoting early math skills and knowledge in children. The toolkit is based on the Teaching Math to Young Children IES practice guide (Frye et al., 2013) and is being developed in collaboration with state and district partners in Virginia.

IES requests clearance for data collection instruments and the collection of district administrative data for an efficacy study of the toolkit as part of the REL Appalachia (REL AP) contract.

The study will assess the efficacy of the professional development resources included in the toolkit. The evaluation will also assess how teachers implement the toolkit to provide context for the efficacy findings and guidance to improve the toolkit and its future use. The evaluation will take place in 50 schools across approximately 10 school divisions in Virginia and focus on mathematics teaching practices and student mathematics knowledge and skills in preschool classrooms. The purpose of this study will be to measure the efficacy and implementation of the REL AP developed toolkit designed to improve teacher practice and preschool students' math learning outcomes. The toolkit evaluation will produce a report for district and school leaders who are considering strategies to improve math learning in preschool. The report will be designed to help them decide whether and how to use the toolkit to help them implement the practice guide recommendations.

Dated: January 10, 2024.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–00685 Filed 1–12–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2024–SCC–0009]

Agency Information Collection Activities; Comment Request; SEA Procedures for Adjusting ED-Determined Title I Allocations to Local Education Agencies (LEAs)

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before March 18, 2024.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2024–SCC–0009. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Todd Stephenson, 202–205–1645.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: SEA Procedures for Adjusting ED-Determined Title I Allocations to Local Education Agencies (LEAs).

OMB Control Number: 1810–0622.

Type of Review: An extension without change of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 52.

Total Estimated Number of Annual Burden Hours: 2,080.

Abstract: We are requesting a three-year extension of the current paperwork clearance package (OMB number 1810–0622) related to State educational agency (SEA) procedures for adjusting title I, part A local educational agency (LEA) allocations determined by the U.S. Department of Education (ED).

Title I, part A of the Elementary and Secondary Education Act of 1965, as amended (ESEA), requires ED to allocate Basic Grants, Concentration Grants, Targeted Grants, and Education Finance Incentive Grants directly to LEAs. (See sections 1124(a)(2), 1124A(a), 1125(a), (b), and (c)(2), and 1125A(c) and (d)(1)((B), (2)(B), and (3)(B) of the statute at *https://uscode.house.gov/browse/prelim@title20/chapter70/subchapter1/partA&edition=prelim.*) Title I, part A allocations are based primarily on poverty data provided by the Census Bureau and reflect a national list of LEAs that is generally two years old. For example, the list of LEAs used for calculating school year (SY) 2023–2024 allocations is based on LEAs that existed in SY 2021–2022. Because the list of LEAs used by ED in determining LEA allocations does not match the current universe of LEAs in many States, SEAs must adjust EDs allocations to account for district boundary changes and newly-created LEAs that are eligible for title I, part A funds but did not receive an allocation under ED calculations.

Dated: January 9, 2024.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–00646 Filed 1–12–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Advisory Board

AGENCY: Office of Environmental Management, Department of Energy (DOE).

ACTION: Notice of renewal.

SUMMARY: Pursuant to the Federal Advisory Committee Act and in accordance with Title 41 of the Code of Federal Regulations, and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the Environmental Management Advisory Board (EMAB) will be renewed for a two-year period beginning January 12, 2024.

FOR FURTHER INFORMATION CONTACT: Kelly Snyder, EMAB Designated Federal Officer, by Phone: (702) 918–6715 or Email: *kelly.snyder@em.doe.gov.*

SUPPLEMENTARY INFORMATION: The Board provides the Assistant Secretary for Environmental Management (EM) with information and strategic advice on a broad range of corporate issues affecting the EM program. These corporate issues include, but are not limited to, project management and oversight activities, cost/benefit analyses, program performance, human capital development, and contracts and acquisition strategies. Recommendations to EM on the programmatic resolution of numerous difficult issues will help achieve EM's objective of the safe and efficient cleanup of its contaminated sites.

Additionally, the renewal of the EMAB has been determined to be essential to conduct DOE business and to be in the public interest in connection with the performance of duties imposed on DOE by law and agreement. EMAB will operate in accordance with the provisions of the Federal Advisory Committee Act, and rules and regulations issued in implementation of that Act.

Signing Authority

This document of the Department of Energy was signed on January 9, 2024, by Sarah E. Butler, Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on January 10, 2024.

Treena V. Garrett,

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

[FR Doc. 2024–00683 Filed 1–12–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2362–000]

ALLETE, Inc.; Notice of Authorization for Continued Project Operation

The license for the Grand Rapids Hydroelectric Project No. 2362 was issued for a period ending December 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2362 is issued to ALLETE, Inc. for a period effective January 1, 2024, through December 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before December 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that ALLETE, Inc. is authorized to continue operation of the Grand Rapids Hydroelectric Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: January 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00603 Filed 1–12–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ24–7–000]

City of Colton, California; Notice of Filing

Take notice that on December 27, 2023, City of Pasadena, California submits tariff filing per 35.28(e): City of Colton 2024 TRBAA and ETC Update to be effective January 1, 2024.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

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*). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

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

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically 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.

Comment Date: 5:00 p.m. Eastern Time on January 12, 2024.

Dated: January 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00598 Filed 1–12–24; 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: RP24–304–000.
Applicants: Ruby Pipeline, L.L.C.
Description: 4(d) Rate Filing: RP 2024–01–05 Negotiated Rate Agreement to be effective 1/6/2024.
Filed Date: 1/5/24.
Accession Number: 20240105–5158.
Comment Date: 5 p.m. ET 1/17/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: January 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00601 Filed 1–12–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP24–33–000]

Transwestern Pipeline Company, LLC; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on December 27, 2023, Transwestern Pipeline Company, LLC (Transwestern), 1300 Main Street, Houston, Texas 77002, filed in the above referenced docket, a prior notice request pursuant to sections 157.205 and 157.216 of the Commission's regulations under the Natural Gas Act (NGA), and Transwestern's blanket certificate issued in Docket No. CP82–534–000,[1] for authorization to abandon in place the Monument Compressor Station consisting of two natural gas compressor turbines, compressors, yard and station piping, and ancillary related facilities located in Lea County, New Mexico, (Monument Project). The proposed abandonment will eliminate the need to maintain facilities that are not necessary for transportation of natural gas on Transwestern's system, all as more fully set forth in the request, which is on file with the Commission, and open to public inspection.

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[1] *Transwestern Pipeline Company, LLC,* 21 FERC ¶ 62,190 (1982).

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. Public access to records formerly available in the Commission's physical Public Reference Room, which was located at the Commission's headquarters, 888 First Street NE, Washington, DC 20426, are now available via the Commission's website. For assistance, contact the Federal Energy Regulatory Commission at *FercOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY (202) 502–8659.

Any questions concerning this request should be directed to: Blair Lichtenwalter, Senior Director, Regulatory Affairs, Transwestern Pipeline Company, LLC, 1300 Main Street, Houston, TX 77002, (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 March 8, 2024. How to file protests, motions to intervene, and comments is explained below.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,[2] any person [3] 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,[4] and must be submitted by the protest deadline, which is March 8, 2024. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [5] and the regulations under the NGA [6] by the intervention deadline for the project, which is March 8, 2024. 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 March 8, 2024. *The filing of a comment alone will not serve to make the filer a party to the proceeding.* To become a party, you must intervene in the proceeding.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP24–33–000 in your submission.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Protest'', ''Intervention'', or ''Comment on a Filing''; or [7]

(2) You can file a paper copy of your submission by mailing it to the address below. Your submission must reference the Project docket number CP24–33–000.

To file via USPS: Debbie-Anne Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other method: Debbie-Anne Reese, Acting 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

[2] 18 CFR 157.205.

[3] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[4] 18 CFR 157.205(e).

[5] 18 CFR 385.214.

[6] 18 CFR 157.10.

[7] 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.

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: B Blair Lichtenwalter, Senior Director, Regulatory Affairs, Transwestern Pipeline Company, LLC, 1300 Main Street, Houston, TX 77002, (713) 989–2605, or by email at *Blair.Lichtenwalter@energytransfer.com.* Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: January 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00599 Filed 1–12–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC24–36–000.
Applicants: Innovative Solar 42, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act of Innovative Solar 42, LLC.
Filed Date: 1/5/24.
Accession Number: 20240105–5205.
Comment Date: 5 p.m. ET 1/26/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER23–883–001; ER21–1519–006; ER19–2269–009; ER21–1682–006; ER10–1852–080; ER21–254–008; ER16–1354–015; ER10–1971–036; ER10–1951–056; ER11–4462–079; ER10–2641–046; ER19–2266–009; ER21–1532–006; ER16–1913–013; ER21–1506–007; ER19–774–011; ER21–255–008; ER16–1293–016; ER16–1277–016.
Applicants: White Pine Solar, LLC, White Oak Solar, LLC, Taylor Creek Solar, LLC, Stanton Clean Energy, LLC, Shaw Creek Solar, LLC, River Bend Solar, LLC, Quitman II Solar, LLC, Quitman Solar, LLC, Oleander Power Project, Limited Partnership, NEPM II, LLC, NextEra Energy Services Massachusetts, LLC, NextEra Energy Power Marketing, LLC, Live Oak Solar, LLC, Harmony Florida Solar, LLC, Florida Power & Light Company, Elora Solar, LLC, Dougherty County Solar, LLC, Cool Springs Solar, LLC, Bell Ridge Solar, LLC.
Description: Amendment to June 30, 2023, Triennial Market Power Analysis for Southeast Region of Bell Ridge Solar, LLC, et. al.
Filed Date: 1/5/24.
Accession Number: 20240105–5213.
Comment Date: 5 p.m. ET 1/26/24.

Docket Numbers: ER24–81–001.
Applicants: Shady Oaks Wind 2, LLC.
Description: Compliance filing: Compliance Filing to Order.
Filed Date: 1/8/24.
Accession Number: 20240108–5068.
Comment Date: 5 p.m. ET 1/29/24.

Docket Numbers: ER24–266–001.
Applicants: Solar of Alamosa LLC.
Description: Tariff Amendment: Supplement to Petition for Market-Based Rate Authorization to be effective 11/1/2023.
Filed Date: 1/8/24.
Accession Number: 20240108–5121.
Comment Date: 5 p.m. ET 1/29/24.

Docket Numbers: ER24–627–000.
Applicants: Mammoth North LLC.
Description: Notice of Market-Based Rate Authorization of Mammoth North LLC.
Filed Date: 1/2/24.
Accession Number: 20240102–5467.
Comment Date: 5 p.m. ET 1/23/24.

Docket Numbers: ER24–827–000.
Applicants: Grace Orchard Energy Center, LLC.
Description: Baseline eTariff Filing: Grace Orchard Energy Center, LLC Application for MBR Authorization to be effective 1/6/2024.
Filed Date: 1/5/24.
Accession Number: 20240105–5177.
Comment Date: 5 p.m. ET 1/26/24.

Docket Numbers: ER24–828–000.
Applicants: Southwest Power Pool, Inc.
Description: 205(d) Rate Filing: 3951R1 Kiowa County Solar Project GIA to be effective 12/18/2023.
Filed Date: 1/8/24.
Accession Number: 20240108–5051.
Comment Date: 5 p.m. ET 1/29/24.

Docket Numbers: ER24–829–000.
Applicants: New York Independent System Operator, Inc., Niagara Mohawk Power Corporation.
Description: 205(d) Rate Filing: New York Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): NYISO-National Grid Joint 205: Amnd LGIA for High River Solar Project SA2682 to be effective 12/21/2023.
Filed Date: 1/8/24.
Accession Number: 20240108–5061.
Comment Date: 5 p.m. ET 1/29/24.

Docket Numbers: ER24–830–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amendment to WMPA, Service Agreement No. 6114; Queue No. AD1–129 to be effective 3/9/2024.
Filed Date: 1/8/24.
Accession Number: 20240108–5109.
Comment Date: 5 p.m. ET 1/29/24.

Docket Numbers: ER24–831–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 5071; Queue No. AB1–132 to be effective 3/9/2024.
Filed Date: 1/8/24.
Accession Number: 20240108–5143.
Comment Date: 5 p.m. ET 1/29/24.

Docket Numbers: ER24–832–000.
Applicants: RWE Trading Americas Inc.
Description: Baseline eTariff Filing: Application for Market Based Rate Authority to be effective 2/22/2024.
Filed Date: 1/8/24.
Accession Number: 20240108–5163.
Comment Date: 5 p.m. ET 1/29/24.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: January 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00602 Filed 1–12–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meetings

The following notice of meeting is published pursuant to Section 3(a) of the Government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

TIME AND DATE: January 25, 2024.

* *Note.*—The Closed meeting will follow the Joint meeting of the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission.[1]

PLACE: Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Non-Public, Cyber Security, Energy and Security Issues.

CONTACT PERSON FOR MORE INFORMATION: Debbie-Anne A. Reese, Acting Secretary, Telephone (202) 502–8400.

Chairman Phillips, and Commissioners Clements, and Christie voted to hold a closed meeting that will be held on January 25, 2024. The certification of the General Counsel explaining the action closing the meeting is available for viewing on the Commission's website at *https://elibrary.ferc.gov/eLibrary/search* using the eLibrary link, under accession number 20240110–3025.

The Chairman and the Commissioners and members of their staff, and the Nuclear Regulatory Commission and members of their staff, are expected to attend the meeting. Other staff members from the Commission's program offices who will advise the Commissioners in the matters discussed will also be present.

Issued: January 10, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00766 Filed 1–11–24; 4:15 pm]

BILLING CODE 6717–01–P

[1] *See FERC,* Notice of Joint Meeting of the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission, Docket No. AD06–6–000 (Jan. 10, 2024).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2361–000]

ALLETE, Inc; Notice of Authorization for Continued Project Operation

The license for the Prairie River Hydroelectric Project No. 2361 was issued for a period ending December 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2361 is issued to ALLETE, Inc. for a period effective January 1, 2024, through December 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before December 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that ALLETE, Inc. is authorized to continue operation of the Prairie River Hydroelectric Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: January 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00604 Filed 1–12–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1494–405]

Grand River Dam Authority; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 CFR part 380, Commission staff reviewed the Grand River Dam Authority's (GRDA) application for an amendment to the license of the Pensacola Hydroelectric Project No. 1494 and have prepared an Environmental Assessment (EA) for the proposed amendment. GRDA proposes to acquire, develop, and manage a 540-acre tract of land known as the Coal Creek Wildlife Management Area (WMA) and include these lands in the project boundary. This area is located along the south side of the Neosho River about three miles southwest of Miami, Oklahoma, immediately adjacent to the project boundary. Features of the Pensacola Project include: a concrete dam; auxiliary spillways; a reservoir known as Grand Lake O' the Cherokees (Grand Lake); six penstocks, turbines, and generators; a powerhouse; a tailrace; and appurtenant facilities. The project is located on the Neosho (Grand) River in Craig, Delaware, Mayes, and Ottawa counties, Oklahoma, and occupies federal land administered by the Bureau of Indian Affairs.

The EA contains Commission staff's analysis of the potential environmental effects of developing and maintaining the Coal Creek WMA by GRDA and cooperatively with the Oklahoma Department of Wildlife Conservation to provide habitat for migratory birds and other wildlife through specific habitat restoration and management measures, and concludes that the proposed amendment, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

The EA may be viewed on the Commission's website at *http://www.ferc.gov* using the ''elibrary'' link. Enter the docket number (P–1494) in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

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, contact FERC Online Support.

All comments must be filed by February 7, 2024.

The Commission strongly encourages electronic filing. Please file comments 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. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–1494–405.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

For further information, contact Rebecca Martin at 202–502–6012 or *Rebecca.Martin@ferc.gov.*

Dated: January 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00597 Filed 1–12–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ24–6–000]

City of Pasadena, California; Notice of Filing

Take notice that on December 22, 2023, City of Pasadena, California submits tariff filing per 35.28: City of Pasadena 2024 TRBAA Update to be effective January 1, 2024.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

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*). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

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

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically 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.

Comment Date: 5 p.m. eastern time on January 12, 2024.

Dated: January 8, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–00600 Filed 1–12–24; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than February 15, 2024.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414. Comments can also be sent electronically to *Comments.applications@chi.frb.org:*

1. *Northstar Financial Group, Inc., Bad Axe, Michigan;* to acquire Mainstreet Community Bank of Florida, DeLand, Florida.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–00691 Filed 1–12–24; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than January 31, 2023.

A. Federal Reserve Bank of Philadelphia (William Spaniel, Senior Vice President) 10 Independence Mall, Philadelphia, Pennsylvania 19106. Comments can also be sent electronically to *comments.applications@phil.frb.org:*

1. *Kenneth R. Lehman, Fort Lauderdale, Florida;* to acquire voting shares of Blue Ridge Bankshares, Inc., Charlottesville, Virginia, and thereby indirectly acquire voting shares of Blue Ridge Bank, National Association, Martinsville, Virginia.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–00692 Filed 1–12–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Supplemental Evidence and Data Request on The Effect of Dietary Digestible Carbohydrate Intake on Risk of Type 2 Diabetes, Growth, Size, and Body Composition

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Request for supplemental evidence and data submission.

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ) is seeking scientific information submissions from the public. Scientific information is being solicited to inform our review on *The Effect of Dietary Digestible Carbohydrate Intake on Risk of Type 2 Diabetes, Growth, Size, and Body Composition,* which is currently being conducted by the AHRQ's Evidence-based Practice Centers (EPC) Program. Access to published and unpublished pertinent scientific information will improve the quality of this review.

DATES: *Submission Deadline* on or before February 15, 2024.

ADDRESSES:

Email submissions: epc@ahrq.hhs.gov.

Print submissions:

Mailing Address: Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E53A, Rockville, MD 20857.

Shipping Address (FedEx, UPS, etc.): Center for Evidence and Practice Improvement Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E77D, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Kelly Carper, Telephone: 301–427–1656 or Email: *epc@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Agency for Healthcare Research and Quality has commissioned the Evidence-based Practice Centers (EPC) Program to complete a review of the evidence for *The Effect of Dietary Digestible Carbohydrate Intake on Risk of Type 2 Diabetes, Growth, Size, and Body Composition.* AHRQ is conducting this review pursuant to Section 902 of the Public Health Service Act, 42 U.S.C. 299a.

The EPC Program is dedicated to identifying as many studies as possible that are relevant to the questions for each of its reviews. In order to do so, we are supplementing the usual manual and electronic database searches of the literature by requesting information from the public (*e.g.,* details of studies conducted). We are looking for studies that report on *The Effect of Dietary Digestible Carbohydrate Intake on Risk of Type 2 Diabetes, Growth, Size, and Body Composition.* The entire research protocol is available online at: *https://effectivehealthcare.ahrq.gov/products/effect-dietary-digestible*.

This is to notify the public that the EPC Program would find the following information on *The Effect of Dietary Digestible Carbohydrate Intake on Risk of Type 2 Diabetes, Growth, Size, and Body Composition* helpful:

- A list of completed studies that your organization has sponsored for this topic. In the list, please *indicate whether results are available on ClinicalTrials.gov along with the ClinicalTrials.gov trial number.*
- *For completed studies that do not have results on ClinicalTrials.gov,* a summary, including the following elements, if relevant: study number, study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, primary and secondary outcomes, baseline characteristics, number of patients screened/eligible/enrolled/lost to follow-up/withdrawn/analyzed, effectiveness/efficacy, and safety results.
- *A list of ongoing studies that your organization has sponsored for this topic.* In the list, please provide the *ClinicalTrials.gov* trial number or, if the trial is not registered, the protocol for the study including, if relevant, a study number, the study period, design,

methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, and primary and secondary outcomes.

▪ Description of whether the above studies constitute *ALL Phase II and above clinical trials* sponsored by your organization for this topic and an index outlining the relevant information in each submitted file.

Your contribution is very beneficial to the Program. Materials submitted must be publicly available or able to be made public. Materials that are considered confidential; marketing materials; study types not included in the review; or information on topics not included in the review cannot be used by the EPC Program. This is a voluntary request for information, and all costs for complying with this request must be borne by the submitter.

The draft of this review will be posted on AHRQ's EPC Program website and available for public comment for a period of 4 weeks. If you would like to be notified when the draft is posted, please sign up for the email list at: *https://www.effectivehealthcare.ahrq.gov/email-updates.*

The review will answer the following questions. This information is provided as background. AHRQ is not requesting that the public provide answers to these questions.

Key Questions (KQ)

KQ 1: What is the association between dietary digestible carbohydrate intake and the incidence of type 2 diabetes (T2D) and effect on growth, size, and body composition (*i.e.,* obesity, overweight, body weight and composition)?

PICOTS (Populations, Interventions, Comparators, Outcomes, Timing, and Setting)

INCLUSION AND EXCLUSION CRITERIA BY POPULATION, INTERVENTION, COMPARATOR, OUTCOME, TIMING, SETTING/STUDY DESIGN (PICOTS)

PICOTS elements	Inclusion criteria	Exclusion criteria
Population	• Participants who are generally healthy, including participants who are determined to be overweight/obese, women who are pregnant or lactating. • Age of participants: ○ Between 2 and 9 years (before puberty) ○ Between 9 and 17 years ○ 18 years and older.	• Studies that enroll participants with diseases/health-related conditions that impact carbohydrate absorption or metabolism including cancer and malabsorption syndromes. • Studies that exclusively enroll participants hospitalized with an illness or injury. • Studies that exclusively enroll participants with type 1 or 2 diabetes (*i.e.,* studies that aim to treat participants who have already been diagnosed with the endpoint outcomes of interest). • Studies designed to induce weight loss or treat patients who are determined to be overweight and obese through energy restriction or hypocaloric diets for the purposes of treating additional or other medical conditions. • Studies that exclusively enroll participants who are determined to be undernourished, underweight, stunted, or wasted. • Studies that enroll participants who are prebariatric or postbariatric surgery. • Exclude participants less than 2 years old.
Interventions	• Total dietary digestible carbohydrate intake from foods, beverages, and dietary supplements. ○ Total dietary digestible carbohydrate intake defined as collective starch and sugar intake; carbohydrate intake not including dietary fiber). • A dietary pattern that quantifies the intake of total dietary digestible carbohydrates and allows the isolation of the effect of carbohydrate intake from the effect of the intake of other macronutrients.	• Studies that do not specify the amount of total digestible carbohydrate intake (*e.g.,* studies that only report type or source of digestible carbohydrate). • Studies that do not describe the entire macronutrient distribution of the diet (*i.e.,* studies that do not report total digestible carbohydrate, total fat, and total protein contents of experimental or baseline diets). • Studies that only assess digestible carbohydrate intake via infusions (rather than the GI tract). • Studies that primarily measure postprandial responses, as opposed to longer term studies. • Studies that examine food products or dietary supplements not widely available to U.S. consumers. • Multi-component interventions that do not isolate the effect or association of digestible carbohydrate.
Comparators	• Different total dietary digestible carbohydrate intake level(s).	• Comparison of different sources of carbohydrates without specifying the amount of carbohydrate intake. • Studies that do not attempt to control for the energy intake of participants such that comparisons are made on an isocaloric basis. • Comparisons of available carbohydrate exposure should not be confounded by differences in participants' energy intake.
Outcomes	• Incidence of type 2 diabetes • Incidence of gestational diabetes. • Surrogate markers suggesting prediabetes or abnormal glycemia. ○ HbA_{1C} level. ○ Glucose tolerance/insulin resistance/insulin sensitivity. • Growth, size, and body composition. ○ Body weight. ○ BMI. ○ Body circumference. ○ Body composition and distribution. ○ Classifications of underweight, healthy weight, overweight, and obesity.	• Type 1 Diabetes.

INCLUSION AND EXCLUSION CRITERIA BY POPULATION, INTERVENTION, COMPARATOR, OUTCOME, TIMING, SETTING/STUDY DESIGN (PICOTS)—Continued

PICOTS elements	Inclusion criteria	Exclusion criteria
Timing	• Type 2 diabetes • Minimum intervention length of 12 weeks Effect on growth, size, and body composition. ○ Minimum intervention length of 12 weeks.	• Any intervention length <12 weeks.
Settings	• All except hospital and acute care	• Hospital and acute care.
Study design	• Randomized controlled trials • Nonrandomized controlled trials, including quasi-experimental and controlled before-and-after studies. • Prospective cohort studies • Nested case-control studies • Relevant systematic reviews, or meta-analyses (used for identifying additional studies).	• In vitro studies, nonoriginal data (*e.g.,* narrative reviews, scoping reviews, editorials, letters, or erratum), retrospective cohort studies, case series, qualitative studies, cost-benefit analysis, cross-sectional (*i.e.,* nonlongitudinal) studies, survey.
Publications	• Studies published in English only • Studies published in peer-reviewed journals • Studies published at and after the year 2000	• Non-English language studies.

Abbreviations: BMI = body mass index; HbA_{1c} = hemoglobin A_{1C}; GI = gastrointestinal; KQ = Key Question; PICOTS = populations, interventions, comparators, outcomes, timing, and settings; RCT = randomized controlled trial; U.S. = United States

Dated: January 8, 2024.

Marquita Cullom,

Associate Director.

[FR Doc. 2024–00618 Filed 1–12–24; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Supplemental Evidence and Data Request on Updating the Measurement Criteria for AHRQ's National Healthcare Quality and Disparities Report (NHQDR)

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS. ACTION: Request for Supplemental Evidence and Data Submission.

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ) is seeking scientific information submissions from the public. Scientific information is being solicited to inform our review on *Updating the Measurement Criteria for AHRQ's National Healthcare Quality and Disparities Report (NHQDR),* which is currently being conducted by the AHRQ's Evidence-based Practice Centers (EPC) Program. Access to published and unpublished pertinent scientific information will improve the quality of this review.

DATES: *Submission Deadline* on or before February 15, 2024.

ADDRESSES:

Email submissions: epc@ahrq.hhs.gov.

Print submissions:

Mailing Address: Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E53A, Rockville, MD 20857.

Shipping Address (FedEx, UPS, etc.): Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E77D, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Kelly Carper, Telephone: 301–427–1656 or Email: *epc@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Agency for Healthcare Research and Quality has commissioned the Evidence-based Practice Centers (EPC) Program to complete a review of the evidence for *Updating the Measurement Criteria for AHRQ's National Healthcare Quality and Disparities Report (NHQDR).* AHRQ is conducting this review pursuant to Section 902 of the Public Health Service Act, 42 U.S.C. 299a.

The EPC Program is dedicated to identifying as many studies as possible that are relevant to the questions for each of its reviews. In order to do so, we are supplementing the usual manual and electronic database searches of the literature by requesting information from the public (*e.g.,* details of studies conducted). We are looking for studies that report on *Updating the Measurement Criteria for AHRQ's National Healthcare Quality and Disparities Report (NHQDR).* The entire research protocol is available online at: *https://effectivehealthcare.ahrq.gov/products/measurement-criteria-qdr/protocol.*

This is to notify the public that the EPC Program would find the following information on *Updating the Measurement Criteria for AHRQ's National Healthcare Quality and Disparities Report (NHQDR)* helpful:

- A list of completed studies that your organization has sponsored for this topic. In the list, please *indicate whether results are available on ClinicalTrials.gov* along with the ClinicalTrials.gov trial number.
- *For completed studies that do not have results on ClinicalTrials.gov,* a summary, including the following elements, if relevant: study number, study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, primary and secondary outcomes, baseline characteristics, number of patients screened/eligible/enrolled/lost to follow-up/withdrawn/analyzed, effectiveness/efficacy, and safety results.
- *A list of ongoing studies that your organization has sponsored for this topic.* In the list, please provide the *ClinicalTrials.gov* trial number or, if the trial is not registered, the protocol for the study including, if relevant, a study number, the study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, and primary and secondary outcomes.
- Description of whether the above studies constitute *ALL Phase II and above clinical trials* sponsored by your organization for this topic and an index outlining the relevant information in each submitted file.

Your contribution is very beneficial to the Program. Materials submitted must be publicly available or able to be made public. Materials that are considered confidential; marketing materials; study types not included in the review; or information on topics not included in the review cannot be used by the EPC Program. This is a voluntary request for information, and all costs for complying with this request must be borne by the submitter.

The draft of this review will be posted on AHRQ's EPC Program website and available for public comment for a period of 4 weeks. If you would like to be notified when the draft is posted, please sign up for the email list at: *https://www.effectivehealthcare.ahrq.gov/email-updates.*

The review will answer the following questions. This information is provided as background. AHRQ is not requesting that the public provide answers to these questions.

Guiding Questions

The brief will be facilitated by guiding questions (GQs), documenting research and key informant input:

GQ1. Which prioritization criteria for health care quality measures have been proposed?

• What settings and intended use were the criteria developed for?

• How are the criteria defined and operationalized?

• In what context have these criteria been used?

• How are the criteria similar or different from the current NHQDR criteria?

GQ2. How should the current NHQDR measure selection prioritization criteria be updated?

• What is the operationalized definition of each updated prioritization criteria?

• What type of health care quality measures would help the NHQDR's primary audience monitor the effectiveness of health policy levers?

GQ3. How should the new NHDQR measure selection prioritization criteria be applied?

PICOTS (Populations, Interventions, Comparators, Outcomes, Timing, and Setting)

CRITERIA FOR INCLUSION/EXCLUSION OF STUDIES IN THE REVIEW

Domain	Inclusion	Exclusion
Population	• Publications that address quality of care indicators, criteria, or benchmarks. We will accept the authors' definition of quality of care. Quality indicators may include care processes-related measures (*e.g.,* follow-up post discharge, continuity of care, medication errors), heath services utilization measures (*e.g.,* hospital readmission, emergency department visit), care satisfaction (*e.g.,* patient satisfaction, care needs met, trust in care provider), or health outcomes (*e.g.,* mortality, physical functional status, mental functioning, quality of life) used as quality indicators; care disparities may either address differences in provided health services, focus on care services or health outcomes of priority populations.	• Publications not addressing quality of care, disparities, or social determinants of health.
Concept	• Publications that describe a process of developing, selecting, applying, comparing, evaluating, or prioritizing measures, *i.e.,* procedures, guiding principles, suggested selection criteria, proposed decision rules, or consensus finding methods; publications must describe an empirical ongoing or completed process to select measures used to assess care quality of a healthcare delivery organization or healthcare system.	• Publications describing only the need for quality of care measures, only quality of care measures without describing the process of how to select measures, only discussing the importance of selecting measures, suggesting measures only for individual clinical areas or patient populations, or only describing hypothetical steps to select measures.
Context	• Healthcare, specifically healthcare delivery organizations	• Studies in contexts outside of healthcare, not specific to healthcare, or not applicable to the U.S. health care system.
Other limiters	• Reports published in English-language journal manuscripts, trial records, and gray literature in the public domain from the outlined sources.	• Data reported in abbreviated format (*e.g.,* conference abstracts) will be excluded; studies not published in English. • Systematic reviews will be retained for reference mining.

Searches will be conducted without date restriction.

Dated: January 8, 2024.

Marquita Cullom,

Associate Director.

[FR Doc. 2024–00617 Filed 1–12–24; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–24–0621]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled ''National Youth Tobacco Survey 2024–2026'' to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on June 5, 2023 to obtain comments from the public and affected agencies. CDC received five comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

National Youth Tobacco Survey 2024–2026 (OMB Control No. 0920–0621, Exp. 1/31/2024)—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC)

Background and Brief Description

Tobacco use is the leading cause of preventable disease and death in the United States, and nearly all tobacco use begins during youth and young adulthood. A limited number of health risk behaviors, including tobacco use, account for the overwhelming majority of immediate and long-term sources of morbidity and mortality. Because many health risk behaviors are established during adolescence, there is a critical need for public health programs directed towards youth, and for information to support these programs.

Since 2004, the Centers for Disease Control and Prevention (CDC) has periodically collected information about tobacco use among adolescents (National Youth Tobacco Survey (NYTS) 2004, 2006, 2009, 2011–2023 (OMB Control No. 0920–0621, Exp. 01/31/2024). This surveillance activity builds on previous surveys funded by the American Legacy Foundation in 1999, 2000, and 2002. At present, the NYTS is the most comprehensive source of nationally representative tobacco-related data among students in grades 9–12, moreover, the NYTS is the only source of such data for students in grades 6–8. The NYTS has provided national estimates of tobacco use behaviors, information about exposure to pro- and anti-tobacco influences, and information about tobacco-related racial and ethnic disparities. Information collected through the NYTS is used to identify trends over time, to inform the development of tobacco cessation programs for youth, and to evaluate the effectiveness of existing interventions and programs.

CDC plans to request OMB approval to conduct additional cycles of the NYTS in 2024, 2025, and 2026. The survey will be conducted among nationally representative samples of students attending public and private schools in grades 6–12. The survey will be digital, web-based, self-administered, and will be taken on school or personal computers, tablets, or mobile devices. Information supporting the NYTS also will be collected from state-, district-, and school-level administrators and teachers. During the 2024–2026 timeframe, changes will be incorporated that reflect CDC's ongoing collaboration with FDA and the need to measure progress toward meeting strategic goals established by the Family Smoking Prevention and Tobacco Control Act. Information collection will occur annually and may include a number of new questions, as well as increased representation of minority youth.

The survey will examine the following topics: Use of e-cigarettes, cigarettes, cigars, smokeless tobacco, hookahs, roll-your-own cigarettes, pipes, snus, dissolvable tobacco, bidis, heated tobacco products, and nicotine pouches; knowledge and attitudes; media and advertising; access to tobacco products and enforcement of restrictions on access; secondhand smoke and e-cigarette aerosol exposure; social determinants of health such as family/household affluence; provision of school- and community-based interventions, and cessation.

Results of the NYTS will continue to be used to inform and evaluate the National Comprehensive Tobacco Control Program, provide data to inform the Department of Health and Human Service's Tobacco Control Strategic Action Plan, and provide national benchmark data for state-level Youth Tobacco Surveys. Information collected through the NYTS also is expected to provide multiple measures and data for monitoring progress on seven tobacco-related objectives for Healthy People 2030.

CDC requests OMB approval for an estimated 22,086 annual burden hours over each of the next three years. There are no costs to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
State administrators	State-level Recruitment Script for the NYTS	42	1	30/60
District administrators	District-level Recruitment Script for the NYTS	308	1	30/60
School administrators	School-level Recruitment Script for the NYTS	420	1	30/60
Teachers	Data Collection Checklist	1,497	1	15/60
Students	National Youth Tobacco Survey	28,109	1	45/60
	Screening for Cognitive Interviews	300	1	10/60
	Cognitive Interviews	30	2	120/60
	Pilot Testing	100	1	45/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Public Health Ethics and Regulations, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2024–00652 Filed 1–12–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number CDC–2020–0046, NIOSH–233–C]

Request for Public Comment on NIOSH Initial Recommendations To Change the Status of Liraglutide and Pertuzumab on the NIOSH List of Antineoplastic and Other Hazardous Drugs in Healthcare Settings

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Request for comment.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), in the Department of Health and Human Services (HHS), requests public comment on two draft reevaluations with initial recommendations to change the status of two drugs, liraglutide and pertuzumab, on the NIOSH List of Antineoplastics and Other Hazardous Drugs in Healthcare Settings (List). The reevaluations were developed based on the process described in the NIOSH Procedures for Developing the NIOSH List of Hazardous Drugs in Healthcare Settings. Based on the reevaluations, the NIOSH initial recommendations are to remove liraglutide and pertuzumab from the List.

DATES: Electronic or written comments must be received by February 15, 2024.

ADDRESSES: You may submit comments, identified by CDC–2020–0046 and docket number NIOSH–233–C, by either of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* National Institute for Occupational Safety and Health, NIOSH Docket Office, 1090 Tusculum Avenue, MS C–34, Cincinnati, Ohio 45226–1998.

Instructions: All information received in response to this notice must include the agency name and docket number (CDC–2020–0046; NIOSH–233–C). All relevant comments, including any personal information provided, will be posted without change to *https://www.regulations.gov.* Do not submit comments by email. CDC does not accept comments by email. For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: R. Todd Niemeier, Ph.D., National Institute for Occupational Safety and Health, MS–C15, 1090 Tusculum Avenue, Cincinnati, OH 45226. Telephone: (513) 533–8166.

SUPPLEMENTARY INFORMATION: NIOSH seeks public comments on its reevaluations with initial recommendations to change the status of two drugs, pertuzumab and liraglutide, on the NIOSH List of Antineoplastic and Other Hazardous Drugs in Healthcare Settings (the List). The NIOSH reevaluations were conducted based on the process described in the NIOSH Procedures for Developing the NIOSH List of Hazardous Drugs in Healthcare Settings, available at *https://www.cdc.gov/niosh/docs/2016-161/.*

NIOSH reevaluated the placement of pertuzumab on the NIOSH List in response to a request for reevaluation from the manufacturer. Based on this reevaluation, the initial NIOSH recommendation is to remove pertuzumab from the NIOSH List. In its reevaluation NIOSH determined that, due to the intrinsic molecular properties of pertuzumab and the nature of the specific hazard posed by exposure to pertuzumab, it is not likely to pose a hazard to workers in healthcare settings. The potential adverse health effect relevant to pertuzumab occupational exposure is the increased potential for fetal developmental abnormalities due to oligohydramnios during pregnancy [FDA 2012]. However, the development of oligohydramnios during pregnancy is reversible and would require repeated exposures to pertuzumab that are high enough to cause oligohydramnios through the relevant period of development. Pertuzumab has limited dermal, oral, and inhalation bioavailability due to its intrinsic molecular properties. Repeated unintended exposures resulting from needlestick injuries at levels high enough to result in sustained oligohydramnios is unlikely. For these reasons, pertuzumab is not expected to pose a hazard to workers in healthcare workplaces.

NIOSH reevaluated the placement of liraglutide on the NIOSH List in response to a request for reevaluation from the manufacturer. Based on this reevaluation, the initial NIOSH recommendation is to remove liraglutide from the NIOSH List. In its reevaluation NIOSH determined that, due to the intrinsic molecular properties of liraglutide and the nature of the specific hazard posed by exposure to liraglutide, it is not likely to pose a hazard to workers in healthcare settings. In animal studies liraglutide was reported to cause C-cell specific thyroid tumors [FDA 2009]. This carcinogenic effect was due to mitogenic activity, and the progression required continued liraglutide exposure. The relevance of C-cell specific thyroid tumor formation in response to liraglutide exposure to humans is unknown but cannot be ruled out. Potential fetal developmental abnormalities are also seen in some animal studies, and there may be risk to the fetus in pregnant patients. However, the intrinsic molecular properties of the liraglutide peptide greatly decrease dermal, oral, and inhalation bioavailability, and the hazards related to liraglutide exposure would require repeated needlestick injuries. Systemic exposures in workplaces are not likely to reach levels required for the potential adverse effects to pose a hazard.

In addition to providing the opportunity for public comment, NIOSH is conducting external peer review of its reevaluations. NIOSH has completed the peer review of pertuzumab and will conduct the peer review of liraglutide concurrently with the public review. The charges to the public and peer reviewers are provided below.

Public and Peer Review Charge for the Reevaluation of Pertuzumab on the NIOSH List of Hazardous Drugs

The manufacturer's request to reevaluate the inclusion of pertuzumab on the NIOSH List proposed that pertuzumab does not present a potential hazard to healthcare worker exposures because the properties of the drug limit the potential for exposure and therefore adverse health effects from that exposure. NIOSH developed a scenario for worker exposure to pertuzumab to evaluate this proposal. Based on this scenario NIOSH determined that pertuzumab does not meet the NIOSH definition of a hazardous drug and recommends that it be removed from the List. Please review the NIOSH reevaluation of pertuzumab and consider the following questions.

1. Is this an appropriate method for evaluating the potential for exposure to pertuzumab?

2. Is oligohydramnios the best health effect to evaluate? If not, what other health effect(s) should be evaluated and why?

3. Is a needlestick injury the only reasonable route of exposure for healthcare workers? Please explain.

4. Are the assumptions about the amount of exposure to pertuzumab in a healthcare setting reasonable? Please explain.

5. Is the determination that the amount of exposure to pertuzumab in a healthcare setting does not constitute a hazard for healthcare workers reasonably supported by the available scientific information? Please explain.

6. What alternatives could be considered to this approach for monoclonal antibodies to characterize the potential hazard to workers?

Public and Peer Review Charge for the Reevaluation of Liraglutide on the NIOSH List of Hazardous Drugs

The manufacturer's request to reevaluate the inclusion of liraglutide on the NIOSH List proposed that it does not present a potential hazard to healthcare worker exposures because the properties of the drug limit the potential for exposure and therefore adverse health effects from that exposure. To reevaluate this drug, NIOSH reviewed data regarding the hazards and potential for systemic exposure to liraglutide. Based on this reevaluation NIOSH determined that liraglutide does not meet the NIOSH definition of a hazardous drug and recommends that it be removed from the List. Please review the NIOSH reevaluation of liraglutide and consider the following questions.

1. Are the evaluated health effects the appropriate health effects to evaluate? If not, what other health effect(s) should be evaluated and why?

2. Are the assumptions about the potential exposures to liraglutide in a healthcare setting reasonable? Please explain.

3. Is the determination that the amount of exposure to liraglutide in a healthcare setting does not constitute a hazard for healthcare workers reasonably supported by the available scientific information? Please explain.

4. What alternative approaches could be considered to characterize the potential hazard to workers from peptide-based drugs?

5. Is there any additional information that NIOSH should consider in its reevaluation of liraglutide?

References

FDA [2009]. Liraglutide Pharmacology Review. Retrieved from *https://www.accessdata.fda.gov/scripts/cder/daf/.*

FDA [2012]. US Food and Drug Administration Pharmacology Review of Perjeta. Retrieved from *https://www.accessdata.fda.gov/drugsatfda_docs/nda/2012/125409Orig1s000PharmR.pdf*

NIOSH [2016]. NIOSH list of antineoplastic and other hazardous drugs in healthcare settings, 2016. By Connor TH, MacKenzie BA, DeBord DG, Trout DB, O'Callaghan JP. Cincinnati, OH: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication Number 2016–161. *https://www.cdc.gov/niosh/docs/2016-161/*

NIOSH [2023]. Procedures for developing the NIOSH list of hazardous drugs in healthcare settings. By Whittaker C, Ovesen JL, MacKenzie BA, Hartley T, Berry KA, Piacentino J. Cincinnati, OH: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication No. 2023–129. *https://www.cdc.gov/niosh/docs/2023-129/.*

John J. Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2024–00693 Filed 1–12–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–24–0576]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled ''Possession, Use, and Transfer of Select Agents and Toxins (42 CFR part 73)'' to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on August 15, 2023, to obtain comments from the public and affected agencies. CDC did not receive any comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

The CDC will accept all comments for this proposed information collection project. The OMB is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Possession, Use, and Transfer of Select Agents and Toxins (OMB Control No. 0920–0576, Exp. 1/31/2024)—Revision—Office of Readiness and Response (ORR), Centers for Disease Control and Prevention (CDC)

Background and Brief Description

Subtitle A of the *Public Health Security and Bioterrorism Preparedness and Response Act of 2002, (42 U.S.C. 262a),* requires the United States Department of Health and Human Services (HHS) to regulate the possession, use, and transfer of biological agents or toxins that have the potential to pose a severe threat to public health and safety (select agents and toxins). Subtitle B of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (which may be cited as the *Agricultural Bioterrorism Protection Act of 2002), (7 U.S.C. 8401),* requires the United States Department of Agriculture (USDA) to regulate the possession, use, and transfer of biological agents or toxins that have the potential to pose a severe threat to animal or plant health, or animal or plant products (select agents and toxins). Accordingly, HHS and USDA have promulgated regulations requiring individuals or entities that possess, use, or transfer select agents and toxins to register with the Centers for Disease Control and Prevention (CDC) or the Animal and Plant Health Inspection Service (APHIS). See 42 CFR part 73, 7 CFR part 331, and 9 CFR part 121 (the select agent regulations). The Federal Select Agent Program (FSAP) is the collaboration of the CDC, Division of Regulatory Science and Compliance (DRSC) and the APHIS Division of Agricultural Select Agents and Toxins (DASAT) to administer the select agent regulations in a manner to minimize the administrative burden on persons subject to the select agent regulations. Accordingly, CDC and APHIS have adopted an identical system to collect information for the possession, use, and transfer of select agents and toxins.

CDC is requesting OMB approval to continue to collect information under the select agent regulations through the use of five forms: (1) Application for Registration for Possession. Use, and Transfer of Select Agents and Toxins (APHIS/CDC Form 1); (2) Request to Transfer Select Agents or Toxins (APHIS/CDC Form 2); (3) Incident Notification and Reporting (Theft, Loss, or Release) (APHIS/CDC Form 3); (4) Reporting the Identification of a Select Agent or Toxin (APHIS/CDC Form 4); and 5) Request for Exemption of Select Agents and Toxins for an Investigational Product (APHIS/CDC Form 5).

An entity may amend its registration (Section 7(h)(1)) if any changes occur to the information previously submitted to FSAP. When applying for an amendment to a certificate of registration, an entity would complete the relevant portion of the application package (APHIS/CDC Form 1).

Besides the forms listed above, there is no standard form for the following information:

1. An individual or entity may request an exclusion from the requirements of the select agent regulations of an attenuated strain of a select agent or a select toxin modified to be less potent or toxic. (Section 3(e) and 4(e)).

2. Annual inspections that are conducted by the entity must be documented. (Section 9(a)(6)).

3. An individual's security risk assessment may be expedited upon written request by a Responsible Official and a showing of good cause. (Section 10(f)).

4. An individual or entity may request approval to perform a ''restricted experiment'' (Section 13).

5. An individual or entity must develop and implement a written security plan, biosafety plan, and incident response plan (Sections 11(a), 12(a), and 14(a)).

6. The Responsible Official must ensure a record of the training for each individual with access to select agents and toxins and each escorted individual is maintained (Section 15(d)).

7. An individual or entity may appeal a denial, revocation, or suspension of registration. (Section 20(a)).

8. An individual may appeal a denial, limitation, or revocation of access approval. (Section 20(b)).

The currently approved annualized burden is 4467. CDC requests OMB approval for an estimated 3504 annual burden hours. The total estimated annualized burden for all data collection was calculated using the 2021 Annual Report of the FSAP available at *https://www.selectagents.gov/resources/publications/annualreport/2021.htm.* Burden has been reduced due to a decrease in the number of respondents. Information will be collected through the FSAP IT system, email, and hard copy mail from respondents. Upon OMB approval, CDC will begin use of the revised forms in January 2024 through January 2027. There is no cost to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Section	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Sections 3 & 4	Request for Exclusions	1	1	1
Sections 5 & 6	Form 4—Report of Identification of a Select Agent or Toxin	917	1	1
Sections 5 & 6	Form 5—Request of Exemption	1	1	1
Section 7	Form 1—Application for Registration	5	1	5
Section 7	Form 1 Sec 6A—Amendment to a Certificate of Registration	144	5	1
Section 9	Documentation of self-inspection	233	1	1
Section 10	Request for Expedited Review	1	1	30/60
Section 11	Security Plan	233	1	1
Section 12	Biosafety Plan	233	1	1
Section 13	Request Regarding a Restricted Experiment	3	1	2
Section 14	Incident Response Plan	233	1	1
Section 15	Training	233	1	1
Section 16	Form 2—Request to Transfer Select Agents and Toxins	229	1	1.5
Section 17	Records	233	1	30/60
Section 19	Form 3—Notification of Theft, Loss, or Release	185	1	1
Section 20	Administrative Review	22	1	1

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Public Health Ethics and Regulations, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2024–00651 Filed 1–12–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–24–1346; Docket No. CDC–2023–0102]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Oral Health Basic Screening Survey for Children. The project provides State-specific data on dental caries (tooth decay) and dental sealants from a State-representative sample of elementary school children or children enrolled in Head Start programs and has been used by States to monitor oral health status of children and evaluate public health programs and policies.

DATES: CDC must receive written comments on or before March 18, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2023–0102 by either of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; phone: 404–639–7570; email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and
5. Assess information collection costs.

Proposed Project

Oral Health Basic Screening Survey for Children (OMB Control No. 0920–1346, Exp. 8/31/2024)—Extension—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Dental caries (tooth decay) is one of the most common chronic diseases among children in the United States and can lead to pain, infection, and diminished quality of life throughout the lifespan. Dental sealants are a cost-effective measure to prevent caries but remain underutilized. To address States' critical need for State-level oral health surveillance data on dental caries and sealants, the Association of State and Territorial Dental Directors (ASTDD) developed and released an oral health screening survey protocol referred to as the Basic Screening Survey (BSS) in 1999 in collaboration with the Ohio Department of Health and with technical assistance from the CDC Division of Oral Health.

BSS is a non-invasive visual observation of the mouth performed by trained screeners including dental and non-dental health professionals (*e.g.,* dentists, hygienists, school nurses), and is not duplicative of any other Federal collection. Though the National Health and Nutrition Examination Survey (NHANES) collects national data on oral health status including dental caries and sealants based on clinical examination, it is not designed to provide State-level data. BSS is designed to be easy to perform while being consistent and aligned with the oral health Healthy People objectives, which are based on NHANES measures. BSS is the only data source that provides State-representative data on oral health status based on clinical examination. BSS is also used to monitor State progress toward key national oral health objectives.

The BSS is a State-tailored survey administered and conducted by individual States. CDC has supported some of the 50 States to build and maintain their oral health surveillance system and ASTDD to provide technical assistance to States through State and partner cooperative agreements since 2001. Conducting BSS for third graders is a key component of that support. The target populations include school children in grades K–3 and children enrolled in Head Start in 50 States and Washington, DC. ASTDD and CDC recommend that States conduct BSS at minimum for third graders at least once every five years. Individual States determine how often to conduct BSS and which grade or grades to target based on their program needs and available resources. Forty-seven States have conducted BSS for children, and all of the 47 conducted BSS in Grade 3. Thirty-two States also have conducted BSS in one or more other grades (K–2) or in Head Start. CDC estimates that approximately 34 States, including 20 States currently funded by CDC, will conduct one BSS, at least for third grade, during the period for which this approval is being sought.

State health departments administer the survey by determining probability samples, arranging logistics with selected schools or Head Start sites, gaining consent, obtaining demographic data, training screeners, conducting the oral health screening at schools or Head Start sites. Screeners record four data points either electronically or on a paper form: (1) presence of treated caries; (2) presence of untreated tooth decay; (3) urgency of need for treatment; and (4) presence of dental sealants on at least one permanent molar tooth.

State programs enter, clean and analyze the data; de-identify it; and respond to ASTDD's annual email request for State-aggregated prevalence of dental caries and sealants. ASTDD reviews the data to ensure that both survey design and data meet specific criteria before sending it to CDC for publication on the CDC's public-facing Oral Health Data website (*www.cdc.gov/oralhealthdata*).

BSS for children serves as a key State oral health surveillance data source and facilitates State capacity to: (1) monitor children's oral health status, trends, and disparities, and compare with other States; (2) inform planning, implementation and evaluation of effective oral health programs and policies; (3) measure State progress toward Healthy People objectives; and (4) educate the public and policy makers regarding cross-cutting public health programs. CDC also uses the data to evaluate performance of CDC oral health funding recipients.

The estimated total annualized burden hours for the survey across the 34 States over the three years of this request are 40,207. There are no costs to children respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Child	Screening form	150,370	1	5/60	12,531
Parent/caretaker	Consent	150,370	1	1/60	2,506
Screener	Screening form	301	1	666/60	3,341
School/site	Participation form	2,890	1	68/60	3,275
State Official	Data Submission form	34	1	32,742/60	18,554
Total					40,207

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Public Health Ethics and Regulations, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2024–00654 Filed 1–12–24; 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 5 U.S.C. 1009(d), 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, Office of Strategic Business Initiatives, 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–PS–24–039 Improving the Quality of Life of People with HIV Aged 50 Years and Older in the United States, and RFA–PS–24–042 A Bridge to Adherence: Long-Acting Antiretroviral Therapy for People with HIV Released from Prison.

Dates: May 1–2, 2024.

Times: 10 a.m.–5 p.m., EDT.

Place: Videoconference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Seraphine Pitt Barnes, Ph.D., M.P.H, C.H.E.S., Scientific Review Officer, National Center for HIV, Viral Hepatitis, STD, and TB Prevention, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H24–6, Atlanta, Georgia 30329–4027. Telephone: (770) 488–6115; Email: *SPittBarnes@cdc.gov.*

The Director, Office of Strategic Business Initiatives, 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, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024–00676 Filed 1–12–24; 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 5 U.S.C. 1009(d), 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, Office of Strategic Business Initiatives, 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–IP–24–046, Nationwide Cohort to Estimate Burden of Respiratory Viruses and Immunologic Response (Blood Donor Cohort).

Dates: April 11–12, 2024.

Times: 10 a.m.–5 p.m., EDT.

Place: Videoconference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Gregory Anderson, M.S., M.P.H, Scientific Review Officer, National Center for HIV, Viral

Hepatitis, STD, and TB Prevention, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H24–6, Atlanta, Georgia 30329–4027. Telephone: (404) 718–8833; Email: *GAnderson@cdc.gov.*

The Director, Office of Strategic Business Initiatives, 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, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024–00675 Filed 1–12–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2024–0001]

Advisory Committee on Immunization Practices

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice and request for comment.

SUMMARY: In accordance with regulatory provisions, the Centers for Disease Control and Prevention (CDC) announces the following meeting of the Advisory Committee on Immunization Practices (ACIP). This meeting is open to the public. Time will be available for public comment.

DATES: The meeting will be held on February 28, 2024, from 8 a.m. to 5 p.m., EST and February 29, 2024, from 8 a.m. to 3 p.m., EST, (times subject to change; see the ACIP website for updates: *https://www.cdc.gov/vaccines/acip/index.html*).

Written comments must be received between February 1–22, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2024–0001, by either of the methods listed below. CDC does not accept comments by email.

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Ms. Stephanie Thomas, ACIP Meeting, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H24–8, Atlanta, Georgia 30329–4027. Attn: Docket No. CDC–2024–0001.

Instructions: All submissions received must include the Agency name and docket number. All relevant comments received in conformance with the *https://www.regulations.gov* suitability policy will be posted without change to *https://www.regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

The meeting will be webcast live via the World Wide Web. The webcast link can be found on the ACIP website at *https://www.cdc.gov/vaccines/acip/index.html.*

FOR FURTHER INFORMATION CONTACT: Stephanie Thomas, Committee Management Specialist, Advisory Committee on Immunization Practices, National Center for Immunization and Respiratory Diseases, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H24–8, Atlanta, Georgia 30329–4027. Telephone: (404) 639–8836; Email: *ACIP@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The Advisory Committee on Immunization Practices (ACIP) is charged with advising the Director, Centers for Disease Control and Prevention (CDC), on the use of immunizing agents. In addition, under 42 U.S.C. 1396s, the Committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines for Children program, along with schedules regarding dosing interval, dosage, and contraindications to administration of vaccines. Further, under applicable provisions of the Affordable Care Act and section 2713 of the Public Health Service Act, immunization recommendations of ACIP that have been approved by the Director, CDC, and appear on CDC immunization schedules generally must be covered by applicable health plans.

Matters To Be Considered: The agenda will include discussions on influenza vaccines, chikungunya vaccine, COVID–19 vaccines, meningococcal vaccines, pneumococcal vaccines, polio vaccines, Human papillomavirus (HPV) vaccines, respiratory syncytial virus vaccines, a combined Diphtheria and Tetanus Toxoids and Acellular Pertussis, Inactivated Poliovirus, Haemophilus influenzae Type B Conjugate, and Hepatitis B vaccine (Vaxelis®), and vaccines to prevent diphtheria, tetanus, and pertussis. Recommendation votes are scheduled for influenza vaccines, COVID–19 vaccines, and chikungunya vaccine. A Vaccines for Children (VFC) vote is scheduled for vaccines to prevent diphtheria, tetanus, and pertussis. Agenda items are subject to change as priorities dictate. For more information on the meeting agenda, visit *https://www.cdc.gov/vaccines/acip/meetings/index.html.*

Meeting Information: The meeting will be webcast live via the World Wide Web. For more information on ACIP, please visit the ACIP website: *https://www.cdc.gov/vaccines/acip/index.html.*

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data. Please note that comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Comments will be posted on *https://www.regulations.gov.* Therefore, do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near-duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket.

Written Public Comment: The docket will be opened to receive written comments on February 1–22, 2024. Written comments must be received by February 22, 2024.

Oral Public Comment: This meeting will include time for members of the public to make an oral comment. Oral public comment will occur before any scheduled votes, including all votes relevant to the ACIP's Affordable Care Act and Vaccines for Children Program roles. Priority will be given to individuals who submit a request to make an oral public comment before the meeting according to the procedures below.

Procedure for Oral Public Comment: All persons interested in making an oral public comment at the February 28–29, 2024, ACIP meeting must submit a request at *https://www.cdc.gov/vaccines/acip/meetings/index.html* between February 1, 2024, and no later than 11:59 p.m., EST, February 22, 2024, according to the instructions provided.

If the number of persons requesting to speak is greater than can be reasonably accommodated during the scheduled time, CDC will conduct a lottery to determine the speakers for the scheduled public comment session. CDC staff will notify individuals regarding their request to speak by email by February 26, 2024. To accommodate the significant interest in participation in the oral public comment session of ACIP meetings, each speaker will be limited to three minutes, and each speaker may speak only once per meeting.

The Director, Office of Strategic Business Initiatives, 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, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024–00674 Filed 1–12–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Meeting of the Board of Scientific Counselors, National Center for Health Statistics

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Centers for Disease Control and Prevention (CDC) announces the following meeting for the Board of Scientific Counselors, National Center for Health Statistics (BSC, NCHS). This meeting is open to the public. Time will be available for public comment.

DATES: The meeting will be held on March 6, 2024, from 11 a.m. to 5 p.m., EST.

ADDRESSES: Instructions to access the live meeting broadcast will be posted here: *https://www.cdc.gov/nchs/about/bsc/bsc_meetings.htm.*

FOR FURTHER INFORMATION CONTACT: Rebecca Hines, M.H.S., Designated Federal Officer, Board of Scientific Counselors, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Mailstop P–08, Hyattsville, Maryland 20782. Telephone: (301) 458–4715; Email: *RSHines@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The Board of Scientific Counselors, National Center for Health Statistics (BSC, NCHS) is charged with providing advice and making recommendations to the Secretary, Department of Health and Human Services; the Director, Centers for Disease Control and Prevention; and the Director, National Center for Health Statistics, regarding the scientific and technical program goals and objectives, strategies, and priorities of NCHS.

Matters to be Considered: The meeting agenda will include an update from the NCHS Director; welcoming of new Board members; updates from NCHS programs; and discussion regarding current issues and topics. The Board will reserve time for public comment at the end of the day. Meeting times and agenda topics are subject to change as priorities dictate.

Meeting Information: Please visit the BSC, NCHS website for details: *https://www.cdc.gov/nchs/about/bsc/bsc_meetings.htm.* Further information and the meeting agenda will be available on the website, including any agenda updates and the instructions for accessing the live meeting broadcast.

The Director, Office of Strategic Business Initiatives, 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, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024–00641 Filed 1–12–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–24–1181; Docket No. CDC–2023–0101]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies the opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Airline and Traveler Information Collection: Domestic Manifests and Passenger Locator Form. These data collection forms align with CDC's regulatory and public health mission under the authorities listed in CDC regulations to allow CDC to collect passenger and crew information from travelers and airlines when there has been a confirmed or suspected case of communicable disease aboard a domestic or international flight that puts other travelers at public health risk.

DATES: CDC must receive written comments on or before March 18, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2023–0101 by either of the following methods:

• *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected;

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and

5. Assess information collection costs.

Proposed Project

Airline and Traveler Information Collection: Domestic Manifests and the Passenger Locator Form (42 CFR parts 70 and 71)—Revision—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The goal of this information collection is to ensure that, consistent with the authorities in the Public Health Service Act (PHSA) and in the Code of Federal Regulations (CFR), CDC can collect conveyance, passenger and crew member manifest information (aka manifests) and Passenger Locator Forms (PLF) in the event an individual with a confirmed or suspected case of a communicable disease is known to have traveled on an interstate flight while infectious or potentially infectious and presented a risk of spread to other passengers or crew. This information is collected so that CDC can initiate the process of contact tracing or provision of other public health follow up to prevent further disease spread.

The intended use of the information is to enable CDC to provide contact information to State and local health departments, so they can contact travelers in a timely manner to provide them with a notification that they may have been exposed to a communicable disease and to provide follow-up health information and any recommended interventions. In limited circumstances CDC may contact travelers directly. There are no statistical sampling or research design methods being used. CDC makes a determination of whether or not to collect manifest information depending on the risk of communicable disease spread during and after travel. There is no subpopulation being studied. The universe of respondents is any airline aboard which an infectious or potentially infectious individual is confirmed to have traveled.

Data will be analyzed to ensure that timely responses from airlines are received and that the manifest information is shared with State and local public health departments, who generally bear the responsibility of performing the contact investigations. However, there is no predetermined methodology to analyze the provision of manifest data from an airline.

The Domestic TB Manifest Order Template and Domestic non-TB Manifest Order Template have combined the domestic manifest request into one Manifest Order Template to align with current processes and needs. In addition, the estimated burden for tuberculosis and other infectious diseases domestic manifest orders have been combined into one estimate for the domestic manifest order template as the estimated time and burden to complete the manifest request is estimated to be very similar for all infectious diseases.

CDC requests OMB approval for an estimated 228,134 annual burden hours. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Airline Medical Officer or Equivalent/Computer and Information Systems Manager.	Domestic Manifest Order Template	500	1	6 (360/60)	3,000
Traveler	Public Health Passenger Locator Form: Outbreak of Public Health Significance (International Flights).	2,700,000	1	5/60	225,000
Traveler	Public Health Passenger Locator Form: Limited Onboard Exposure (International and Domestic Flights).	1600	1	5/60	134
Total					228,134

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Public Health Ethics and Regulations, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2024–00653 Filed 1–12–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10450, CMS–10652 and CMS–10540]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by February 15, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Extension of a currently approved Information Collection; *Title of Information Collection:* Consumer Assessment of Healthcare Providers and Systems (CAHPS) Survey for Merit-based Incentive Payment Systems (MIPS); *Use:* The CAHPS for MIPS survey is used in the Quality Payment Program (QPP) to collect data on fee-for-service Medicare beneficiaries' experiences of care with eligible clinicians participating in MIPS and is designed to gather only the necessary data that CMS needs for assessing physician quality performance, and related public reporting on physician performance, and should complement other data collection efforts. The survey consists of the core Agency for Healthcare Research and Quality (AHRQ) CAHPS Clinician & Group Survey, version 3.0, plus additional survey questions to meet CMS's information and program needs. The survey information is used for quality reporting, the compare tool on the *Medicare.gov* website, and annual statistical experience reports describing MIPS data for all MIPS eligible clinicians.

This 2024 information collection request addresses the requirements related to the statutorily required quality measurement. The CAHPS for MIPS survey results in burden to three different types of entities: groups, virtual groups, and subgroups; vendors; and beneficiaries associated with administering the survey. Virtual groups are subject to the same requirements as groups and subgroups; therefore, we will refer only to ''groups'' as an inclusive term for all entities unless otherwise noted. *Form Number:* CMS–10450 (OMB control number: 0938–1222); Frequency: Yearly; *Affected Public:* Business or other for-profits and Not-for-profit institutions and Individuals and Households; *Number of Respondents:* 25,536; *Total Annual Responses:* 25,536; *Total Annual Hours:* 5,867 (For policy questions regarding this collection contact Renee Oneill at 410–786–8821.)

2. *Type of Information Collection Request:* Extension of currently approved Information Collection; *Title of Information Collection:* Virtual Groups for Merit-Based Incentive Payment System (MIPS); *Use:* Section 1848(q)(5)(I)(ii) of the 2018 Quality Payment Program final rule establishes that a process must be in place to allow an individual MIPS eligible clinician or group consisting of not more than 10 MIPS eligible clinicians to elect, with respect to a performance period for a year, to be in a virtual group with at least one other such individual MIPS eligible clinician or group. Section 1848(q)(5)(I)(iii) of the Act establishes the following requirements that pertain to an election process: (1) individual eligible clinicians and groups forming virtual groups are required to make the election prior to the start of the applicable performance period under MIPS and cannot change their election during the performance period; (2) an individual eligible clinician or group may elect to be in no more than one virtual group for a performance period and in the case of the group electing to be in a virtual group for the performance period, the election applies to all eligible clinicians in the group; (3) a virtual group is a combination of TINs; (4) formal written agreements are required among the eligible clinicians (includes individual eligible clinicians and eligible clinicians within the groups) electing to be a virtual group; and (5) the Secretary has the authority to include other requirements determined appropriate.

Section 1848(q)(5)(I)(i) of the Act also provides that MIPS eligible clinicians electing to be a virtual group must: (1) have their performance assessed for the quality and cost performance categories in a manner that applies the combined performance of all the MIPS eligible clinicians in the virtual group to each MIPS eligible clinician in the virtual group for the applicable performance period; and (2) be scored for the quality and cost performance categories based on such assessment. *Form Number:* CMS–10652 (OMB control number: 0938–1343); Frequency: Yearly; *Affected Public:* Individuals and Households, Private Sector, Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 16; *Total Annual Responses:* 16; *Total Annual Hours:* 160 (For policy questions regarding this collection contact Renee O'Neill at 410–786–8821.)

3. *Type of Information Collection Request:* Revision of a currently approved collection. *Title of Information Collection:* Quality Improvement Strategy Implementation Plan, Progress Report, and Modification Summary Supplement Forms. *Use:* Section 1311(c)(1)(E) of the Affordable Care Act requires qualified health plans (QHPs) offered through an Exchange must implement a quality improvement strategy (QIS) as described in section 1311(g)(1). Section 1311(g)(3) of the Affordable Care Act specifies the guidelines under Section 1311(g)(2) shall require the periodic reporting to the applicable Exchange the activities that a qualified health plan has conducted to implement a strategy as described in section 1311(g)(1). CMS intends to have QHP issuers complete the appropriate QIS forms annually for implementation and progress reporting of their quality improvement strategies. The QIS forms will include topics to assess an issuer's compliance in creating a payment structure that provides increased reimbursement or other incentives to improve the health outcomes of plan enrollees, prevent hospital readmissions, improve patient safety and reduce medical errors, promote wellness and health, and reduce health and health care disparities, as described in Section 1311(g)(1) of the Affordable Care Act.

The QIS forms will allow: (1) the Department of Health & Human Services (HHS) to evaluate the compliance and adequacy of QHP issuers' quality improvement efforts, as required by Section 1311(c) of the Affordable Care Act, and (2) HHS will use the issuers' validated information to evaluate the issuers' quality improvement strategies for compliance with the requirements of Section 1311(g) of the Affordable Care Act. *Form Number:* CMS–10540 (OMB control number: 0938–1286); *Frequency:* Annually; *Affected Public:* Public sector (Individuals and Households), Private sector (Business or other for-profits and not-for-profit institutions); *Number of Respondents:* 250; *Total Annual Responses:* 250; *Annual Hours:* 4,933. (For policy questions regarding this collection, contact Preeti Hans at 301–492–1444).

Dated: January 10, 2024.

William N. Parham, III

Director, Division of Information Collections and Regulatory Impacts, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2024–00657 Filed 1–12–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Expedited Office of Management and Budget Review and Public Comment: Office of Community Services Affordable Housing and Supportive Services Demonstration Data Collection (New Collection)

AGENCY: Office of Community Services, Administration for Children and Families, U.S. Department of Health and Human Services

ACTION: Request for public comments.

SUMMARY: The Office of Community Services (OCS), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is requesting expedited review of an information collection request from the Office of Management and Budget (OMB) and inviting public comments on the proposed collection. The Affordable Housing and Supportive Services Demonstration was appropriated by the Departments of Labor, Health and Human Services, and Related Agencies Appropriations Bill, 2023 through the Social Services Research Demonstration program (SSRD). The House report language directs ACF to provide a report on the findings of this demonstration within 1 year after grants are awarded. ACF is soliciting public comment within the next 30 days and requesting expedited approval from OMB to collect information to study the implementation of this demonstration program to inform this report. Following initial approval, ACF will request an extension of approval within 6 months. This extension process will include additional commenting opportunities.

DATES: *Comments due within February 15, 2024.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described in this notice.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be submitted by emailing *infocollection@acf.hhs.gov.* Identify all by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: ACF is requesting that OMB grant a 180-day approval for this request under procedures for expedited processing. A request for review under normal procedures will be submitted within 180 days of the approval for this request. Given the Congressional directive for a report on the Affordable Housing and Supportive Services Demonstration within 1 year, OCS has prepared data collection instruments to study the implementation of this demonstration program with the intent to produce a robust report to Congress. Under normal circumstances, OCS would submit the data collection instruments through a standard information collection request with OMB. However, the short timeframe attached to the Congressional directive make it reasonably likely that the use of normal clearance procedures to comply with the Paperwork Reduction Act would cause this Congressional deadline to be missed. If OCS were to proceed with the normal timeline for OMB review and approval, OCS would be unable to collect, clean, analyze, and consolidate program data such that it would be accessible for the report to Congress due within 1 year. Thus, OCS is requesting emergency OMB approval of this data collection to ensure we can accommodate the Congressional request for a report on the findings of this demonstration within 1 year. OCS is hoping to center the study around three main research categories—implementation of supportive services in affordable housing, changes in participant access to supportive services in affordable housing, and overall participant experience and outcomes along several variables of interest. Ultimately, OCS hopes to illustrate how supportive services are implemented in affordable housing spaces by program directors and caseworkers, and also demonstrate participant experiences accessing those services in the affordable housing setting, as well as which services and supports worked to improve resident well-being and overall self-sufficiency. To answer these research questions, OCS will engage in the following activities:

• Collecting program official, caseworker, and resident beneficiary level data from the Affordable Housing and Supportive Services Demonstration.

• Conducting interviews with program officials and caseworkers that administer the supportive services to residents living in affordable housing units to better understand their program implementation efforts and responses to resident needs.

• Conducting focus groups with beneficiary residents to understand their needs and experiences with the supportive services offered in their affordable housing residence.

• Administering a self-sufficiency matrix to beneficiary residents to assess any change or improvement in beneficiary resident reporting of overall self-sufficiency and wellbeing, which is measured using several indicators, with the receipt of additional supportive services in the affordable housing setting.

Respondents: There will be three types of respondents to the proposed instruments. First, the direct beneficiaries living in the residential housing communities will respond to instruments 1, 2, and 3. Second, the program directors/administrative staff will respond to instruments 4, 5, 6, and 7. Finally, the caseworkers providing direct support to beneficiaries will respond to instrument 8. Caseworkers may also be asked to support the implementation and administration of instruments 1, 2, and 3.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total/annual burden hours
1—Self-Sufficiency Matrix	560	2	1.5	1,680
2—Service Receipt Questionnaire	560	2	.25	280
3—Resident Focus Group	25	1	1.5	37.5
4—Quarterly PPR Questions	9	4	2	72
5—Semi-Annual Report MANDATORY	9	2	3	54
6—Semi-Annual Report OPTIONAL	3	2	1	6
7—Interviews of Program Directors	18	1	1.5	27
8—Interviews of Caseworkers	18	1	1	18
Estimated Total Annual Burden Hours	....	....	....	2,174.5

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication. Comments will be considered and any necessary updates to materials made prior to, and responses provided in, the submission to OMB that will follow this public comment period.

Authority: Sec. 1110, Social Security Act, 42 U.S.C. 1310.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2024–00648 Filed 1–12–24; 8:45 am]

BILLING CODE 4184–24–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–N–0065]

Notice of Approval of Product Under Voucher: Material Threat Medical Countermeasure Priority Review Voucher; FABHALTA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the approval of a product redeeming a material threat medical countermeasure (MCM) priority review voucher. The Federal Food, Drug, and Cosmetic Act (FD&C Act) authorizes FDA to award priority review vouchers to sponsors of approved material threat MCM product applications that meet certain criteria. FDA is required to publish notice of the issuance of material threat MCM priority review vouchers as well as the approval of products redeeming a voucher. FDA has determined that FABHALTA (iptacopan) capsules, approved December 5, 2023, meets the redemption criteria.

FOR FURTHER INFORMATION CONTACT: Cathryn Lee, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–1394, email: *Cathryn.Lee@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under section 565A of the FD&C Act (21 U.S.C. 360bbb–4a) FDA will report the issuance of material threat MCM priority review vouchers and the approval of products for which a voucher was redeemed. FDA has determined that the application for FABHALTA (iptacopan) capsules, approved December 5, 2023, meets the redemption criteria.

For further information about the material threat MCM Priority Review Voucher Program and for a link to the full text of section 565A of the FD&C Act, go to *https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/21st-century-cures-act-mcm-related-cures-provisions#prv.* For further information about FABHALTA (iptacopan) capsules go to the ''Drugs@FDA'' website at *http://www.accessdata.fda.gov/scripts/cder/daf/.*

Dated: January 10, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–00688 Filed 1–12–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Microbiology, Infectious Diseases and AIDS Initial Review Group; Microbiology and Infectious Diseases Research Study Section Microbiology and Infectious Diseases Research Study Section (MID).

Date: February 6–7, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Hailey P. Weerts, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institute of Health, 5601 Fishers Lane, MSC 9834, Rockville, MD 20892, (240) 669–5931, *hailey.weerts@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 10, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00666 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Clinical trials review.

Date: March 21, 2024.

Time: 11:30 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Maurizio Grimaldi, M.D., Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue Gateway Bldg. Suite 2C218, Bethesda, MD 20892 301–496–9374 *grimaldim2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 10, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00669 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of Member Conflict Applications.

Date: February 28, 2024.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Tracy Koretsky, Ph.D., Scientific Review Officer, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, MSC 6200, Room 3AN12F, Bethesda, Maryland 20892, 301–594–2886, *tracy.koretsky@nih.gov.*

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Training and Workforce Development Study Section—B Review of Applications for Basic Biomedical Predoctoral T32 awards.

Date: March 1, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Isaah S. Vincent, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12L, Bethesda, Maryland 20892, 301–594–2948, *isaah.vincent@nih.gov.*

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of Research on Interventions that Promote the Careers of Individuals in the Biomedical Research Enterprise (R01).

Date: March 14, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Sonia Ivette Ortiz-Miranda, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, MSC 6200, Bethesda, Maryland 20892, 301–402–9448, *sonia.ortiz-miranda@nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: January 9, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00625 Filed 1–12–24; 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 Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Chemosensory Fellowship Application Review 2.

Date: February 8, 2024.

Time: 2:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Shiguang Yang, DVM, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Room 8349, Bethesda, MD 20892, 301–496–8683, *yangshi@nidcd.nih.gov*.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Clinical Research Center Grant Review.

Date: March 12, 2024.

Time: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Boulevard, Room 8351, Bethesda, MD 20892, (301) 451–6339, *kellya2@nih.gov*.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Clinician-Scientist Training Review.

Date: March 21, 2024.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Boulevard, Room 8351, Bethesda, MD 20892, (301) 451–6339, *kellya2@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: January 9, 2024.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00632 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Integrative Health; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Integrative Health Special Emphasis Panel; Research Network to Promote Multidisciplinary Mechanistic and Translational Studies of Sickle Cell Disease Pain (U24, Clinical Trial Optional).

Date: February 14, 2024.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Center for Complementary and Integrative Health, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892.

Contact Person: Marta V. Hamity, Ph.D., Scientific Review Officer, Office of Scientific Review, Division of Extramural Activities, NCCIH/NIH, 6707 Democracy Boulevard, Suite 401, Bethesda, MD 20892, *marta.hamity@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: January 9, 2024.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00634 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Brain Cell Atlas of AD/ADRD.

Date: February 12, 2024.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Sandhya Sanghi, Ph.D., Scientific Research Officer, 7201 Wisconsin Avenue (2N230), NIA/SRB, Bethesda, MD 20814, (301) 496–2879, *sandhya.sanghi@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 10, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00665 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Request for Information Inviting Input on an NIH-Wide Strategic Plan for Autoimmune Disease Research

AGENCY: National Institutes of Health, HHS.

ACTION: Request for information.

SUMMARY: The purpose of this Request for Information (RFI) is to invite input on the development of a National Institutes of Health (NIH)-wide strategic plan to advance autoimmune disease research. NIH is seeking input from members of the scientific community,

Federal partners, academic institutions, the private sector, health professionals, professional societies, advocacy groups, patient communities, and other interested members of the public.

DATES: The NIH-wide Strategic Plan for Autoimmune Disease Research Request for Information is open for public comment through March 1, 2024. Comments must be received by March 1, 2024, to ensure consideration. Comments received after the public comment period has closed may be considered by the Office of Autoimmune Disease Research within the Office of Research on Women's Health.

ADDRESSES: Submissions must be submitted electronically via the following website: *https://rfi.grants.nih.gov/?s=656f78c997c67a6239036b22*.

FOR FURTHER INFORMATION CONTACT: Questions about this request for information should be directed to Vicki Shanmugam, MBBS, MRCP, FACR, CCD, Director, Office of Autoimmune Disease Research, Office of Research on Women's Health, 6707 Democracy Boulevard, Bethesda, MD 20892, oadr-orwh#*rfi@od.nih.gov,* 301–402–1770.

SUPPLEMENTARY INFORMATION: This notice is in accordance with the 21st Century Cures Act, wherein NIH and its institutes are required to regularly update their strategic plans. In 2022, the National Academies of Sciences, Engineering, and Medicine report, Enhancing NIH Research on Autoimmune Disease*https://pubmed.ncbi.nlm.nih.gov/35593778/%22%20/l%20%22:~:text=Enhancing%20NIH%20Research%20on%20Autoimmune%20Disease%20also%20calls,years%29%20to%20study%20disease%20across%20the%20life%20course,* examined NIH research efforts related to autoimmune diseases. Subsequently, Congress, via the Joint Explanatory Statement *https://www.appropriations.senate.gov/imo/media/doc/Division%20H%20-%20LHHS%20Statement%20FY23.pdf* accompanying the Fiscal Year 2023 Consolidated Appropriations Act, 2023 directed the establishment of an Office of Autoimmune Disease Research*https://orwh.od.nih.gov/oadr-orwh* within the Office of Research on Women's Health (OADR–ORWH) *https://orwh.od.nih.gov/* and directed OADR–ORWH to:

- Coordinate development of a multi-institute and center (IC) strategic research plan;
- Identify emerging areas of innovation and research opportunity;
- Coordinate and foster collaborative research across ICs;
- Annually evaluate the NIH autoimmune disease research portfolio;
- Provide resources to support planning, collaboration, and innovation; and
- Develop a publicly accessible central repository for autoimmune disease research.

Currently, various NIH institutes, centers, and offices (ICOs) support autoimmune disease research in alignment with their individual mission areas. Establishing an NIH-wide Strategic Plan for Autoimmune Disease Research will allow OADR–ORWH to amplify ICO efforts and create opportunities for synergistic innovation focused on areas of autoimmune disease research that will benefit from multi-ICO partnerships and opportunities to implement cross-cutting research.

Information Requested

NIH is seeking input from internal and external partners throughout the scientific research, advocacy, and clinical practice communities, including those employed by NIH and by institutions receiving NIH support, as well as the public, on the following key areas related to autoimmune disease research:

Objective 1: Research areas that would benefit from cross-cutting, collaborative research (these areas may include basic or translational research, clinical research, health services research, population science, data science, preventative research, biomedical engineering, and other areas of research).

Objective 2: Opportunities to advance collaborative, innovative, or interdisciplinary areas of autoimmune disease research.

Objective 3: Opportunities to improve outcomes for individuals living with autoimmune diseases including NIH-designated health disparities populations *https://www.nimhd.nih.gov/about/overview/,* populations and individuals with rare diseases, and specific populations that have been historically underrepresented in research and clinical trials.

Objective 4: Cross-cutting areas that are integral to advancing autoimmune disease research at NIH including development of a publicly accessible central repository for autoimmune disease research, sex- and gender-intentional research design across all stages of research, and engagement of all populations in research and clinical trials.

Responses to this RFI are voluntary and are meant for information and planning purposes only. Do not include any proprietary, classified, confidential, trade secret, or sensitive information in your response. Respondents are advised that the responses are reviewed by NIH staff, and the U.S. government is under no obligation to acknowledge receipt of the information provided or provide feedback to the respondents. This RFI is for planning purposes only and should not be construed as a solicitation, grant, or cooperative agreement, or as an obligation on the part of the federal government, the NIH, or individual NIH institutes, centers, and offices to provide any kind of support for any ideas identified in response to it.

The government may use the information submitted in response to this RFI at its discretion. The government reserves the right to use any submitted information on public NIH websites, in reports, in summaries of the state of the science, in any possible resultant solicitation(s), grant(s), or cooperative agreement(s), or in the development of future funding announcements.

The government will not pay for the preparation of any information submitted or for the government's use of such information. No basis for claims against the U.S. government shall arise as a result of a response to this request for information or from the government's use of such information.

NIH looks forward to your input, and we hope that you will share this RFI document with your colleagues.

Dated: January 6, 2024.

Lawrence A. Tabak,

Principal Deputy Director, National Institutes of Health.

[FR Doc. 2024–00695 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute on Drug Abuse Special Emphasis Panel, February 13, 2024, 10:00 a.m. to February 14, 2024, 05:00 p.m., National Institute of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 which was published in the **Federal Register** on November 24, 2023, FR Doc 2023–25938, 88 FR 82387.

This notice is being amended to change the meeting date from February 13–14, 2024 to February 14, 2024. The meeting time and location will remain the same. The meeting is closed to the public.

Dated: January 10, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00667 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Healthcare Decision Making.

Date: January 30, 2024.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kimberly Firth, Ph.D., National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7702, *firthkm@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 10, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00671 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Training and Workforce Development Study Section—C Training and Workforce Development Study Section C (TWD–C)—Review of B2B, B2D and IRACDA.

Date: February 22, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Sonia Ivette Ortiz-Miranda, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, MSC 6200 Bethesda, Maryland 20892, 301–402–9448, *sonia.ortiz-miranda@nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: January 9, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00635 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Brain Aging Models.

Date: February 21, 2024.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Bita Nakhai, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue Gateway Bldg., Suite 2C212, Bethesda, MD 20892, 301–402–7701, *nakhaib@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 10, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00670 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Integrative Health; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Integrative Health Special Emphasis Panel; NCCIH Training and Education Review Panel (CT).

Date: March 7–8, 2024.

Time: 10:00 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.

Contact Person: Michael Eric Authement, Ph.D., Scientific Review Officer, Office of Scientific Review, Division of Extramural Activities, 6707 Democracy Boulevard, Bethesda, MD 20817, *michael.authement@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: January 9, 2024.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00628 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center For Complementary & Integrative Health; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Integrative Health Special Emphasis Panel; HEAL Initiative: Toward Developing Quantitative Imaging and Other Relevant Biomarkers of Myofascial Tissues for Clinical Pain Management (R61/R33, Clinical Trial Required).

Date: February 16, 2024.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Complementary and Integrative Health, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892.

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: January 9, 2024.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00633 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Request for Information (RFI): Inviting Comments on the National Institutes of Health's (NIH) Strategic Plan for Data Science 2023–2028

AGENCY: National Institutes of Health, HHS.

ACTION: Request for information.

SUMMARY: The purpose of this Request for Information (RFI) is to solicit public comments on the updated NIH Strategic Plan for Data Science, 2023–2028, including members of the scientific community, academic institutions, the private sector, health professionals, professional societies, advocacy groups, and patient communities, as well as other interested members of the public.

DATES: The NIH Request for Information is open for public comment. To assure consideration, your response must be received by March 15, 2024, 11:59 p.m. (ET).

ADDRESSES: All comments must be submitted electronically on the submission website at *https://datascience.nih.gov/rfi-strategic-plan* or to the mailbox at *strategic-plan-rfi@od.nih.gov.*

Responses must be received by 11:59:59 p.m. (ET) on March 15, 2024.

Responses to this RFI are voluntary and may be submitted anonymously. You may voluntarily include your name and contact information with your response. If you choose to provide NIH with this information, NIH will not share your name and contact information outside of NIH unless required by law.

Other than your name and contact information, please do not include any personally identifiable information or any information that you do not wish to make public. Proprietary, classified, confidential, or sensitive information should not be included in your response. The government will use the information submitted in response to this RFI at its discretion. Other than your name and contact information, the government reserves the right to use any submitted information on public websites, in reports, in summaries of the state of the science, in any possible resultant solicitation(s), grant(s), or cooperative agreement(s), or in the development of future funding opportunity announcements. This RFI is for informational and planning purposes only and is not a solicitation for applications or an obligation on the part of the government to provide support for any ideas identified in response to it. Please note that the government will not pay for the preparation of any information submitted or for use of that information.

We look forward to your input and hope that you will share this RFI opportunity with your colleagues.

FOR FURTHER INFORMATION CONTACT: Questions about this request for information should be directed to Dr. Susan Gregurick, 301–538–9781, *strategic-plan-rfi@od.nih.gov,* National Institutes of Health, Office of Data Science Strategy, 9000 Rockville Pike, Bethesda, Maryland 20892.

SUPPLEMENTARY INFORMATION: NIH is requesting public comment on topics under consideration for the updated NIH Strategic Plan for Data Science, 2023–2028 from its partners and collaborators, including members of the scientific community, academic institutions, the private sector, health professionals, professional societies, advocacy groups, and patient communities, as well as other interested members of the public. This RFI is in accordance with 42 U.S.C. 281 as amended.

Background

The updated Strategic Plan for Data Science (*https://datascience.nih.gov/sites/default/files/NIH-STRATEGIC-PLAN-FOR-DATA-SCIENCE-2023-2028-final-draft.pdf*) sets a bold vision for the future, one in which data generated in the course of care of individuals and data generated from biomedical and basic research become powerful inputs that enhance our understanding of fundamental biology and enables the development of new clinical treatments and diagnostic technologies. This updated plan builds on accomplishments from the initial NIH Strategic Plan for Data Science (*https://datascience.nih.gov/nih-strategic-plan-data-science*) and will prepare NIH to face the acceleration of sophisticated new technologies and address the rapid rise in the quantity and diversity of data. The updated Strategic Plan supports the NIH Policy for Data Management and Sharing (*https://sharing.nih.gov/data-management-and-sharing-policy*) and embraces data-driven discovery as a powerful tool to elucidate biological processes and better characterize the health and health consequences of all people. This plan also fosters ethical use of new methodologies arising from artificial intelligence and machine learning.

The updated Strategic Plan will accomplish five overarching goals:

- *Goal 1:* Improve Capabilities to Sustain the NIH Policy for Data Management and Sharing
- *Goal 2:* Develop Programs to Enhance Human Derived Data for Research
- *Goal 3:* Provide New Opportunities in Software, Computational Methods, and Artificial Intelligence
- *Goal 4:* Support for a Federated Biomedical Research Data Infrastructure
- *Goal 5:* Strengthen a Broad Community in Data Science

The complete draft plan is available at: *https://datascience.nih.gov/sites/default/files/NIH-STRATEGIC-PLAN-FOR-DATA-SCIENCE-2023-2028-final-draft.pdf.*

Information Requested

NIH is requesting public comment throughout the scientific research community and members of the general public for the updated NIH Strategic Plan for Data Science. NIH encourages organizations (*e.g.,* patient advocacy groups, professional organizations) to submit a single response reflective of the views of the organization or membership as a whole.

Response to this RFI is voluntary. Respondents are free to address any or all topics listed below, as well as other relevant topics, for NIH's consideration. If you choose to provide NIH with this information, NIH will not share your name and contact information outside of NIH unless required by law.

The NIH seeks comments on any of the following topics:

- The appropriateness of the goals of the plan, the strategies and implementation tactics proposed to achieve them; including potential benefits, drawbacks or challenges.
- Opportunities for NIH to partner to achieve these goals.
- Emerging research needs and opportunities that should be added to the plan.
- Any other topic the respondent feels is relevant for NIH to consider in developing this strategic plan.

This RFI is for planning purposes only and should not be construed as a solicitation for applications or proposals, or as an obligation in any way on the part of the United States federal government. The federal government will not pay for the preparation of any information submitted or for the government's use. Additionally, the government cannot guarantee the confidentiality of the information provided.

Dated: January 6, 2024.

Lawrence A. Tabak,

Principal Deputy Director, National Institutes of Health.

[FR Doc. 2024–00696 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting of the National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Brain Initiative TMM RFA Review.

Date: February 15, 2024.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Democracy II, Suite 920, 6707 Democracy Blvd., Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Alexander O. Komendantov, Ph.D., MS, Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Blvd., Bethesda, MD 20892, (301) 451–3397, *alexander.komendantov@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health.)

Dated: January 9, 2024.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00627 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, March 06, 2024, 10:00 a.m. to March 06, 2024, 04:00 p.m., National Institutes of Health, NIDDK, Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892 which was published in the **Federal Register** on November 07, 2023, 88 FR 77326.

This meeting notice is amended to change the date from 3/06/2024 to 3/05/2024. The meeting is closed to the public.

Dated: January 9, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–00626 Filed 1–12–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Test Concerning Entry of Section 321 Low-Value Shipments Through the Automated Commercial Environment (ACE) (Also Known as Entry Type 86); Republication With Modifications

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document republishes with modifications and supersedes a U.S. Customs and Border Protection (CBP) notice published in the **Federal Register** on August 13, 2019, announcing a test to allow certain low-value shipments, including those shipments subject to Partner Government Agency (PGA) data requirements, to be entered by filing a new type of informal entry electronically in the Automated Commercial Environment (ACE). The test is known as the ACE Entry Type 86 Test. This document modifies the ACE Entry Type 86 Test to clarify the waiver of certain regulations and consequences of misconduct by test participants. In addition, this document makes minor technical changes to the original notice.

DATES: The ACE Entry Type 86 Test commenced September 28, 2019, and will continue until concluded by an announcement published in the **Federal Register**. Comments will be accepted throughout the duration of the test. The changes set forth in this modification will go into effect on February 15, 2024.

ADDRESSES: Comments concerning this notice and any aspect of this test may be submitted at any time during the test via email to ecommerce@*cbp.dhs.gov.* In the subject line of your email, please indicate, ''Comment on the ACE Entry Type 86 Test.''

FOR FURTHER INFORMATION CONTACT: Christopher Mabelitini, Director, Intellectual Property Rights & E-Commerce Division, Trade Policy & Programs, Office of Trade, U.S. Customs and Border Protection, 202–325–6915, *ecommerce@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION: On August 13, 2019, U.S. Customs and Border Protection (CBP) published a notice (the August 13 Notice) in the **Federal Register** (84 FR 40079) announcing a test allowing low-value shipments meeting the requirements for admission under the administrative exemption in 19 U.S.C. 1321(a)(2)(C) (Section 321) [1] and the implementing regulation in 19 CFR 10.151, including those shipments subject to Partner Government Agency (PGA) data requirements, to be entered by filing a new type of informal entry electronically in the Automated Commercial Environment (ACE). The test is known as the ACE Entry Type 86 Test. The ACE Entry Type 86 Test allows CBP to address the growing volume of Section 321 low-value shipments resulting from the global shift in trade to an e-commerce platform, test the new functionality in ACE, facilitate cross-border e-commerce, and allow Section 321 low-value shipments subject to PGA data requirements to utilize a Section 321 low-value shipment entry process for the first time. Further background on entry type 86 and the entry type 86 process can be found in Sections I and II below.

This document republishes and supersedes the August 13 Notice, with the modifications described below. These changes are being made in response to enforcement challenges surrounding low-value shipments entered via the ACE Entry Type 86 Test. Such challenges include, but are not limited to, CBP's efforts to prevent the importation of illicit substances like fentanyl and other narcotics, counterfeits and other intellectual property rights violations, and goods made with forced labor. CBP's enforcement efforts for merchandise entered using entry type 86 have brought to light violations such as entry by parties without the right to make entry, incorrect manifesting of cargo, misclassification, misdelivery (*e.g.,* delivery of goods prior to release from CBP custody), undervaluation, and incorrectly executed powers of attorney.

To address these problems, CBP is making the following amendments to the ACE Entry Type 86 Test. This notice modifies the deadline to file entry type 86 from ''within 15 days'' of the arrival of the cargo to ''upon or prior to arrival'' (*see* Section IV). The traditional entry timeframe, allowing filing up to 15 days after arrival of the cargo, has proven to be inconsistent with the expedited process envisioned for the ACE Entry Type 86 Test. As a result, CBP is amending the test to require that the entry type 86 must be filed prior to or upon arrival of the cargo.

In addition, this notice clarifies that only those regulations specified in this notice are waived by the test (*see* Sections IV and V). All other regulations, including those allowing CBP to require formal entry, remain in force. This notice also clarifies the consequences of misconduct by participants in the ACE Entry Type 86 Test (*see* Section VIII). Lastly, this notice makes stylistic and structural changes, standardizing the terminology used, restructuring, and renumbering the sections of the August 13 Notice, and adding additional section headings to guide the reader.

For ease of reference, the August 13 Notice is republished below, with the amendments and clarifications described above.

I. Background

A. Exemption for Section 321 Low-Value Shipments

Section 321(a)(2)(C) of the Tariff Act of 1930 (19 U.S.C. 1321(a)(2)(C)), as amended by the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Section 901, Public Law 114–125, 130 Stat. 122 (19 U.S.C. 4301 note), authorizes CBP to provide an administrative exemption to admit free from duty and any tax imposed on or by reason of importation, shipments of merchandise (other than bona-fide gifts and certain personal and household goods) imported by one person on one day having an aggregate fair retail value in the country of shipment of not more than $800. The regulations issued under the authority of section 321(a)(2)(C) are set forth in sections 10.151 and 10.153 of title 19 of the Code of Federal Regulations (19 CFR 10.151 and 10.153).

A shipment of merchandise valued at $800 or less, which qualifies for informal entry under 19 U.S.C. 1498 and meets the requirements in 19 U.S.C. 1321(a)(2)(C), and 19 CFR 10.151, is referred to in this document as a ''Section 321 low-value shipment.'' Unless a CBP official has reason to believe that a Section 321 low-value shipment fails to comply with any pertinent law or regulation, section 10.153 sets forth the guidance to be applied by a CBP officer in determining whether an article or parcel shall be exempted from duty and tax under section 10.151 and qualify as a Section 321 low-value shipment. Accordingly, consolidated shipments addressed to one consignee shall be treated as one importation; alcoholic beverages and cigars (including cheroots and cigarillos) and cigarettes containing tobacco, cigarette tubes, cigarette papers, smoking tobacco (including water pipe tobacco, pipe tobacco, and roll-your-own tobacco), snuff, or chewing tobacco are not exempt; any merchandise subject to antidumping and countervailing duties is not exempt; any merchandise of a class or kind provided for in any absolute or tariff-rate quota, whether the quota is open or closed, is not exempt; and, there is no exemption from any tax imposed under the Internal Revenue Code that is collected by other agencies on imported goods.

B. ''Release From Manifest'' Process for Section 321 Low-Value Shipments

Pursuant to 19 CFR 10.151, merchandise subject to the Section 321(a)(2)(C) administrative exemption shall be entered under informal entry procedures. If formal entry is deemed necessary pursuant to 19 CFR 143.22, a shipment otherwise qualifying for the exemption may not be entered pursuant to 19 CFR 10.151. The relevant informal entry procedures for Section 321 low-value shipments are set forth in 19 CFR 128.24 and 19 CFR part 143, subpart C. Pursuant to the CBP regulations, a Section 321 low-value shipment may be entered, using reasonable care, by the owner, purchaser, or consignee of the shipment, or, when appropriately designated by one of these persons, a customs broker licensed under 19 U.S.C. 1641. *See* 19 CFR 143.26(b).

Section 321 low-value shipments may be entered by presenting the bill of lading or a manifest listing each bill of lading. *See* 19 CFR 143.23(j)(3). This type of informal entry is termed the ''release from manifest'' process. Generally, such shipments are released

[1] For purposes of this test, all references to ''Section 321'' refer to the administrative exemption in 19 U.S.C. 1321(a)(2)(C), and do not refer to any other exemption in 19 U.S.C. 1321.

from CBP custody based on the information provided on the manifest or bill of lading. Such information may be provided by express consignment operators, carriers, or brokers. The following information must be provided as part of the ''release from manifest'' process: the country of origin of the merchandise; shipper name, address and country; ultimate consignee name and address; specific description of the merchandise; quantity; shipping weight; and value. *See* 19 CFR 128.21(a) and 19 CFR 143.23(k). No Harmonized Tariff Schedule of the United States (HTSUS) subheading or entry summary is required on an advance manifest for Section 321 low-value shipments. *See* 19 CFR 143.23(k) and 19 CFR 128.24(e).

A Section 321 low-value shipment is not exempt from PGA requirements. Many agencies do not have *de minimis* exemptions for their PGA reporting requirements, and require strict accountability of imported goods for national security, health and safety reasons, and to identify specific shipments of potentially violative products for reporting or enforcement targeting purposes. Low-value shipments may also require the payment of applicable PGA duties, fees or applicable excise taxes collected by other agencies. Shipments that have PGA data reporting requirements, or require the payment of any duties, fees, or taxes may not benefit from the use of a less complex Section 321 entry process like the ''release from manifest'' process, and must be entered using the appropriate informal or formal entry process to ensure that the PGA requirements are met. All shipments subject to PGA requirements are currently ineligible for entry under the ''release from manifest'' process.

II. Establishment of an Electronic Entry Process for Section 321 Low-Value Shipments Through ACE

On August 13, 2019, CBP published the August 13 Notice announcing the ACE Entry Type 86 Test to allow Section 321 low-value shipments, including those shipments subject to PGA data requirements, to be entered by filing a new type of informal entry electronically in ACE. Prior to the development of entry type 86, Section 321 low-value shipments subject to PGA requirements were required to be entered using the more complex informal entry type ''11'' or formal entry. The ACE Entry Type 86 Test provides a less complex entry and release process for Section 321 low-value shipments, including those subject to PGA data requirements, and expedites the clearance of compliant Section 321 low-value shipments into the United States through the use of ACE. Merchandise imported by mail is excluded from the ACE Entry Type 86 Test and may not be entered under the entry type 86.

In developing the ACE Entry Type 86 Test, CBP coordinated with the Commercial Customs Operations Advisory Committee (COAC), trade industry representatives, and PGAs, and considered the public comments received from the ''Administrative Exemption on Value Increased for Certain Articles'' interim final rule (Administrative Exemption IFR). On August 26, 2016, CBP published the Administrative Exemption IFR in the **Federal Register** (81 FR 58831), which amended the CBP regulations to implement section 901 of TFTEA by raising the value of the Section 321 administrative exemption from $200 to $800, and solicited comments regarding the collection of data on behalf of PGAs for shipments valued at $800 or less. CBP received eight public comments. A more detailed analysis of the comments received and CBP's responses to the public comments will be addressed at a later date. In summary, of the eight public comments, seven addressed the collection of data for Section 321 low-value shipments. Among these seven comments, five commenters encouraged the automated clearance of Section 321 low-value shipments using ACE and the collection of PGA data using a Section 321 *de minimis* entry process.

Five of the commenters encouraged CBP to automate Section 321 clearance using ACE. These commenters pointed out that automating Section 321 clearance through ACE will increase CBP's ability to provide risk-based targeting of inbound shipments, assure supply chain security, enforce trade laws, and protect intellectual property rights. Various ACE clearance processes were suggested by the commenters, including using the Automated Broker Interface (ABI) to allow the owner, purchaser, consignee, or designated customs broker to file the necessary information.

Most commenters also asserted that any ACE Section 321 clearance process should allow for the submission of PGA data. One commenter pointed out that unless Section 321 low-value shipments subject to PGA requirements could be cleared under a Section 321 *de minimis* entry process, the *de minimis* exemption would be of little use to the greater public because a large percentage of these imported shipments are regulated by PGAs. Commenters also noted that the primary purpose of increasing the Section 321 administrative exemption was to benefit e-commerce micro and small businesses engaging in global trade and the vast majority of these businesses lack the capacity to comply with complex trade rules.

CBP believes that the development of the new entry type 86 effectively addresses the public comments; facilitates legitimate trade while also allowing CBP to enhance its targeting capabilities; ensures that PGAs can identify potentially violative products for reporting or enforcement targeting purposes while allowing filers to utilize a less complex entry process; and decreases the challenges faced by CBP in targeting, locating and examining Section 321 low-value shipments by collecting necessary data. Processing Section 321 low-value shipments in ACE utilizes the ''single window'' system, thereby granting all government agencies involved with the importation of goods into the United States access to data concerning the shipments and gives the trade a single mechanism to enter data.

III. Authorization for the Test

The test described in this notice is authorized pursuant to 19 CFR 101.9(a), which grants the Commissioner of CBP the authority to impose requirements different from those specified in the CBP regulations for purposes of conducting a test program or procedure designed to evaluate the effectiveness of new technology or operational procedures regarding the processing of passengers, vessels, or merchandise, to the extent that such different requirements do not affect the collection of the revenue, public health, safety, or law enforcement.

The ACE Entry Type 86 Test allows CBP to test ACE functionality, and to test the new operational procedures involved with the new entry type, including any challenges that may result and any coordination that is necessary with PGAs. Additionally, the test allows CBP to determine if entry type 86 effectively addresses the threats and complexities resulting from the global shift in trade to an e-commerce platform and the vast increase in Section 321 low-value shipments, and facilitates cross-border e-commerce.

IV. ACE Entry Type 86 Test Requirements

A Section 321 low-value shipment may be entered by the owner, purchaser, or consignee of the shipment, or, when appropriately designated by one of these persons, a customs broker licensed under 19 U.S.C. 1641. *See* 19 CFR 143.26(b). For purposes of the ACE

Entry Type 86 Test, CBP is deviating from this regulation and requiring that consignees intending to file an entry type 86 appoint a customs broker to act as the importer of record (IOR) for the shipment. All customs brokers designated to enter a qualifying entry type 86 shipment must be appointed through a valid power of attorney, and must comply with all other applicable broker statutory and regulatory requirements. *See* 19 CFR 141.46; *see, e.g.,* 19 U.S.C. 1641; 19 U.S.C. 1484; 19 CFR part 111; 19 CFR part 141. The filing of entry type 86 is considered ''customs business'' under 19 U.S.C. 1641.[2]

To participate in this test, an owner, purchaser, or customs broker appointed by an owner, purchaser, or consignee will file an informal entry type 86 in ACE through ABI. ABI allows participants to electronically file all required import data with CBP, and transfers that data into ACE. To participate in ABI, a filer must meet the requirements and procedures set forth in 19 CFR part 143, subpart A, and must meet the technical requirements set forth in the Customs and Trade Automated Interface Requirements (CATAIR).[3]

The test is open to all owners, purchasers, consignees, and designated customs brokers of Section 321 low-value shipments, including those subject to PGA requirements, imported by all modes of cargo transportation, except mail. CBP encourages all eligible parties to participate in this test to test the functionality of the new entry type. Importers of Section 321 low-value shipments that do not contain any PGA data requirements may continue to utilize the ''release from manifest'' process or may utilize the ACE Entry Type 86 Test.

When filing an entry type 86, a bond and entry summary documentation are not required. Under entry type 86, the importing party is exempt from payment of the harbor maintenance tax and merchandise processing fee for merchandise released as a Section 321 low-value shipment. *See* 19 CFR 24.23(c)(1)(v) and 24.24(d)(3). However, any merchandise that is not exempt from the payment of any applicable PGA duties, fees, or taxes imposed under applicable statute or regulation by other agencies on imported goods does not qualify for entry as a Section 321 low-value shipment. An entry type 86 filing that is determined to owe any duties, fees, or taxes will be rejected by CBP and must be refiled using the appropriate informal or formal entry process. Additionally, CBP may require formal entry for any merchandise if it is deemed necessary for import admissibility enforcement purposes, revenue protection, or the efficient conduct of customs business. *See* 19 CFR 143.22. Further clarification pertaining to CBP's authority under 19 CFR 143.22 and the waiver of certain regulations under the ACE Entry Type 86 Test can be found below in Section V.

An entry type 86 requires the owner, purchaser, or customs broker appointed by the owner, purchaser, or consignee to file the following data elements with CBP at any time prior to or upon arrival of, the cargo:

(1) The bill of lading or the air waybill number;
(2) Entry number;
(3) Planned port of entry;
(4) Shipper name, address, and country;
(5) Consignee name and address;
(6) Country of origin;
(7) Quantity;
(8) Fair retail value in the country of shipment;
(9) 10-digit HTSUS number;
(10) IOR number of the owner, purchaser, or broker when designated by a consignee (conditional).

The IOR number is a conditional ACE Entry Type 86 Test data element and is required when the shipment is subject to PGA data reporting requirements. The IOR number provided must be that of the shipment's owner, purchaser, or broker when designated by a consignee.

Upon receipt of the data in an entry type 86 filing, CBP will determine whether the shipment is subject to PGA data reporting requirements. Any PGA data reporting requirements would be satisfied by the PGA Message Set and the filing of any supporting documentation via the Document Image System (DIS). The PGA Message Set enables the trade community to electronically submit all data required by the PGAs only once to CBP, eliminating the necessity for the submission and subsequent manual processing of paper documents, and makes the required data available to the relevant PGAs for import and transportation-related decision making. *See* the December 13, 2013 **Federal Register** notice (78 FR 75931) for a further discussion of the PGA Message Set and the October 15, 2015 **Federal Register** notice (80 FR 62082) for a further discussion of DIS.

A ''CBP release'' message indicates that CBP has determined that the Section 321 low-value goods may be released from CBP custody. All merchandise released by CBP is released conditionally and remains subject to recall through the issuance of a Notice of Redelivery. Merchandise that is regulated by one or more PGAs may not proceed into commerce until CBP releases the merchandise and all PGAs that regulate the merchandise have issued a ''may proceed'' message.

The definitions of the ACE data elements, the technical requirements for submission, and information describing how filers receive transmissions are set forth in the CATAIR guidelines for ACE, which may be found at *https://www.cbp.gov/trade/ace/catair.*

V. Waiver of Regulations Under the Test

For purposes of this test, 19 CFR 10.151 will be waived for test participants only insofar as the informal entry procedures for ''release from manifest'' are inconsistent with the requirements in this notice. Additionally, 19 CFR 128.21(a), 128.24(e), 143.23(j) and (k), and 143.26(b) will be waived for test participants to the extent such procedures are inconsistent with the requirements of this notice. In addition, 19 CFR 141.5 is waived to the extent that it conflicts with the requirement in this notice that entry type 86 be filed prior to arrival, or upon arrival of the cargo. Regulations not specifically waived by the ACE Entry Type 86 Test remain in full force, including CBP's authority under 19 CFR 143.22 to require that any shipment, even a low-value shipment that would otherwise be eligible for entry using entry type 86, be formally entered instead. As noted below, if CBP requires that a shipment be formally entered, the filer will have up to 15 days after arrival to file formal entry, consistent with 19 CFR 141.5 and 142.2(a).

Pursuant to 19 CFR 143.22, CBP has the authority to require that any shipment, including a shipment for which an entry type 86 has been filed, be formally entered instead. In particular, CBP may require formal

[2] Pursuant to 19 U.S.C. 1641, ''customs business'' is defined as those activities involving transactions with CBP concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by CBP on merchandise by reason of its importation, or the refund, rebate, or drawback of those duties, taxes, or other charges. ''Customs business'' also includes the preparation of documents or forms in any format and the electronic transmission of documents, invoices, bills, or parts thereof, intended to be filed with CBP in furtherance of such activities, whether or not signed or filed by the preparer, or activities relating to such preparation, but does not include the mere electronic transmission of data received for transmission to CBP.

[3] *See* General Notice of August 26, 2008 (73 FR 50337) for a complete discussion on the procedures for obtaining an ACE Portal Account.

entry for a shipment that would otherwise be eligible for informal entry, including an entry type 86, if formal entry is ''deemed necessary for import admissibility enforcement purposes; revenue protection; or the efficient conduct of customs business.'' *Id.*

This notice clarifies that when CBP exercises its authority under 19 CFR 143.22 to require formal entry for a shipment, the entry type 86 filer will be notified that the entry type 86 filing will not be accepted for purposes of making entry. In such circumstances, the requirement to file entry within 15 days of the date of arrival for the merchandise is not waived and will not be satisfied by the rejected entry type 86 filing. 19 CFR 141.5; 19 CFR 142.2(a). In order to comply with CBP's determination to require formal entry for a shipment, a party with the right to make entry must file an entry and entry summary in accordance with 19 CFR parts 141 and 142, which include the associated filing timeframes and the requirement to obtain a bond. 19 CFR 142.4(a). Failure to timely file the requisite entry summary will result in an immediate demand for liquidated damages in the entire amount of the bond in the case of a single entry bond, or an equivalent amount if a continuous bond was filed. 19 CFR 142.15.

VI. Comments

All interested parties are invited to comment on any aspect of this test at any time. CBP requests comments and feedback on all aspects of this test, including the design, conduct and implementation of the test, in order to determine whether to modify, alter, expand, limit, continue, end, or fully implement this new entry process.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), an agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget (OMB). The collections of information for the ACE Entry Type 86 Test are included in an existing collection for CBP Form 3461 (OMB control number 1651–0024).

VIII. Misconduct Under This Test

A test participant may be subject to civil and criminal penalties, administrative sanctions, or liquidated damages, as provided by law, for any of the following:

(1) Failure to follow the rules, requirements, terms, and conditions of this test;

(2) Failure to exercise reasonable care in the execution of participant obligations; or

(3) Failure to abide by applicable laws and regulations that have not been waived.

These penalties, administrative sanctions, and liquidated damages may be imposed under any statutory authority or under any CBP regulations that have not been waived by the test. CBP may suspend or remove a filer from further participation in the ACE Entry Type 86 Test based on a determination that that filer's participation in the test poses an unacceptable compliance risk.

Dated: January 10, 2024.

AnnMarie R. Highsmith,

Executive Assistant Commissioner, Office of Trade.

[FR Doc. 2024–00698 Filed 1–12–24; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2023–0028; OMB No. 1660–0002]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Disaster Assistance Registration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-Day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. FEMA invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning changes to modernize and simplify the disaster assistance registration. The changes will reduce the burden on survivors by only requiring them to answer questions based on the type of assistance they need. This will also reduce the amount of time it takes for survivors to apply either online, or through a call center, therefore allowing call center agents to assist survivors more quickly.

DATES: Comments must be submitted on or before February 15, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Brian Thompson, Supervisory Program Specialist, FEMA, Recovery Directorate at 540–686–3602 or *Brian.Thompson6@fema.dhs.gov.* You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (Pub. L. 93–288, *as amended*) (42 U.S.C. 5121–5207) is the legal basis for FEMA to provide financial assistance and services to individuals who apply for disaster assistance benefits in the event of a Presidentially-declared disaster. Housing Assistance is a provision of the Individuals and Households Program, authorized by section 408(c) of the Stafford Act. There are two forms of assistance: financial and direct. Financial Housing Assistance refers to funds provided to eligible applicants for temporary lodging expenses, rental of temporary housing, or repair or replacement of a damaged primary residence. Direct Temporary Housing Assistance includes providing Temporary Housing Units through Multifamily Lease and Repair and Direct Lease, or placing transportable temporary housings, such as manufactured housing units and recreational vehicles or travel trailers, on private, commercial, or group sites.

This program provides financial assistance and, if necessary, direct assistance to eligible individuals and households who, as a direct result of a major disaster, have necessary expenses and serious needs that are unable to be met through other means. Individuals and households may apply for assistance through the Registration Intake process under the Individuals and Households Program in person, via telephone, or the internet. FEMA provides financial assistance under Other Needs Assistance to individuals or households affected by a major disaster to meet disaster-related medical, dental, funeral, childcare, personal property, transportation, moving and storage expenses, and other necessary expenses or serious needs resulting from a major disaster under section 408(e)(1) of the Stafford Act.

The changes to the following forms support Executive Order 14058, *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government* (86 FR 71357, December 16, 2021). The changes will rebuild trust in the Federal Government by promoting transparency of FEMA's Disaster Assistance application process. The major changes will decrease the amount of time to create a new registration and streamline the application process to create a simpler registration progression focused on an individual's specific recovery needs. Streamlining breaks the application process down into specific work flows in a more user-friendly format:

FEMA Forms FF–104–FY–21–123 (formerly 009–0–1T, English) and FF–104–FY–21–123–A (formerly 009–0–1T, Spanish), Tele-Registration Application for Disaster Assistance are being added back to this collection and will eventually be removed due to the addition of the ten Streamline Registration Intake workflows. The ten workflows are: Home Damage, Personal Property Damage, Vehicle Damage, Emergency Needs, Essential Utilities Outage, Funeral Expenses, Childcare Expenses, Lodging Expenses, Medical or Dental Expenses, and Expenses for Miscellaneous items (*e.g.,* chainsaws, generators, etc.).

FEMA Form FF–104–FY–21–123–COVID–FA (English), Tele-Registration, COVID–19 Funeral Assistance is being added back to this collection and will eventually be removed and replaced with FEMA Form FF–104–FY–22–260, Streamline Registration Intake for Funeral Expenses, Disaster Assistance Registration.

COVID–19 Funeral Assistance will remain in FEMA Template FT–104–FY–22–101, Request for Information (RFI)—Funeral Verification (English) until the COVID–19 application period ends.

This collection contains the proposed changes to the disaster application process that will reduce the time to apply for IHP assistance. This update specifically recognizes post launch usability and the public's responses to the changes which will also be non-substantive throughout as the updates are not specifically content driven. These changes will reduce the burden on survivors by only requiring them to answer questions based on the type of assistance they need.

In documenting all post-registration callouts, auto-dialer contacts and subsequent collection of data, FEMA can determine whether applicants have unmet needs, can process the applicant for financial or direct assistance sharing the results of those contacts directly with external stakeholders. This data is specifically used for FEMA and its stakeholders to determine whether assistance is warranted.

The notice also includes FEMA documenting all post-registration contacts, including callouts, casework, and auto-dialers performed for the purpose of determining whether disaster assistance applicants have unmet needs and may be eligible for additional assistance and/or share the results of those contacts directly with external stakeholders, such as state or local government partners, who can potentially assist those same applicants with assistance or services not provided by FEMA through specific programs directly targeted to disaster survivors.

This notice specifically recognizes post launch usability and feedback from the public. FEMA is seeking the public's comments on identifying ways on making this a more user-friendly collection and more functional to meet the end users-applicants' needs. The changes in this information collection will also be non-substantive throughout as the updates are not specifically content driven. These changes in the application process are, however, designed to not only reduce the burden on the public but also reduce the administrative burden through this modernization update.

This proposed information collection previously published in the **Federal Register** on October 19, 2023, at 88 FR 72092 with a 60-day public comment period. No public comments were received. The purpose of this renewal is to allow public comment regarding post launch usability for the Streamline RI implementation and to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Disaster Assistance Registration.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0002.

FEMA Forms: FEMA Form FF–104–FY–21–122 (formerly 009–0–1, English), Paper Application, Disaster Assistance Registration; FEMA Form FF–104–FY–21–122–A (formerly 009–0–2, Spanish), Solicitud en Papel, Registro Para Asistencia De Desastre; FEMA Form FF–104–FY–21–123 (formerly 009–0–1T, English), Tele-Registration, Disaster Assistance Registration; FEMA Form FF–104–FY–21–123–A (formerly 009–0–1T, Spanish), Tele-Registration, Registro Para Asistencia De Desastre; FEMA Form FF–104–FY–21–123–COVID–FA (English), Tele-Registration, COVID–19 Funeral Assistance; FEMA Form FF–104–FY–21–125 (formerly 009–0–1Int, English), internet, Disaster Assistance Registration; FEMA Form FF–104–FY–21–125–A (formerly 009–0–2Int, Spanish), internet, Registro Para Asistencia De Desastre; FEMA Form FF–104–FY–21–127 (formerly 009–0–5, English), Manufactured Housing Unit Revocable License and Receipt for Government Property (Revocable License); FEMA Form FF–104–FY–21–127–A (formerly 009–0–6, Spanish), Licencia Revocable para la Unidad de Vivienda Temporera y Recibo para el uso de Propiedad del Gobierno (Licencia Revocable) ; FEMA Form FF–104–FY–21–128 (formerly 009–0–3, English), Declaration and Release; FEMA Form FF–104–FY–21–128–A (formerly 009–0–4, Spanish), Declaracion Y Autorizacion; FEMA Form FF–104–FY–22–255, Streamline Registration Intake for Home Damage, Disaster Assistance Registration; FEMA Form FF–104–FY–22–256, Streamline Registration Intake for Personal Property Damage, Disaster Assistance Registration; FEMA Form FF–104–FY–22–257, Streamline Registration Intake for Vehicle Property Damage, Disaster Assistance Registration; FEMA Form FF–104–FY–22–258, Streamline Registration Intake for Emergency Needs, Disaster Assistance Registration; FEMA Form FF–104–FY–22–259, Streamline Registration Intake for Essential Utilities Outage, Disaster Assistance Registration; FEMA Form FF–104–FY–22–260, Streamline Registration Intake for Funeral Expenses, Disaster Assistance Registration; FEMA Form FF–104–FY–22–261, Streamline Registration Intake for Childcare Expenses, Disaster Assistance Registration; FEMA Form FF–104–FY–22–262, Streamline Registration Intake for Lodging Expenses, Disaster Assistance Registration; FEMA Form FF–104–FY–22–263, Streamline Registration Intake for Medical or Dental Expenses, Disaster Assistance Registration; FEMA Form FF–104–FY–22–264, Streamline Registration Intake for Expenses for Miscellaneous Items, Disaster Assistance Registration; FEMA Template FT–104–FY–22–101, Request for Information (RFI)—Funeral Verification; FEMA Template FT–104–

FY–22–102, Request for Information (RFI)—Ownership Verification; FEMA Template FT–104–FY–22–103, Request for Information (RFI)—Occupancy Verification; FEMA Template FT–104–FY–22–104, Request for Information (RFI)—Medical, Dental, Disability-Accessibility-Related Items.

Abstract: The forms in this collection are used to obtain pertinent information to provide financial assistance, and if necessary, direct assistance to eligible individuals and households who, as a direct result of a disaster or emergency, have uninsured or under-insured, necessary or serious expenses they are unable to meet. This revision of a currently approved information collection will improve the applicant's experience with the disaster assistance registration process by providing a simpler, more intuitive interface and limiting required responses to those needed based on their needs. These changes will help rebuild trust in the Federal Government by promoting transparency of FEMA's Disaster Assistance application process.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 2,366,134.

Estimated Number of Responses: 2,366,134.

Estimated Total Annual Burden Hours: 700,954.

Estimated Total Annual Respondent Cost: $30,246,167.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $33,303,400.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2024–00673 Filed 1–12–24; 8:45 am]

BILLING CODE 9111–24–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2023–0021; OMB No. 1660–0142]

Agency Information Collection Activities: Submission for OMB Review, Comment Request; Shelter Resident Assessment Tool V2.0

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-Day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission seeks comments concerning the transition of the Survivor Shelter Assessment Tool (SSAT), renamed the Shelter Resident Assessment Tool V 2.0 (SRAT), to the Mass Care/Emergency Assistance Section and how the interview process was simplified and streamlined.

DATES: Comments must be submitted on or before February 15, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C Street SW, Washington, DC 20472, email address: *FEMA-Information-Collections-Management@fema.dhs.gov* or Ronan Dalcross, Mass Care & Emergency Assistance Section Chief, Individual Assistance Division, FEMA Recovery Directorate, *fema-hq-mass-care@fema.dhs.gov,* (202) 212–7269.

SUPPLEMENTARY INFORMATION: The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (Pub. L. 93–288, as amended) is the legal basis for FEMA to provide financial assistance and services to individuals who apply for disaster assistance in the event of a declared Emergency or Major disaster. The Individuals and Households Program provides financial assistance and, if necessary, direct assistance to eligible individuals and households who, as a direct result of a major disaster or emergency declaration, have uninsured or under-insured necessary expenses, a serious need and are unable to meet such expenses or needs through other means under section 408 of the Stafford Act, as codified at 42 U.S.C. 5174, and its implementing regulations at 44 CFR 206.110. FEMA requires the ability to collect information regarding the housing needs of shelter residents expressing interest in or seeking disaster assistance to provide services and assistance to transition them out of shelters and into temporary or permanent housing solutions expeditiously. Additionally, aggregated reports resulting from the individualized data collection about shelter residents and their unmet housing and related needs will support planning activities for FEMA, state entities, and Non-Governmental Organizations to transition residents out of the shelter.

This proposed information collection previously published in the **Federal Register** on September 27, 2023, at 88 FR 66478 with a 60-day public comment period. One public comment was received with multiple questions about the instrument itself. Comments mentioned the accessibility and 508 compliance in the document used to present the questions, and not the tool itself. Clarification was provided about the tool, and the suggested additional items were added to the list of accessible communication items in question 2 of the instrument. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Shelter Resident Assessment Tool (SRAT) V2.0.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0142.

FEMA Forms: FEMA Form FF–104–FY–21–168 (formerly 009–0–42), Shelter Resident Assessment Tool (SRAT) V2.0.

Abstract: FEMA requires the ability to collect information regarding the housing needs of shelter residents to provide services and assistance to transition them out of shelters and into temporary or permanent housing solutions expeditiously. FEMA may provide Public Assistance funding to State, Tribal, and Territorial governments for costs related to emergency shelter under section 403 of the Stafford Act, as codified at 42 U.S.C. 5170b. Aggregated reports resulting from the individualized data collection will support state, Non-Governmental Organizations and FEMA planning activities to transition the shelter population.

Affected Public: Individuals or Households (Primary); Federal Government; State, Local or Tribal Government; Not-For-Profit.

Estimated Number of Respondents: 7,500.

Estimated Number of Responses: 7,500.

Estimated Total Annual Burden Hours: 1,625.

Estimated Total Annual Respondent Cost: $70,119.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $73,090.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2024–00672 Filed 1–12–24; 8:45 am]

BILLING CODE 9111–24–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037239; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Longyear Museum of Anthropology, Colgate University, Hamilton, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Longyear Museum of Anthropology (LMA) intends to repatriate certain cultural items that meet the definition of unassociated funerary objects, sacred objects, or objects of cultural patrimony and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Broome, Jefferson, Onondaga, Oswego, and Tioga County, NY.

DATES: Repatriation of the cultural items in this notice may occur on or after February 15, 2024.

ADDRESSES: Kelsey Olney-Wall, Repatriation Manager, Longyear Museum of Anthropology, Colgate University, 13 Oak Drive, Hamilton, NY 13346, telephone (315) 228–7677, email *kolneywall@colgate.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the LMA. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the LMA.

Description

Sometime between 1950 and 1965, 17 cultural items were removed from Broome, Onondaga, Oswego, and Jefferson Counties, NY, by avocational archeologist Walter ''Bud'' Bennett, during his excavations at Brown (noted as Keefe and Whitford), Center Village, Oberlander Site 1, Saunders, and Watson Farm. The eight objects of cultural patrimony from the Brown Site, are one smoothing stone, one hammerstone, two stone knives, three stone projectile points, and one stone flake. The one object of cultural patrimony from Center Village is a stone projectile point. The one object of cultural patrimony from the Oberlander Site 1 is a stone projectile point. The one object of cultural patrimony from Saunders is a stone projectile point. The one sacred object from Watson Farm is a pot sherd, and the five objects of cultural patrimony are three stone projectile points, one worked stone, and one stone cobble. The collection was donated to the museum in 1965 by the estate of Walter ''Bud'' Bennett, a local amateur archeologist from Poolville, NY.

Sometime between 1924 and 1957, 649 cultural items were removed from Jefferson, Onondaga, and Oswego Counties, N.Y. by Herbert Bigford Sr., during his excavations at Barnes (a.k.a. Oran), Comstock, Delphi Falls, Durfee, Harrington Farm, Indian Hill, Meather House, Nolee, Pierrepont Manor, Pompey Center, Pratt Falls, Selkirk, and Towles. The 13 sacred objects from the Barnes site include one pipe stem, 11 bone beads (seven bird, three mammal, and one worked mammal bone), and one pottery sherd with an effigy face. The 56 objects of cultural patrimony include 27 bone awls (19 worked mammal bone, one baculum, one dog fibula, five bird bone, and one beaver ulna), three bone needles (two worked mammal bone, one bird bone), one worked antler, two punches of worked mammal bone, four dog canines, one worked mammal fishhook, five beaver teeth (one incisor, four other), two pieces of worked mammal bone, one chisel, one stone projectile point, and nine stone discs. The 91 unassociated funerary objects from the Comstock site include 90 wampum beads and one comb fragment. The 32 sacred objects include 26 pot sherds (12 rim sherds, 8 pot sherds, and six sherds with effigy faces), one pipe, and five pipe fragments. The 49 objects of cultural patrimony include seven awls (six of worked mammal bone and one deer metatarsal), two bones needles of mammal bone, one grooved mammal bone, three miscellaneous mammal bone fragments, one mammal bone tube, 11 antler fragments, two phalanges (one elk and one deer/sheep/goat), one fox tibia, 13 celts, one worked stone, one charred wooden square, one glass cassock button, one metal hook, one metal sheet, one metal ring, and two metal nails. The one object of cultural patrimony from the Delphi Falls site is a faunal bone awl. The five sacred objects from the Durfee site include five pipes (four ceramic, one kaolin). The 54 sacred objects from the Harrington Farm site include 54 pottery sherds. The one object of cultural patrimony from the Indian Hill site is a worked mammal bone awl. The 37 sacred objects from the Meather House site include 32 pottery sherds and five pipe fragments. The one object of cultural patrimony is a raccoon jaw (with tooth). The 101 sacred objects from the Nolee site include 81 pottery sherds and 20 pipe fragments. The three objects of cultural patrimony include one worked mammal bone awl, one bear canine, and one lead musket ball. The 17 sacred objects from the Pierrepont Manor site are 14 pottery sherds and three pipe fragments. The two objects of cultural patrimony are two stone discs. The two sacred objects from the Pompey Center site are two bone beads (one elk/cow and one deer). The two objects of cultural patrimony are one worked antler punch and one mammal rib awl. The one sacred object from the Pratt Falls site is a bird bone bead. The five objects of cultural patrimony are two bone awls (one dog fibula and one bear fibula), two elk canines, and one ground slate. The three sacred objects from the Selkirk site are three pottery sherds. The one object of cultural patrimony is a stone projectile point. The 89 sacred objects from the Towles site are one polished bird bone bead, two glass beads, 57 pottery sherds, five pottery discs, 22 pipe fragments, and two pieces of miscellaneous copper. The 83 objects of cultural patrimony are two bear canines, one beaver incisor, one worked antler, one catfish dorsal spine awl (or needle), four deer phalanges, one deer phalanx, two mammal bone needles, three worked mammal bone awls, one depressed lump of pottery, one clamshell, one shell button, two stone knives, 29 stone projectile points, two stone drills, one quartz rock, 13 stone scrapers, three stone celts, three worked stones, one rounded stone, three stone discs, two perforated stones, one net sinker, one stone gouge or celt, one metal bracelet, two musket balls, and one metal bell. In 1959, Colgate University purchased the Bigford collection from Winona F. Bigford.

At an unknown date, one cultural item was removed from Onondaga County, NY, by an unknown individual from an unknown site in Pompey. The one object of cultural patrimony is a hammerstone. It is unknown how and when this object entered the museum collection.

By 1962, 14 cultural items were removed from Broome County, NY, by John Hagen during his excavations at the Castle Creek Site. The 14 objects of cultural patrimony are 14 worked stones. It is unknown how and when Mr. Hagen acquired these belongings. The museum acquired this collection as a gift from John Hagen, of Hudson Falls, NY, in 1962.

Sometime between 1930 and 1943, 106 cultural items were removed from Broome County, Onondaga County, Oswego County, and Tioga County, NY, by Mortimer Cooley Howe during his excavations at D. Bocke's Farm and Harris Farm, Pratt Falls, and unknown sites in Amber, Baldwinsville, Binghamton, Brewerton, Elbridge, Marcellus, Phoenix, Skaneateles, Spafford, Stiles Station, and Tyler Hollow N.Y. The five objects of cultural patrimony from an unknown site in Amber are four stone projectile points and one stone gouge. The one object of cultural patrimony from an unknown site in Baldwinsville is a stone celt. The one object of cultural patrimony from an unknown site in Binghamton is a stone knife. The 12 objects of cultural patrimony from an unknown site in Brewerton are five stone projectile points, one stone knife, and six net sinkers. The one object of cultural patrimony from the D. Bockes Farm site is a stone projectile point. The three objects of cultural patrimony from an unknown site in Elbridge are one celt and two projectile points. The two objects of cultural patrimony from the Harris Farm site are two stone projectile points. The one object of cultural patrimony from an unknown site in Marcellus is a stone projectile point. The eight objects of cultural patrimony from an unknown site in Phoenix are three stone knives and five stone pestles. The four unassociated funerary objects from the Pratt Falls site are four mammal bone comb fragments. The 10 sacred objects are one pipe stem and nine metal fragments/brass kettle pieces. The 31 objects of cultural patrimony are eight worked mammal bone awls, four antler punches, three faunal bone punches, one faunal bone needle, three stone tools, one stone halfted thumbnail scraper, 10 stone scrapers, and one mirror fragment. The 18 objects of cultural patrimony from an unknown site in Skaneateles are 18 stone projectile points. The seven objects of cultural patrimony from an unknown site in Spafford are six stone projectile points and one stone knife. The one object of cultural patrimony from an unknown site in Stiles Station is a stone knife. The one object of cultural patrimony from an unknown site in Tyler Hollow is a stone projectile point. The items in the collection were gathered by Mortimer Cooley Howe while he was a student at Colgate and the University of Michigan. The Howe collection was donated to Colgate University, posthumously, by his father Burton Howe in 1947.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: archeological information, geographical information, historical information, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the LMA has determined that:

- The 95 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- The 365 cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- The 327 cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Onondaga Nation.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after February 15, 2024. If competing requests for repatriation are received, the LMA must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The LMA is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: January 9, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–00609 Filed 1–12–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037244; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items Amendment: University of Pennsylvania Museum of Archaeology and Anthropology, Philadelphia, PA

AGENCY: National Park Service, Interior.

ACTION: Notice; amendment.

SUMMARY: The University of Pennsylvania Museum of Archaeology and Anthropology (Penn Museum) is rescinding specific paragraphs in a Notice of Intent to Repatriate Cultural Items published in the **Federal Register** on February 16, 2011.

FOR FURTHER INFORMATION CONTACT: Dr. Christopher Woods, Williams Director, University of Pennsylvania Museum of Archaeology and Anthropology, 3260 South Street, Philadelphia, PA 19104–6324, telephone (215) 898–4050, email *director@Pennmuseum.org.*

SUPPLEMENTARY INFORMATION: Notice was previously given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA) of the intent to repatriate five cultural items removed from Sitka, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Penn Museum. The National Park Service is not responsible for the determinations in this notice. Additional information on the amendments and determinations in this notice, including the results of consultation, can be found in the summary or related records held by the Penn Museum.

Amendment

This notice removes five cultural items from a published in a Notice of Intent to Repatriate Cultural Items in the **Federal Register** (76 FR 9049–9051, February 16, 2011). Repatriation of five cultural items in the original Notice of Intent to Repatriate Cultural Items has not occurred. In the **Federal Register** (76 FR 9050, February 16, 2011), paragraphs 3 through 11 are removed. The five cultural items are one Wolf Helmet (catalog number NA8507), one Shark Helmet (29–1–1), one Ganook Hat (NA6864), one Noble Killer Hat (NA11741), and one Eagle Hat (NA11742). This amendment is being made upon the resolution of a competing claim for the five Tlingit Kaagwaantaan Clan cultural items. A new notice of intent to repatriate cultural items will follow.

The Penn Museum is responsible for sending a copy of this notice to the Central Council of Tlingit and Haida Indian Tribes of Alaska, a Federally-recognized Indian Tribe, acting on behalf of the Tlingit Kaagwaantaan Clan of Sitka, AK.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, 10.13, and 10.14.

Dated: January 9, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–00612 Filed 1–12–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037237; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion Amendment: University of California, Riverside, Riverside, CA

AGENCY: National Park Service, Interior.

ACTION: Notice; amendment.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of California, Riverside has amended a Notice of Inventory Completion published in the **Federal Register** on March 25, 2004. This notice amends the number of associated funerary objects in a collection removed from Riverside County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after February 15, 2024.

ADDRESSES: Megan Murphy, University of California, Riverside, 900 University Avenue, Riverside, CA 92517–5900, telephone (951) 827–6349, email *megan.murphy@ucr.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the University of California, Riverside. The National Park Service is not responsible for the determinations in this notice. Additional information on the amendments and determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the University of California, Riverside.

Amendment

This notice amends the determinations published in a Notice of Inventory Completion in the **Federal Register** (69 FR 15379–15380, March 25, 2004). Repatriation of the items in the original Notice of Inventory Completion has not occurred. The amendment is being made to reflect the addition of newly identified associated funerary objects for two of the collections listed in the original notice.

For CA–RIV–2199, the original notice only listed human remains, but tribal representatives have reviewed the remaining objects in the collection and have identified 14 lots of associated funerary objects. These objects include one lot of ceramics, one lot of unfired clay, one lot of glass, one lot of lithics, one lot of metal, one lot of plastic, one lot of rubber, one lot of shell beads, one lot of faunal bones, one lot of fabric, one lot of floral materials, one lot of geological materials, one lot of unmodified shell, and one lot fire-altered rock.

For CA–RIV–4169 the original notice only listed human remains, but tribal representatives have reviewed the remaining objects in the collections and have identified six lots of associated funerary objects. These objects include two lots of ceramics, one lot of shell beads, one lot of faunal bones, one lot of unmodified shells, and one lot of glass.

Determinations (as Amended)

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the University of California, Riverside has determined that:

- The human remains described in this amended notice represent the physical remains of three individuals of Native American ancestry.
- The 20 lots of objects described in this amended notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California; Augustine Band of Cahuilla Indians, California; Cabazon Band of Cahuilla Indians (Previously listed as Cabazon Band of Mission Indians, California); Cahuilla Band of Indians; Los Coyotes Band of Cahuilla and Cupeno Indians, California; Morongo Band of Mission Indians, California; Ramona Band of Cahuilla, California; Santa Rosa Band of Cahuilla Indians, California; and the Torres Martinez Desert Cahuilla Indians, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after February 15, 2024. If competing requests for repatriation are received, the University of California, Riverside must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The University of California, Riverside is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, 10.13, and 10.14.

Dated: January 9, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–00607 Filed 1–12–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037243; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Beloit College, Logan Museum of Anthropology, Beloit, WI

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Beloit College, Logan Museum of Anthropology (LMA) intends to repatriate a cultural item that meets the definition of an unassociated funerary object that has a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural item was removed from Ashland County, WI.

DATES: Repatriation of the cultural item in this notice may occur on or after February 15, 2024.

ADDRESSES: Nicolette B. Meister, Logan Museum of Anthropology, 700 College Street, Beloit, WI 53511, telephone (608) 363–2305, email *meistern@beloit.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the LMA. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of the consultation, can be found in the summary or related records held by the LMA.

Description

One cultural item was removed from Feature 171, Burial 4 of the Marina site (47As24) in Ashland County, WI. In 1975, an excavation was directed by Robert J. Salzer under an agreement between Beloit College and the Interagency Archeological Services branch of the National Park Service. The one unassociated funerary object is wooden plank (7302.6).

La Pointe is the traditional home of the Lake Superior Ojibwa. Burial 4 dates to circa 1760–1770 and the assemblage is consistent with Ojibwa burials of the Late Historic period (1760–1820). The associated human remains are not in the possession or control of a Federal agency or museum because all human remains excavated from the site were transferred in 1976 from Beloit College to the Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin.

Cultural Affiliation

The cultural item in this notice is connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, geographical, historical, and oral tradition.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the LMA has determined that:

- The one cultural item described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and is believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural item and the Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin.

Requests for Repatriation

Additional, written requests for repatriation of the cultural item in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated

Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural item in this notice to a requestor may occur on or after February 15, 2024. If competing requests for repatriation are received, the LMA must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural item are considered a single request and not competing requests. The LMA is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: January 9, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–00611 Filed 1–12–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037246; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: University of Pennsylvania Museum of Archaeology and Anthropology, Philadelphia, PA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of Pennsylvania Museum of Archaeology and Anthropology (Penn Museum) intends to repatriate certain cultural items that meet the definition of sacred objects and/or objects of cultural patrimony and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Sitka, AK.

DATES: Repatriation of the cultural items in this notice may occur on or after February 15, 2024.

ADDRESSES: Dr. Christopher Woods, Williams Director, University of Pennsylvania Museum of Archaeology and Anthropology, 3260 South Street, Philadelphia, PA 19104–6324, telephone (215) 898–4050, email *director@Pennmuseum.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Penn Museum. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the Penn Museum.

Description

The five cultural items are one Wolf Helmet (catalog number NA8507), one Shark Helmet (29–1–1), one Ganook Hat (NA6864), one Noble Killer Hat (NA11741), and one Eagle Hat (NA11742). The Wolf Helmet is a sacred object; the Shark Helmet is an object of cultural patrimony; and the Ganook Hat, Noble Killer Hat, and Eagle Hat are both sacred objects and objects of cultural patrimony. The five cultural items were purchased in Sitka, AK, by Louis Shotridge, a Tlingit curator employed by the Penn Museum to conduct research and make museum collections. In 1918, Louis Shotridge purchased the Wolf Helmet (NA8507) as part of a collection of five objects referred to as the ''Eagle's Nest House Collection,'' for $40.00. In 1925, Louis Shotridge purchased the Ganook Hat (NA6864) for $450.00 from a Tlingit individual, Augustus Bean (Ke.t-xut'.tc), a housemaster of one of the three Wolf Houses of the Kaagwaantaan Clan of Sitka, AK. In 1926, Louis Shotridge purchased the Noble Killer (or Noble Killerwhale) Hat (NA11741) and the Eagle Hat (NA11742) from a Tlingit individual, Augustus Bean (Ke.t-xut'.tc), a housemaster for one of the three Wolf Houses of the Kaagwaantaan Clan of Sitka, AK. These two hats, together with a third hat, were acquired by Louis Shotridge for $800.00. In 1929, Louis Shotridge purchased the Shark Helmet (29–1–1) for $350.00 from a Tlingit individual of the Kaagwaantaan clan.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological information, geographical information, historical information, kinship, oral tradition, other relevant information, or expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Penn Museum has determined that:

- One of the cultural items described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- One of the cultural items described above has ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- Three of the cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents and have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Sitka Tribe of Alaska.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after February 15, 2024. If competing requests for repatriation are received, the Penn Museum must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The Penn Museum is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: January 9, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–00613 Filed 1–12–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037240; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Longyear Museum of Anthropology, Colgate University, Hamilton, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Longyear Museum of Anthropology (LMA) has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were removed from St. Mary's County, MD.

DATES: Repatriation of the human remains in this notice may occur on or after February 15, 2024.

ADDRESSES: Kelsey Olney-Wall, Repatriation Manager, Longyear Museum of Anthropology, Colgate University, 13 Oak Drive, Hamilton, NY 13346, telephone (315) 228–7677, email *kolneywall@colgate.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the LMA. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the LMA.

Description

At an unknown date, human remains representing, at minimum, one individual were removed from St. Mary's County, MD. Writing on the cranium states ''Indian-White Mixture, St. Mary's County, Maryland.'' The exact site is uncertain. The human remains were acquired by Professor Frederick Hulse of the Sociology and Anthropology Department at Colgate University through a transfer from T.D. Stewart, Curator of Physical Anthropology at the Smithsonian Institution's National Museum of Natural History (formally the U.S. National Museum) Physical Anthropology department in 1948. It is not known how the Smithsonian Institution acquired this individual prior to 1948. No associated funerary objects are present.

Cultural Affiliation

The human remains in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: geographical information, historical information, kinship, oral tradition, other relevant information, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the LMA has determined that:

• The human remains described in this notice represent the physical remains of one individual of Native American ancestry.

• There is a relationship of shared group identity that can be reasonably traced between the human remains described in this notice and the Upper Mattaponi Tribe.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice and, if joined to a request from one or more of the Indian Tribes, the Choptico Band of Indians, Piscataway Conoy Tribe, and the Piscataway Indian Nation, non-federally recognized Indian groups.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after February 15, 2024. If competing requests for repatriation are received, the LMA must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. The LMA is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: January 9, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–00610 Filed 1–12–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037236; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Detroit Institute of Arts, Detroit, MI

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Detroit Institute of Arts intends to repatriate certain cultural items that meet the definition of unassociated funerary objects and objects of cultural patrimony and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from unknown locations in Alaska.

DATES: Repatriation of the cultural items in this notice may occur on or after February 15, 2024.

ADDRESSES: Denene De Quintal Ph.D., Detroit Institute of Arts, 5200 Woodward Avenue, Detroit, MI 48202, telephone (313) 578–1067, email *NAGPRA@dia.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Detroit Institute of Arts. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the Detroit Institute of Arts.

Description

Four cultural items and two unassociated funerary objects were removed from an unknown location in Alaska. Between the years 1871–1895, Frederick Stearns acquired these items and later bequeathed them to the Detroit Institute of Arts (DIA) in 1907. The four objects of cultural patrimony include a *Gooch Shá́daa* (Wolf Headdress) (72.488); a *Weix' S'eek Daakeit* (Sculpin Tobacco Pipe) (72.490); a *Xixch' S'eek Daakeit* (Frog Tobacco Pipe) (72.491); and a *Kaashishxaaw S'eek Daakeit* (Dragonfly Pipe) (72.496), and one unassociated funerary object is a Bear Tooth amulet (99.5B2318). One unassociated funerary object was removed from an unknown location in Alaska. The cultural item was acquired by Caleb Lyon and subsequently sold to Frederick Stearns between the years 1871–1895. Mr. Stearns bequeathed the item to the DIA in 1907 with the other objects listed above. The unassociated funerary object is a *Naaxein k'ideit* (Chilkat Apron) (99.5B5047).

One cultural item was removed from an unknown location in Alaska. Mrs. Bessie Visaya of Juneau, Alaska, initially obtained the item, which was later acquired by the Michael R. Johnson Gallery. The DIA purchased this object in 1977. The object of cultural patrimony is a *Yaxté X'oow* (Big Dipper Button Blanket) (77.61).

One cultural item was removed from an unknown location in Alaska. The cultural item was acquired by George E. Buchanan in 1923, who then donated the item to the Detroit News. The Detroit News loaned and then later donated the item to the DIA. The object of cultural patrimony is a Naaxein (Chilkat Blanket) (23.28).

One cultural item was removed from an unknown location in Alaska. The Carlebach Gallery in New York obtained the item from Rasmussen on an unknown date. In 1959, the DIA purchased the item from the gallery. The object of cultural patrimony is a Naaxein Kudás' (Chilkat Shirt) (59.265).

One unassociated funerary object was removed from an unknown location in Alaska. Henry Glover Stevens acquired the cultural item and later bequeathed it to his siblings. In 1934, they donated it to the DIA. The unassociated funerary object is a *Sheishoox* (Rattle) (34.49).

One unassociated funerary object was removed from an unknown location in Alaska. Richard A. Pohrt and Marion D. Pohrt purchased the item in 1990. They later donated it to the DIA in 1998. The unassociated funerary object is a shaman figure (1998.170).

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: geographical, historical, kinship, linguistics, and oral tradition.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Detroit Institute of Arts has determined that:

- The four cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- The seven cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Central Council of the Tlingit & Haida Indian Tribes.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES.** Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after February 15, 2024. If competing requests for repatriation are received, the Detroit Institute of Arts must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The Detroit Institute of Arts is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: January 9, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–00606 Filed 1–12–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037238; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Longyear Museum of Anthropology, Colgate University, Hamilton, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Longyear Museum of Anthropology (LMA) intends to repatriate certain cultural items that meet the definition of unassociated funerary objects or sacred objects and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Bay County, FL.

DATES: Repatriation of the cultural items in this notice may occur on or after February 15, 2024.

ADDRESSES: Kelsey Olney-Wall, Repatriation Manager, Longyear Museum of Anthropology, Colgate University, 13 Oak Drive, Hamilton, NY 13346, telephone (315) 228–7677, email *kolneywall@colgate.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the LMA. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the LMA.

Description

The five cultural items were removed from Bay County, FL, in 1902 and 1918 by Clarence B. Moore, during his excavations of a small sand mound at

Bear Point (By-5, now known as Strickland Point) and an unknown site in St. Andrews Bay. The four unassociated funerary objects are four potsherds (Catalog A55/Index 149; Catalog A56/Index 150). The one sacred object is a large shell dipper (Catalog A57/Index 151).

On January 25, 1955, after receiving Congressional authorization, the Smithsonian Institution officially transferred one lot of ''Archaeological Specimens (duplicate) (Educational study collections),'' to Colgate University's Sociology and Anthropology Professor John Longyear III, Curator of the LMA (previously the Anthropology Museum). The five cultural items from Bear Point Mound were accessioned into the LMA collection at this time.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: archeological information, geographical information, historical information, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the LMA has determined that:

- The four cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- The one cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Seminole Tribe of Florida and The Choctaw Nation of Oklahoma.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after February 15, 2024. If competing requests for repatriation are received, the LMA must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The LMA is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: January 9, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–00608 Filed 1–12–24; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1386]

Certain Self-Balancing Electric Skateboards and Components Thereof; Notice of Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 5, 2023, under section 337 of the Tariff Act of 1930, as amended, on behalf of Future Motion, Inc. of Santa Cruz, California. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain self-balancing electric skateboards and components thereof by reason of the infringement of certain claims of U.S. Patent No. 9,400,505 (''the '505 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a general exclusion order, or in the alternative a limited exclusion order, and cease and desist orders. A motion for temporary relief filed concurrently with the complaint requests that the Commission issue a temporary exclusion order prohibiting the importation into and the sale within the United States after importation of certain self-balancing electric skateboards and components thereof during the course of the Commission's investigation.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2023).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on January 9, 2024, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1, 2, 4–6, 8–10, 13–15, and 17–19 of the '505 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''one-wheeled, self-balancing electric skateboards that move in response to a rider's weight distribution on the board'';

(3) Pursuant to section 210.58 of the Commission's Rules of Practice and Procedure, 19 CFR 210.58, the motion for temporary relief under subsection (e) of section 337 of the Tariff Act of 1930, which was filed with the complaint, is provisionally accepted and referred to the presiding administrative law judge for investigation;

(4) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

Future Motion, Inc., 1201 Shaffer Road, Santa Cruz, California 95060

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Floatwheel, 5th Tech Rd Industry Complex, Building 06 F27 15, Guilin City, GuangXi Province 546008, China

Changzhou Smilo Motors Co., Ltd., Guzhuang, Benniu Town, Xinbei District, Changzhou, Jiangsu Province, China

Changzhou Gaea Technology Co., Ltd., Changxin Industrial Park, No. 218, Taishan Road, Xinbei District, Changzhou, Jiangsu, China

Shanghai Loyal Industry Co., Ltd., d/b/a ''SoverSky'', Room 204–192, 500 Chuansha Road, Shanghai, China

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(5) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: January 9, 2024.

Katherine Hiner,

Supervisory Attorney.

[FR Doc. 2024–00614 Filed 1–12–24; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1334]

Certain Raised Garden Beds and Components Thereof; Notice of a Commission Determination To Review in Part a Final Initial Determination Finding a Violation of Section 337; Request for Written Submissions on Remedy, the Public Interest, and Bonding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined to review in part a final initial determination on violation of section 337 (the ''Final ID'') issued by the presiding administrative law judge (''ALJ'') finding a violation of section 337 by reason of misappropriation of trade secrets and unfair competition based on false advertising under the Lanham Act. The Commission requests written submissions from the parties, interested government agencies, and other interested persons on the issues of remedy, the public interest, and bonding, under the schedule set forth below.

FOR FURTHER INFORMATION CONTACT: Edward S. Jou, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3316. 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 October 19, 2022, based on an amended complaint (the ''Complaint'') filed by Vego Garden, Inc. of Houston, Texas (the ''Complainant'' or ''Vego Garden''). 87 FR 63527–28 (Oct. 19, 2022). The Complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, and in the sale of, certain raised garden beds and components thereof by reason of misappropriation of trade secrets and unfair competition, the threat or effect of which is to destroy or substantially injure a domestic industry. *Id.* at 63527.

The Commission's notice of investigation named five respondents, *see id.,* and the name of one of the respondents was corrected pursuant to an amended complaint. *See* 88 FR 2637–38 (Jan. 17, 2023) (amending complaint and notice of investigation). The five named respondents, as amended, are: Huizhou Green Giant Technology Co., Ltd. (''Green Giant'') of Guangdong, China; Utopban International Trading Co., Ltd. d/b/a Vegega (''Utopban International'') of Rosemead, California; Utopban Limited (''Utopban'') of Hong Kong, China; Forever Garden of El Monte, California; and VegHerb, LLC d/b/a Frame It All (''VegHerb'') of Cary, North Carolina. *See id.* at 2638. The Office of Unfair Import Investigations (''OUII'') is also a party in this investigation. *Id.*

The investigation was terminated as to Utopban International based on withdrawal of the complaint's allegations. Order No. 9 (Jan. 30, 2023), *unreviewed by* Comm'n Notice (Feb. 27, 2023). The investigation was terminated as to Forever Garden and VegHerb based on settlement agreements. Order No. 11 (Feb. 23, 2023) (VegHerb) and Order No. 12 (Feb. 23, 2023) (Forever Garden), *both unreviewed by* Comm'n Notice (Mar. 23, 2023).

An evidentiary hearing was held on May 22–25, 2023, and the ALJ issued the Final ID on September 8, 2023, finding violations of section 337 by reason of misappropriation of trade secrets and unfair competition based on false advertising under the Lanham Act. The ALJ also issued a recommended determination (''RD'') on September 8, 2023. The RD recommended the issuance of limited exclusion orders for Green Giant and Utopban and a cease and desist order for Utopban. The RD further recommended that a 100% bond be set during the Presidential review period.

Respondents Green Giant and Utopban filed a petition for review of the Final ID on September 20, 2023. Complainant Vego Garden filed a response in opposition to the petition on September 28, 2023. OUII filed a response in opposition to the petition on October 2, 2023.

Having reviewed the record of the investigation, including the Final ID, the parties' submissions to the ALJ, the petition for review and responses thereto, the Commission has determined to review the Final ID in part. Specifically, the Commission has determined to review the ID's findings with respect to: (1) the Commission's statutory authority to investigate unfair acts under section 337(a)(1)(A) involving extraterritorial conduct, including the alleged trade secret misappropriation and false advertising under the Lanham Act; (2) the ID's findings of trade secret misappropriation with respect to the product development research trade secret and the product manufacturing trade secret; and (3) all of the ID's findings with respect to domestic industry (*i.e.,* the existence of a domestic industry and injury to the domestic industry) (ID at 103–136). The Commission has determined not to review the remaining findings in the ID.

In connection with its review, the Commission requests responses to the following questions. The parties are requested to brief their positions with reference to the applicable law and the existing evidentiary record.

(1) Discuss and identify any record evidence or arguments that were presented to the ALJ describing or documenting the customer feedback, market research, and cost analysis that was alleged to be part of the product development research trade secret.

(2) Discuss and identify any record evidence or arguments that were presented to the ALJ showing dissemination outside of Vego Garden of the customer feedback, market research, and cost analysis alleged to be part of the product development research trade secret and the acquisition or use of such information by Respondents.

(3) When was the product development research trade secret allegedly misappropriated? Discuss and identify any record evidence or arguments that were presented to the ALJ describing or documenting the state of Vego Garden's customer feedback, market research, and cost analysis relating to its 8-inch product development at the time of the alleged misappropriation. *See, e.g.,* Final ID 77–78.

(4) Discuss and identify any record evidence or arguments that were presented to the ALJ showing whether the product manufacturing trade secret was developed, in whole or in part, in the United States. In your response to this question, please address the claimed research and development costs for this trade secret, Mr. Xiong's testimony regarding the development of the bending machine, and the identity and location of the named inventor on the Chinese patent application that is alleged to describe the bending machine. *See* Final ID at 52–53 (citing research and development costs for bending machine); Tr. (Xiong) at 62:14–21 (describing design of bending machine); JX–0021 (Chinese patent application).

(5) Discuss and identify any record evidence or arguments that were presented to the ALJ explaining the relationship between the alleged research and development costs for the asserted product development research and product manufacturing trade secrets and the asserted domestic industry expenditures. See Final ID at 35 (research and development costs for 8-inch product), 52–53 (research and development costs for bending machine), 108–19 (asserted domestic industry expenditures).

(6) Discuss and identify any record evidence or arguments that were presented to the ALJ supporting or contradicting the ID's determination to allocate the entirety of Vego Garden's farm purchase and 2022 expenses to the domestic industry. *See* Final ID at 114. When responding to this issue, please address Mr. Xiong's testimony describing different uses of the farm property. *See* Tr. (Xiong) at 36:12–21 (research and development and marketing), 41:19–25 (office space).

(7) Discuss and identify any record evidence or arguments that were presented to the ALJ regarding the accuracy and reliability of the ID's allocations of rental expenses and ''non-real-estate, non-payroll R&D expenses'' to the domestic industry. *See* Final ID at 114–15.

(8) Discuss and identify any record evidence or arguments that were presented to the ALJ regarding the expenses that are reflected in the $7.3 million in expenses cited by Mr. Xiong at the hearing. *See* Tr. (Xiong) at 41:1–42:3; CDX–0003.

(9) Discuss and identify any record evidence or arguments that were presented to the ALJ regarding the alleged injury to the domestic industry that can be attributed to the alleged misappropriation of the product development research trade secret.

The parties are invited to brief only the discrete issues requested above. The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings.

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia,* (1) an exclusion order that could result in the exclusion of the subject articles from entry into the United States; and/or (2) cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843, Comm'n Op. at 7–10 (Dec. 1994).

The statute requires the Commission to consider the effects of that remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and cease and desist orders would have on: (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the

Commission's determination. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding.

In its initial submission, Complainant is also requested to identify the remedy sought and Complainant and OUII are requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to provide the HTSUS subheadings under which the accused products are imported, and to supply the identification information for all known importers of the products at issue in this investigation. The initial written submissions and proposed remedial orders must be filed no later than close of business on January 23, 2024. Reply submissions must be filed no later than the close of business on January 30, 2024. Opening submissions are limited to 50 pages. Reply submissions are limited to 25 pages. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (Mar. 19, 2020). Submissions should refer to the investigation number (''Inv. No. 337–TA–1334'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. Any non-party wishing to submit comments containing confidential information must serve those comments on the parties to the investigation pursuant to the applicable Administrative Protective Order. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing and must be served in accordance with Commission Rule 210.4(f)(7)(ii)(A) (19 CFR 210.4(f)(7)(ii)(A)). All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for this determination took place on January 9, 2024.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: January 9, 2024.

Katherine Hiner,

Supervisory Attorney.

[FR Doc. 2024–00649 Filed 1–12–24; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2009–0025]

UL LLC: Grant of Expansion of Recognition and Modification to the NRTL Program's List of Appropriate Test Standards

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to expand the scope of recognition for UL LLC, as a Nationally Recognized Testing Laboratory (NRTL). Additionally, OSHA announces the final decision to add thirteen test standards to the NRTL Program's List of Appropriate Test Standards.

DATES: The expansion of the scope of recognition becomes effective on January 16, 2024.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone (202) 693–1999 or email *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor; telephone (202) 693–1911 or email *robinson.kevin@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition of UL LLC, (UL) as a NRTL. UL's expansion covers the addition of thirty-five test standards to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by the applicable test standard; and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by NRTLs or applicant organizations for initial recognition, as well as for expansion or renewal of recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides a preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including UL, which details that NRTL's scope of recognition. These pages are available from the OSHA website at *https://www.osha.gov/dts/otpca/nrtl/index.html.*

UL submitted two applications, one dated December 24, 2021 (OSHA–2009–0025–0053), and a second dated May 5, 2023 (OSHA–2009–0025–0054). The first application was amended on July 19, 2022, to remove two standards from the original request (OSHA–2009–0025–0055). In total, the expansion applications, as amended, requested the addition of thirty-seven test standards to the scope of recognition. OSHA staff performed a detailed analysis of the application packets and other pertinent information. OSHA did not perform any on-site reviews in relation to these applications. OSHA determined that two of the standards included in the amended expansion application, UL 80079–36 and 80079–37, are not appropriate test standards and therefore did not propose they be included in UL's NRTL Scope of Recognition or in the NRTL Program's List of Appropriate Test Standards. This expansion announced by this notice includes the remaining thirty-five standards.

OSHA published the preliminary notice announcing UL's expansion applications in the **Federal Register** on October 27, 2023 (88 FR 73874). The agency requested comments by November 13, 2023, but it received no comments in response to this notice.

To obtain or review copies of all public documents pertaining to the UL applications, go to *http://www.regulations.gov* or contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor. Docket No. OSHA–2009–0025 contains all materials in the record concerning UL's recognition. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

II. Final Decision and Order

OSHA staff examined UL's expansion applications, its capability to meet the requirements of the test standards, and other pertinent information. Based on its review of this evidence, OSHA finds that UL meets the requirements of 29 CFR 1910.7 for expansion of its recognition, subject to the limitations and conditions listed in this notice. OSHA, therefore, is proceeding with this final notice to grant UL's expanded scope of recognition. OSHA limits the expansion of UL's recognition to testing and certification of products for demonstration of conformance to the test standards listed below in Table 1.

TABLE 1—TEST STANDARDS FOR INCLUSION IN UL'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 62841–1	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 1: General Requirements.
UL 62841–2–1	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 2–1: Particular Requirements for Hand-Held Drills and Impact Drills.
UL 62841–2–2	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 2–2: Particular Requirements For Hand-Held Screwdrivers and Impact Wrenches.
UL 62841–2–3 *	Electric Motor-Operated Hand-held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 2–3: Particular Requirements For Hand-Held Grinders, Disc-Type Polishers And Disc-Type Sanders.
UL 62841–2–4	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 2–4: Particular Requirements For Hand-Held Sanders And Polishers Other.
UL 62841–2–5	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 2–5: Particular Requirements for Hand-Held Circular Saws.
UL 62841–2–8	Safety Requirements for Particular Requirements for Hand-Held Shears and Nibblers.
UL 62841–2–9	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn and Garden Machinery—Safety—Part 2–9: Particular Requirements for Hand-Held Tappers and Threaders.
UL 62841–2–10	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety Part 2–10: Particular Requirements for Hand-Held Mixers.
UL 62841–2–11	Safety Requirements for Particular Requirements for Hand-Held Reciprocating Saws.
UL 62841–2–14	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn And Garden Machinery—Safety—Part 2–14: Particular Requirements for Hand-Held Planers.
UL 62841–2–17	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 2–17: Particular Requirements for Hand-Held Routers.
UL 62841–2–21	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety Part 2–21: Particular Requirements for Hand-Held Drain Cleaners.
UL 62841–3–1	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–1: Particular Requirements For Transportable Table Saws.
UL 62841–3–4	Safety Requirements for Particular Requirements for Transportable Bench Grinders.
UL 62841–3–6	Safety Requirements for Particular Requirements for Transportable Diamond Drills with Liquid System.
UL 62841–3–7 *	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 3–7: Particular Requirements for Transportable Wall Saws.
UL 62841–3–9	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–9: Particular Requirements for Transportable Mitre Saws.
UL 62841–3–10	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–10: Particular Requirements for Transportable Cut-Off Machines.
UL 62841–3–12 *	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–12: Particular Requirements for Transportable Threading Machines.

TABLE 1—TEST STANDARDS FOR INCLUSION IN UL'S NRTL SCOPE OF RECOGNITION—Continued

Test standard	Test standard title
UL 62841–3–13	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety Part 3–13: Particular Requirements for Transportable Drills.
UL 62841–3–14 *	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 3–14: Particular Requirements for Transportable Drain Cleaners.
UL 62841–3–1000 *	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 3–1000: Particular Requirements For Transportable Laser Engravers.
UL 62841–4–1	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn And Garden Machinery—Safety—Part 4–1: Particular Requirements for Chain Saws.
UL 62841–4–2	Standard for Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn And Garden Machinery—Safety—Part 4–2: Particular Requirements for Hedge Trimmers.
UL 62841–4–4 *	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 4–4: Particular Requirements For Lawn Trimmers, Lawn Edge Trimmers, Grass Trimmers, Brush Cutters And Brush Saws.
UL 62841–4–1000 *	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 4–1000: Particular Requirements For Utility Machines.
UL 60745–2–23	Hand-Held Motor-Operated Electric Tools—Safety—Part 2–23: Particular Requirements for Die Grinders and Small Rotary Tools.
UL 60079–33 *	Explosive Atmospheres—Part 33: Equipment Protection by Special Protection "s"
UL 2610 *	Commercial Premises Security Alarm Units and Systems.
UL 428A *	Electrically Operated Valves for Gasoline and Gasoline/Ethanol Blends with Nominal Ethanol Concentrations Up to 85 Percent (E0–E85).
UL 428B *	Electrically Operated Valves for Diesel Fuel, Biodiesel Fuel, Diesel/Biodiesel Blends with Nominal Biodiesel Concentrations Up To 20 Percent (B20), Kerosene, and Fuel Oil.
UL 3100 *	ANSI/CAN/UL Automated Mobile Platforms (AMPs).
UL 2743	Standard for Portable Power Packs.
UL 8400 *	Virtual Reality, Augmented Reality and Mixed Reality Technology Equipment.

* Represents the standards that OSHA will add to the NRTL Program's List of Appropriate Test. Standards.

In this notice, OSHA also announces the final decision to add thirteen new test standards to the NRTL Program's List of Appropriate Test Standards. Table 2 below lists the standards that are new to the NRTL Program. OSHA has determined that these test standards are appropriate test standards and will add them to the NRTL Program's List of Appropriate Test Standards.

TABLE 2—STANDARDS OSHA WILL ADD TO THE NRTL PROGRAM'S LIST OF APPROPRIATE TEST STANDARDS

Test standard	Test standard title
UL 62841–2–3	Electric Motor-Operated Hand-held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 2–3: Particular Requirements For Hand-Held Grinders, Disc-Type Polishers And Disc-Type Sanders.
UL 62841–3–7	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–7: Particular Requirements for Transportable Wall Saws.
UL 62841–3–12	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–12: Particular Requirements for Transportable Threading Machines.
UL 62841–3–14	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–14: Particular Requirements for Transportable Drain Cleaners.
UL 62841–3–1000	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–1000: Particular Requirements For Transportable Laser Engravers.
UL 62841–4–1000	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 4–1000: Particular Requirements For Utility Machines.
UL 62841–4–4	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 4–4: Particular Requirements for Lawn Trimmers, Lawn Edge Trimmers, Grass Trimmers, Brush Cutters And Brush Saws.
UL 60079–33	Explosive Atmospheres—Part 33: Equipment Protection by Special Protection "s".
UL 2610	Commercial Premises Security Alarm Units and Systems.
UL 428A	Electrically Operated Vales for Gasoline and Gasoline/Ethanol Blends with Nominal Ethanol Concentrations Up to 85 Percent (E0–E85).
UL 428B	Electrically Operated Valves for Diesel Fuel, Biodiesel Fuel, Diesel/Biodiesel Blends with Nominal Biodiesel Concentrations Up To 20 Percent (B20), Kerosene, and Fuel Oil.
UL 3100	ANSI/CAN/UL Automated Mobile Platforms (AMPs).
UL 8400	Virtual Reality, Augmented Reality and Mixed Reality Technology Equipment.

The American National Standards Institute (ANSI) may approve the test standards listed above as American National Standards. However, for convenience, we may use the designation of the standards-developing organization for the standard as opposed to the ANSI designation. Under the NRTL Program's policy (see OSHA Instruction CPL 01–00–004, Chapter 2, Section VIII), any NRTL recognized for a particular test standard may use either the proprietary version of the test standard or the ANSI version of that standard. Contact ANSI to determine whether a test standard is currently ANSI-approved.

A. Conditions

In addition to those conditions already required by 29 CFR 1910.7, UL must abide by the following conditions of the recognition:

1. UL must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as a NRTL, and provide details of the change(s);

2. UL must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and

3. UL must continue to meet the requirements for recognition, including all previously published conditions on UL's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the scope of recognition of UL as a NRTL, subject to the limitations and conditions specified above.

III. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8–2020 (85 FR 58393, Sept. 18, 2020), and 29 CFR 1910.7.

Signed at Washington, DC.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024–00623 Filed 1–12–24; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0043]

TUV SUD America, Inc.: Grant of Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to expand the scope of recognition for TUV SUD America, Inc. (TUVAM) as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on January 16, 2024.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor; telephone: (202) 693–1911; email: *robinson.kevin@dol.gov.* OSHA's web page includes information about the NRTL Program (see *http://www.osha.gov/dts/otpca/nrtl/index.html*).

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition for TUV SUD America Inc. (TUVAM). TUVAM's expansion covers the addition of two test standards and one recognized testing site to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by its applicable test standard; and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes an application by a NRTL for initial recognition and for an expansion or renewal of this recognition, following requirements in Appendix A, 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides its preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including TUVAM, which details the NRTL's scope of recognition. These pages are available from the OSHA website at: *https://www.osha.gov/nationally-recognized-testing-laboratory-program.*

TUVAM submitted two applications to OSHA for expansion of the NRTL scope of recognition. The first application, dated June 8, 2020 (OSHA–2007–0043–0051), requested the expansion of the NRTL scope of recognition to include one additional test site located at: Daimlerstr, 40 Frankfurt am Main, Hessen 60314 Germany. The second application, dated July 12, 2021 (OSHA–2007–0043–0052), requested the expansion of the NRTL scope of recognition to include two additional test standards that were removed from another NRTL expansion application (see OSHA–2007–0043–0042). In that application, TUVAM originally requested the addition of five standards to its scope of recognition on July 12, 2021. That application was amended to remove two standards, and the final **Federal Register** notice announcing the expansion of the NRTL scope of recognition to include the other three standards was published on June 29, 2022 (see 87 FR 38784). This notice covers the remaining two standards from the July 12, 2021, expansion application and the requested testing site. OSHA staff performed an on-site review of TUVAM's testing facilities at TUVAM Frankfurt on June 14–15, 2023, in which assessors found some nonconformances with the requirements of 29 CFR 1910.7. TUVAM has addressed these issues sufficiently, and OSHA staff preliminarily determined that OSHA should grant the applications.

OSHA published the preliminary notice announcing TUVAM's expansion applications in the **Federal Register** on November 22, 2023 (88 FR 81436). The agency requested comments by December 7, 2023, but it received no comments in response to this notice. OSHA now is proceeding with this final notice to grant expansion of TUVAM's NRTL scope of recognition.

To review copies of all public documents pertaining to TUVAM's applications, go to *http://www.regulations.gov* or contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor at (202) 693–2350. Docket No. OSHA–2007–0043 contains all materials in the record concerning TUVAM's recognition. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 for assistance in locating docket submissions.

II. Final Decision and Order

OSHA staff examined TUVAM's expansion applications, conducted a detailed on-site assessment, and examined other pertinent information. Based on its review of this evidence, OSHA finds that TUVAM meets the requirements of 29 CFR 1910.7 for expansion of its recognition, subject to the limitations and conditions. OSHA, therefore, is proceeding with this final notice to grant TUVAM's expanded scope of recognition. OSHA limits the expansion of TUVAM's recognition to include the site at Frankfurt, Germany listed above and the testing and certification of products for demonstration of conformance to the test standards shown below in Table 1.

TABLE 1—LIST OF APPROPRIATE TEST STANDARDS FOR INCLUSION IN TUVAM'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 61010–2–040	Safety Requirements for Electrical Equipment for Measurement, Control and Laboratory Use—Part 2–040: Particular Requirements for Sterilizers and Washer-Disinfectors Used to Treat Medical Materials.
UL 61010–2–091	Standard for Safety Requirements for Electrical Equipment for Measurement, Control and Laboratory Use—Part 2–091: Particular Requirements for Cabinet X-Ray Systems.

OSHA's recognition of the site limits TUVAM to performing product testing and certifications only to the test standards for which the site has the proper capability and programs, and for test standards in TUVAM's scope of recognition. OSHA's recognition of any NRTL for a particular test standard is limited to equipment or materials for which OSHA standards require third-party testing and certification before using them in the workplace. Consequently, if a test standard also covers any products for which OSHA does not require such testing and certification, a NRTL's scope of recognition does not include these products.

A. Conditions

Recognition is contingent on continued compliance with 29 CFR 1910.7, including but not limited to, abiding by the following conditions of recognition:

1. TUVAM must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as a NRTL, and provide details of the change(s);
2. TUVAM must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and
3. TUVAM must continue to meet the requirements for recognition, including all previously published conditions on TUVAM's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the scope of recognition of TUVAM as a NRTL, subject to the limitations and conditions specified above.

III. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW, Washington, DC 20210, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8–2020 (85 FR 58393; Sept. 18, 2020), and 29 CFR 1910.7.

Signed at Washington, DC.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024–00621 Filed 1–12–24; 8:45 am]

BILLING CODE 4510–26–P

LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket No. 23–CRB–0017–AU (RFC Media)]

Notice of Intent To Audit

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Public notice.

SUMMARY: The Copyright Royalty Judges announce receipt from SoundExchange, Inc., of a notice of intent to audit the 2020, 2021, and 2022 statements of account submitted by commercial webcaster and business establishment service RFC Media concerning royalty payments it made pursuant to two statutory licenses.

ADDRESSES: *Docket:* For access to the dockets to read background documents, go to eCRB at *https://app.crb.gov* and perform a case search for docket 23–CRB–0017–AU (RFC Media).

FOR FURTHER INFORMATION CONTACT: Anita Brown, (202) 707–7658, *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: The Copyright Act grants to sound recordings copyright owners the exclusive right to publicly perform sound recordings by means of certain digital audio transmissions, subject to limitations. Specifically, the right is limited by the statutory license in section 114, which allows nonexempt noninteractive digital subscription services, eligible nonsubscription services, and preexisting satellite digital audio radio services to perform publicly sound recordings by means of digital audio transmissions. 17 U.S.C. 114(f). In addition, a statutory license in section 112 allows a service to make necessary ephemeral reproductions to facilitate digital transmission of the sound recording. 17 U.S.C. 112(e).

Licensees may operate under these licenses provided they pay the royalty fees and comply with the terms set by the Copyright Royalty Judges. The rates and terms for the section 112 and 114 licenses are codified in 37 CFR parts 380 and 382–84.

As one of the terms for these licenses, the Judges designated SoundExchange, Inc., (SoundExchange) as the Collective, *i.e.,* the organization charged with collecting the royalty payments and statements of account submitted by licensees, including those that operate commercial and noncommercial webcaster services, preexisting satellite digital audio radio services, new subscription services, and those that make ephemeral copies for transmission to business establishments. The Collective is also charged with distributing the royalties to the copyright owners and performers entitled to receive them under the section 112 and 114 licenses. *See* 37 CFR 380.4(d)(1), 382.5(d)(1), 383.4(a), 384.4(b)(1).

As the Collective, SoundExchange may, only once a year, conduct an audit of a licensee for any or all of the prior three calendar years to verify royalty payments. SoundExchange must first file with the Judges a notice of intent to audit a licensee and deliver the notice to the licensee. *See* 37 CFR 380.6(b), 382.7(b), 383.4(a) and 384.6(b).

On December 22, 2023, SoundExchange filed with the Judges a notice of intent to audit the statements of account submitted by commercial webcaster and business establishment service RFC Media for the years 2020, 2021, and 2022. The Judges must publish notice in the **Federal Register** within 30 days of receipt of a notice announcing the Collective's intent to conduct an audit. *See* 37 CFR 380.6(c) 382.7(c), 383.4(a) and 384.6(c). This notice fulfills the Judges' publication obligation with respect to SoundExchange's December 22, 2023 notice of intent to audit commercial webcaster and business establishment service RFC Media for the years 2020, 2021, and 2022.

Dated: January 9, 2024.

David P. Shaw,

Chief Copyright Royalty Judge.

[FR Doc. 2024–00686 Filed 1–12–24; 8:45 am]

BILLING CODE 1410–72–P

LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket Nos. 23–CRB–0016–AU (Cumulus Media), 23–CRB–0018–AU (Spanish Broadcasting System), 23–CRB–0019–AU (Stephens Media Group), 23–CRB–0020–AU (SummitMedia, LLC) 23–CRB–0021–AU (Urban One)]

Notice of Intent To Audit

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Public notice.

SUMMARY: The Copyright Royalty Judges announce receipt from SoundExchange, Inc., of notices of intent to audit the 2020, 2021, and 2022 statements of account submitted by commercial webcasters Cumulus Media, Spanish Broadcasting, Stephens Media Group, Summit Media, Urban One concerning royalty payments they made pursuant to two statutory licenses.

ADDRESSES: *Dockets:* For access to the dockets to read background documents, go to eCRB at *https://app.crb.gov* and perform a case search for docket 23–CRB–0016–AU (Cumulus Media), 23–CRB–0018–AU (Spanish Broadcasting System), 23–CRB–0019–AU (Stephens Media Group), 23–CRB–0020–AU (SummitMedia, LLC), or 23–CRB–0021–AU (Urban One).

FOR FURTHER INFORMATION CONTACT: Anita Brown, (202) 707–7658, *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: The Copyright Act grants to sound recordings copyright owners the exclusive right to publicly perform sound recordings by means of certain digital audio transmissions, subject to limitations. Specifically, the right is limited by the statutory license in section 114, which allows nonexempt noninteractive digital subscription services, eligible nonsubscription services, and preexisting satellite digital audio radio services to perform publicly sound recordings by means of digital audio transmissions. 17 U.S.C. 114(f). In addition, a statutory license in section 112 allows a service to make necessary ephemeral reproductions to facilitate digital transmission of the sound recording. 17 U.S.C. 112(e).

Licensees may operate under these licenses provided they pay the royalty fees and comply with the terms set by the Copyright Royalty Judges. The rates and terms for the section 112 and 114 licenses are codified in 37 CFR parts 380 and 382–84.

As one of the terms for these licenses, the Judges designated SoundExchange, Inc., (SoundExchange) as the Collective, *i.e.,* the organization charged with collecting the royalty payments and statements of account submitted by licensees, including those that operate commercial and noncommercial webcaster services, preexisting satellite digital audio radio services, new subscription services, and those that make ephemeral copies for transmission to business establishments. The Collective is also charged with distributing the royalties to the copyright owners and performers entitled to receive them under the section 112 and 114 licenses. *See* 37 CFR 380.4(d)(1), 382.5(d)(1), 383.4(a), 384.4(b)(1).

As the Collective, SoundExchange may, only once a year, conduct an audit of a licensee for any or all of the prior three calendar years to verify royalty payments. SoundExchange must first file with the Judges a notice of intent to audit a licensee and deliver the notice to the licensee. *See* 37 CFR 380.6(b), 382.7(b), 383.4(a) and 384.6(b).

On December 22, 2023, SoundExchange filed with the Judges notices of intent to audit the statements of account submitted by commercial webcasters Cumulus Media, Spanish Broadcasting, Stephens Media Group, Summit Media, Urban One for the years 2020, 2021, and 2022. The Judges must publish notice in the **Federal Register** within 30 days of receipt of a notice announcing the Collective's intent to conduct an audit. *See* 37 CFR 380.6(c) 382.7(c), 383.4(a) and 384.6(c). This notice fulfills the Judges' publication obligation with respect to SoundExchange's December 22, 2023 notices of intent to audit commercial webcasters Cumulus Media, Spanish Broadcasting, Stephens Media Group, Summit Media, Urban One for the years 2020, 2021, and 2022.

Dated: January 9, 2024.

David P. Shaw,

Chief Copyright Royalty Judge.

[FR Doc. 2024–00684 Filed 1–12–24; 8:45 am]

BILLING CODE 1410–72–P

LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket No. 23–CRB–0015–AU (BBNRadio.org)]

Notice of Intent To Audit

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Public notice.

SUMMARY: The Copyright Royalty Judges announce receipt from SoundExchange, Inc., of a notice of intent to audit the 2020, 2021, and 2022 statements of account submitted by noncommercial webcaster *BBNRadio.org* concerning royalty payments it made pursuant to two statutory licenses.

ADDRESSES: *Docket:* For access to the dockets to read background documents, go to eCRB at *https://app.crb.gov* and perform a case search for docket 23–CRB–0015–AU (*BBNRadio.org*).

FOR FURTHER INFORMATION CONTACT: Anita Brown, (202) 707–7658, *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: The Copyright Act grants to sound recordings copyright owners the exclusive right to publicly perform sound recordings by means of certain digital audio transmissions, subject to limitations. Specifically, the right is limited by the statutory license in section 114, which allows nonexempt noninteractive digital subscription services, eligible nonsubscription services, and preexisting satellite digital audio radio services to perform publicly sound recordings by means of digital audio transmissions. 17 U.S.C. 114(f). In addition, a statutory license in section 112 allows a service to make necessary ephemeral reproductions to facilitate digital transmission of the sound recording. 17 U.S.C. 112(e).

Licensees may operate under these licenses provided they pay the royalty fees and comply with the terms set by the Copyright Royalty Judges. The rates and terms for the section 112 and 114 licenses are codified in 37 CFR parts 380 and 382–84.

As one of the terms for these licenses, the Judges designated SoundExchange, Inc., (SoundExchange) as the Collective, *i.e.,* the organization charged with collecting the royalty payments and statements of account submitted by licensees, including those that operate commercial and noncommercial webcaster services, preexisting satellite digital audio radio services, new subscription services, and those that make ephemeral copies for transmission to business establishments. The Collective is also charged with distributing the royalties to the copyright owners and performers entitled to receive them under the section 112 and 114 licenses. *See* 37 CFR 380.4(d)(1), 382.5(d)(1), 383.4(a), 384.4(b)(1).

As the Collective, SoundExchange may, only once a year, conduct an audit of a licensee for any or all of the prior three calendar years to verify royalty payments. SoundExchange must first file with the Judges a notice of intent to audit a licensee and deliver the notice to the licensee. *See* 37 CFR 380.6(b), 382.7(b), 383.4(a) and 384.6(b).

On December 22, 2023, SoundExchange filed with the Judges a notice of intent to audit the statements of account submitted by noncommercial webcaster *BBNRadio.org* for the years 2020, 2021, and 2022. The Judges must publish notice in the **Federal Register** within 30 days of receipt of a notice announcing the Collective's intent to conduct an audit. *See* 37 CFR 380.6(c) 382.7(c), 383.4(a) and 384.6(c). This notice fulfills the Judges' publication obligation with respect to SoundExchange's December 22, 2023 notice of intent to audit noncommercial webcaster *BBNRadio.org* for the years 2020, 2021, and 2022.

Dated: January 9, 2024.

David P. Shaw,

Chief Copyright Royalty Judge.

[FR Doc. 2024–00682 Filed 1–12–24; 8:45 am]

BILLING CODE 1410–72–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE: 24–004]

Name of Information Collection: Property Inventory Report—Grants With Educational and Nonprofit Entities

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Comments are due by February 15, 2024.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Bill Edwards-Bodmer, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, 757–864–7998, or *b.edwards-bodmer@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

NASA collects information from grant and cooperative agreement awardees (institutions of higher education and other non-profit organizations) to ensure the proper accounting of federal property within their use/control. The information is used by NASA to maintain an effective internal control system and comply with the Chief Financial Officer Act regarding the accountability of Federal funds, 2 CFR chapters I and II/OMB Guidance for Grants and Cooperative Agreement, and reporting and record keeping per 14 CFR part 1260.74, Grants and Cooperative Agreements.

The information submitted by recipients is an annual report of Government-owned property in the possession of educational or nonprofit institutions holding NASA grants. In addition to the annual report, a property report may also be required at the end of the grant, or on the occurrence of certain events. The collected information is used by NASA to effectively maintain an appropriate internal control system for equipment and property provided or acquired under grants and cooperative agreements with institutions of higher education and other nonprofit organizations, and to comply with statutory requirements.

II. Methods of Collection

Grant and Cooperative Agreement awardees submit annual property reports via an automated NASA Form 1018 by way of the NASA Electronic Submission System (NESS).

III. Data

Title: Property Inventory Report—Grants with Educational and Nonprofit Entities.

OMB Number: 2700–0047.

Type of Review: Reinstatement without change.

Affected Public: Educational and not-for-profit institutions.

Estimated Annual Number of Activities: 238.

Estimated Number of Respondents per Activity: 1.

Annual Responses: 238.

Estimated Time per Response: 8.33 hours.

Estimated Total Annual Burden Hours: 1,983 hours.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

William Edwards-Bodmer,

NASA PRA Clearance Officer.

[FR Doc. 2024–00661 Filed 1–12–24; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Federal Council on the Arts and the Humanities

Arts and Artifacts Indemnity Panel Advisory Committee

AGENCY: Federal Council on the Arts and the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is hereby given that the Federal Council on the Arts and the Humanities will hold a meeting of the Arts and Artifacts Domestic Indemnity Panel.

DATES: The meeting will be held on Wednesday, February 14, 2024, from 12:00 p.m. until adjourned.

ADDRESSES: The meeting will be held by videoconference originating at the National Endowment for the Arts, Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, Room 4060, Washington, DC 20506, (202) 606–8322; *evoyatzis@neh.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the meeting is for panel review, discussion, evaluation, and recommendation on applications for Certificates of Indemnity submitted to the Federal Council on the Arts and the Humanities, for exhibitions beginning on or after April 1, 2024. Because the meeting will consider proprietary financial and commercial data provided in confidence by indemnity applicants, and material that is likely to disclose trade secrets or other privileged or confidential information, and because it is important to keep the values of objects to be indemnified and the methods of transportation and security measures confidential, I have determined that that the meeting will be closed to the public pursuant to subsection (c)(4) of section 552b of Title 5, United States Code. I have made this determination under the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings, dated April 15, 2016.

Dated: January 10, 2024.

Jessica Graves,

Paralegal Specialist, National Endowment for the Humanities.

[FR Doc. 2024–00668 Filed 1–12–24; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request; National Science Foundation-Managed Honor Awards

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995. This is the second notice for public comment; the first was published in the **Federal Register**, and no comments were received. NSF is forwarding the proposed submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAmain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314, or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

Copies of the submission may be obtained by calling 703–292–7556.

SUPPLEMENTARY INFORMATION: NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Title of Collection: National Science Foundation-Managed Honor Awards.

OMB Number: 3145–0035.

Type of Request: Extension of approval of an information collection.

Proposed Project: The National Science Foundation (NSF) administers several external awards, among them the President's National Medal of Science, the Alan T. Waterman Award, the National Science Board (NSB) Vannevar Bush Award, the NSB Science and Society Award, the Presidential Awards for Excellence in Science, Mathematics and Engineering Mentoring (PAESMEM) program, and the Presidential Awards for Excellence in Mathematics and Science Teaching (PAEMST) program.

In 2003, to comply with E-government requirements, the nomination processes were converted to electronic submission via electronic systems as described in the individual nomination process. Individuals can now prepare nominations and references for all but the PAESMEM and PAEMST awards. First-time users must register on the Fastlane website using the link found in the upper right-hand corner above the ''Log In'' box before accessing all but the PAESMEM and PAEMST honorary award categories. For PAEMST nominations and applications are submitted on the PAEMST portal at *www.paemst.org.* For PAESMEM, nominations and applications are submitted on the PAESMEM portal at *www.paesmem.net.*

Use of the Information: The Foundation has the following honorary award programs:

• *President's National Medal of Science.* Statutory authority for the President's National Medal of Science is contained in 42 U.S.C. 1881 (Pub. L. 86–209), which established the award and stated that ''(t)he President shall . . . award the Medal on the recommendations received from the National Academy of Sciences or on the basis of such other information and evidence as . . . appropriate.''

Subsequently, Executive Order 10961 specified procedures for the Award by establishing a National Medal of Science Committee which would ''receive recommendations made by any other nationally representative scientific or engineering organization.'' On the basis of these recommendations, the Committee was directed to select its candidates and to forward its recommendations to the President.

In 1962, to comply with these directives, the Committee initiated a solicitation form letter to invite these nominations. In 1979, the Committee initiated a nomination form as an attachment to the solicitation letter. A slightly modified version of the nomination form was used in 1980.

The Committee has established the following considerations for selection of candidates:

a. The impact of an individual's body of work on the current state of his or her field of science or engineering;

b. Whether the individual's achievements are of an unusually significant nature in relation to the potential effects on the development of thought in his or her field of science or engineering;

c. Whether the nominee has demonstrated unusually distinguished service in the general advancement of science and/or engineering for the Nation, especially when accompanied by substantial contributions to the content of science;

d. The recognition of the nominee by peers within his or her community, and whether s/he is recognized for substantial impact in fields in addition to his/her discipline;

e. If the nominee has made contributions to innovation and industry;

f. Whether the nominee has demonstrated sustained influence on education through publications, teaching activities, outreach, mentoring, etc., and;

g. Whether the nominee's contributions have created significant positive impact for the Nation.

In 2003, the Committee changed the active period of eligibility to three years, including the year of nomination. After that time, candidates must be renominated with a new nomination package for them to be considered by the Committee.

Narratives are now restricted to three pages of text, as stipulated in the guidelines at: *https://www.fastlane.nsf.gov/honawards/medalHome.do.*

• *Alan T. Waterman Award.* Congress established the Alan T. Waterman Award in August 1975 (42 U.S.C. 1881a (Pub. L. 94–86) and authorized NSF to ''establish the Alan T. Waterman Award for research or advanced study in any of the sciences or engineering'' to mark the 25th anniversary of the National Science Foundation and to honor its first Director. The annual award recognizes an outstanding young researcher in any field of science or engineering supported by NSF. In addition to a medal, the awardee receives a grant of $1,000,000 over a five-year period for scientific research or advanced study in the mathematical, physical, medical, biological, engineering, social, or other sciences at the institution of the recipient's choice.

The Alan T. Waterman Award Committee was established by NSF to comply with the directive contained in Public Law 94–86. The Committee solicits nominations from members of the National Academy of Sciences, National Academy of Engineering, scientific and technical organizations, and any other source, public or private, as appropriate.

In 1976, the Committee initiated a form letter to solicit these nominations. In 1980, a nomination form was used which standardized the nomination procedures, allowed for more effective Committee review, and permitted better staff work in a short period of time. On the basis of its review, the Committee forwards its recommendation to the Director, NSF, and the National Science Board (NSB).

Candidates must be U.S. citizens or permanent residents and must be 40 years of age or younger or not more than ten years beyond receipt of the Ph.D. degree by December 31 of the year in which they are nominated. Candidates should have demonstrated exceptional individual achievements in scientific or engineering research of sufficient quality to place them at the forefront of their peers. Criteria include originality, innovation, and significant impact on the field.

• *Vannevar Bush Award.* The Vannevar Bush Award honors truly exceptional lifelong leaders in science and technology who have made substantial contributions to the welfare of the Nation through public service activities in science, technology, and public policy. The National Science Board established this award in 1980 in the memory of Vannevar Bush, who served as a science advisor to President Franklin Roosevelt during World War II, helped to establish Federal funding for science and engineering as a national priority during peacetime, and was behind the creation of the National Science Foundation.

The Vannevar Bush Award recipient is selected annually by the National Science Board's Subcommittee on Honorary Awards (AWD), which is established to solicit nominations from scientific, engineering, and educational societies and institutions, in both the public and private sectors.

Candidates for the Vannevar Bush Award should have demonstrated outstanding leadership and accomplishment in meeting at least two of the following selection criteria:

1. Candidates must be U.S. citizens.
2. Distinguished himself/herself through public service activities in science and technology.
3. Pioneered the exploration, charting, and settlement of new frontiers in science, technology, education, and public service.
4. Demonstrated leadership and creativity that have inspired others to distinguished careers in science and technology.
5. Contributed to the welfare of the Nation and humankind through activities in science and technology.
6. Demonstrated leadership and creativity that has helped mold the history of advancements in the Nation's science, technology, and education.

Nomination Submissions must include:

1. A current curriculum vita without publications (no more than 5 pages).
2. A narrative statement (no more than 8 pages) addressing the candidate's activities and contributions related to the selection criteria.
3. A proposed award citation addressing the candidate's activities in and contributions to national public service activities in science, technology, and public policy.
4. Contact information for award candidate and nominator (mailing address, email address, and phone number).
5. Two reference letters (no more than 2 pages each) from individuals familiar with the candidate's accomplishments, and not affiliated with the candidate's home institution. Letters should be submitted by email to *nsbawards@nsf.gov* on letterhead as a PDF file.

Nominations remain active for three years, including the year of nomination. After that time, candidates must be renominated with a new nomination for them to be considered by the selection committee.

• *NSB Science and Society Award.* The National Science Board established the Public Service Award in November 1996 to honor individuals and groups that have made substantial contributions to increasing public understanding of science and engineering in the United States. These contributions may be in a wide variety of areas that have the potential of contributing to public understanding of and appreciation for science and engineering—including mass media, education and/or training programs, and entertainment. It was changed to the Science and Society Award in 2022.

Eligibility includes any individual or group (company, corporation or organization) that has increased the public understanding of science or engineering.

Candidates for the Science and Society Award should have demonstrated outstanding leadership and accomplishment in two out of three selection criteria:

• Enhanced public understanding and appreciation of science and technology.
• Inspired scientists and engineers to engage with individuals of all ages in schools, civic groups, and other communities to address society needs.
• Fostered diversity in science, technology, engineering, and mathematics.

Note: Members of the U.S. Government are not eligible for this award.

Nomination Procedures:

Nominations for an *individual* must include:

1. A current curriculum vita without publications (no more than 3 pages).
2. A narrative statement (no more than 5 pages) addressing the following:

a. the candidate's public service activities in science and engineering, and

b. the candidate's contributions to public understanding of science and engineering, as they relate to the selection criteria.

3. Contact information of candidate and nominator (mailing address, email address, phone number).

Nominations must be submitted by email to: *nsbawards@nsf.gov.*

Nominations for a *group* must include:

1. A narrative statement (no more than 5 pages) addressing the following:

a. the group's activities, and how it accomplishes the selection criteria for the award,

b. length of years of the program,

c. number and type of individuals served by the group's activities; and

d. data on the success of the program (if available).

2. Contact information of candidate and nominator (mailing address, email address, phone number).

3. Reference letters are optional, and up to 3 letters (no more than to 2 pages each) may be submitted on letterhead as a PDF file.

Nominations must be submitted by email to: *nsbawards@nsf.gov.*

Nominations remain active for three years, including the year of nomination. After that time, candidates must be re-nominated with a new nomination for them to be considered by the selection committee.

• Presidential Awards for Excellence in Science, Mathematics and Engineering Mentoring (PAESMEM) Program

In 1996, the White House, through the National Science and Technology Council (NSTC) and the Office of Science and Technology Policy (OSTP), established the Presidential Awards for Excellence in Science, Mathematics and Engineering Mentoring (PAESMEM) program. The program, administered on behalf of the White House by the National Science Foundation, seeks to identify outstanding mentoring efforts or programs designed to enhance the participation of groups (women, minorities and persons with disabilities as well as groups from low socioeconomic regions) underrepresented in science, mathematics and engineering. The awardees will serve as exemplars to their colleagues and will be leaders in the national effort to more fully develop the Nation's human resources in science, mathematics and engineering. This award is managed at NSF by the Directorate for Education and Human Resources (EHR).

The award will be made to U.S. citizens or U.S. permanent residents based on the following: (1) an individual who has demonstrated outstanding and sustained mentoring and effective guidance to a significant number of early career STEM professionals, students at the K–12, undergraduate, or graduate education level or (2) to an organization that, through its programming, has enabled a substantial number of students underrepresented in science, mathematics and engineering to successfully pursue and complete the relevant degree programs as well as mentoring of early career STEM professionals. Nominees must have served in a mentoring role for at least five years. Nominations are reviewed for impact, significance of the mentoring throrganizational awards must demonstrate rigorous evaluation and/or assessment during the five-year period of the mentoring activity.

Award Ceremony

The awardees are hosted for two days in Washington, DC, for celebratory activities. Recipients of the PAESMEM award receive a monetary award in the amount of $10,000 from NSF and a commemorative Presidential certificate. If scheduling permits, the President meets with the mentors for a photo opportunity at the White House. The Director of OSTP and the Director of NSF present the awards to the mentors at an awards ceremony.

• Presidential Award for Excellence in Mathematics and Science Teaching

The Presidential Award for Excellence in Mathematics and Science Teaching (PAEMST) is the highest recognition that a kindergarten through 12th-grade mathematics or science teacher may receive for outstanding teaching in the United States. Enacted by Congress in 1983, this program authorizes the President to bestow 108 awards with two per state or jurisdiction, assuming there are qualified applicants. Awards are given in the science category, which includes science and engineering, and the mathematics category, which includes mathematics, technology and computer science. In even-numbered years, nominations are accepted for elementary teachers (grades K–6); in odd-numbered years, secondary teachers (grades 7–12) are nominated. This award is managed at NSF by the Directorate for Education and Human Resources (EHR).

Nomination Criteria

A teacher may be nominated by a principal, another teacher, students, members of the community, or the general public. Self-nominations are allowed. Awardees must be either U.S. Citizens or U.S. Permanent Residents. A Nominee must meet the following criteria to apply:

- teach science, technology, engineering, mathematics, and/or computer science as part of his or her contracted teaching responsibilities at the K–6 grade level in a public (including charter) or private school;
- hold at least a bachelor's degree from an accredited institution;
- be a full-time employee of his or her school or school district as determined by state and district policies, with responsibilities for teaching students no less than 50% of the school's allotted instructional time;
- have at least five years of full-time employment as a K–12 teacher prior to the academic school year in which they apply, with science, technology, engineering, mathematics, and/or computer science teaching duties each of the past five years;
- teach in one of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Department of Defense Education Activity schools, or the U.S. Territories as a group (American Samoa, Guam, Commonwealth of the Northern Mariana Islands, and U.S. Virgin Islands);
- be a U.S. citizen or permanent resident; and
- not have received the PAEMST award at the national level in any prior competition or category.

Application Process

- Applicants complete a narrative on five dimensions of outstanding teaching (content knowledge, pedagogy, assessment, leadership and professional development), submit a video of one class, supplemental materials, and references cited. Three letters of reference including one from a school official are required, along with a resume or biographical sketch.
- The applicant completes an application and submits for state review during the academic year. The nomination period runs through the application cycle up to one month before the application deadline.

Review of Nominations

- State coordinators convene state selection committees of prominent mathematicians, scientists, mathematics and science educators, and past awardees to select up to three mathematics category and three science category finalists for recognition at the state level and for submission to NSF. To ensure consistency, state selection committees review their applications using the same criteria and scoring information that was approved by OSTP. Following the state review applicants are given two weeks to complete an addendum to the state application that addresses state reviewer comments.

• NSF (EHR) convenes a National Selection Committee of prominent mathematicians, scientists, mathematics and science educators, and past awardees that review the application packets of the state finalists including the addendum and make recommendations to NSF. NSF reviews the state selection committee recommendations and recommends to OSTP, when possible, one awardee in the mathematics category and one in the science category for all eligible states/jurisdictions. Alternatively, NSF may recommend two awardees from a discipline in a jurisdiction, when warranted.

Award Ceremony

The awardees are hosted for 3–4 days in Washington, DC, for a variety of professional development sessions and celebratory activities. Each awardee receives a citation signed by the President and $10,000 from NSF. If scheduling permits, the President meets the teachers for a photo opportunity at the White House. The Director of OSTP and the Director of NSF present the citations to the teachers at an awards ceremony. Awardees also have the opportunity to meet their congressional representatives and education representatives from other federal agencies.

Estimate of Burden: These are annual award programs with application deadlines varying according to the program. Public burden also may vary according to program; however, across all the programs, it is estimated that each submission will average 19 hours per respondent. If the nominator is thoroughly familiar with the disciplinary background of the nominee, time spent to complete the nomination may be considerably reduced.

Respondents: Individuals, businesses or other for-profit organizations, universities, non-profit institutions, and Federal and State governments.

ESTIMATED TOTAL ANNUAL BURDEN ON RESPONDENTS

Award	Estimated number of responses	Estimated annual burden hours per response	Total estimated annual burden hours
President's National Medal of Science	100	20	2000
Alan T. Waterman Award	150	15	2250
Vannevar Bush Award	10	5	50
NSB Science and Society Award	15	5	75
PAESMEM	200	20	4000
PAEMST	1000	24	24,000
Totals	1,800	....	32,375

Frequency of Responses: Annually.

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: January 9, 2024.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2024–00697 Filed 1–12–24; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2024–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of January 15, 22, 29, and February 5, 12, 19, 2024. The schedule for Commission meetings is subject to change on short notice. The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html*.

PLACE: The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

STATUS: Public and closed.

Members of the public may request to receive the information in these notices electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555, at 301–415–1969, or by email at *Betty.Thweatt@nrc.gov* or *Samantha.Miklaszewski@nrc.gov*.

MATTERS TO BE CONSIDERED:

Week of January 15, 2024

Thursday, January 18, 2024

9:00 a.m. Strategic Programmatic Overview of the Decommissioning and Low-Level Waste and Nuclear Materials Users Business Lines (Public Meeting) (Contact: Candace Spore: 301–415–8537)

Additional Information: The meeting will be held in the Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/*.

Week of January 22, 2024—Tentative

Tuesday, January 23, 2024

10:00 a.m. Briefing on International Activities (Public Meeting) (Contacts: Jennifer Holzman: 301–287–9090, Doris Lewis 301–287–3794)

Additional Information: The meeting will be held in the Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/*.

Thursday, January 25, 2024

10:00 a.m. Joint Meeting of the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission (NRC) (Part 1) (Public Meeting) (Contact: Wesley Held: 301–287–3591)

Additional Information: The meeting will be held at FERC Headquarters, 888 First Street NE, Washington, DC. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/*.

12:45 p.m. Joint Meeting of the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission (NRC) (Part 2) (Closed—Ex. 1)

Additional Information: The meeting will be held at FERC Headquarters, 888 First Street NE, Washington, DC.

Week of January 29, 2024—Tentative

There are no meetings scheduled for the week of January 29, 2024.

Week of February 5, 2024—Tentative

There are no meetings scheduled for the week of February 5, 2024.

Week of February 12, 2024—Tentative

There are no meetings scheduled for the week of February 12, 2024.

Week of February 19, 2024—Tentative

Thursday, February 22, 2024

9:00 a.m. Update on Research and Test Reactors Regulatory Program (Public Meeting) (Contact: Todd Keene: 301–287–0790)

Additional Information: The meeting will be held in the Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/*.

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Wesley Held at 301–287–3591 or via email at *Wesley.Held@nrc.gov*.

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: January 10, 2024.

For the Nuclear Regulatory Commission.

Wesley W. Held,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2024–00738 Filed 1–11–24; 11:15 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–162 and CP2024–168]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 18, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2024–162 and CP2024–168; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 171 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* January 9, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Alireza Motameni; *Comments Due:* January 18, 2024.

This Notice will be published in the **Federal Register**.

Jennie L. Jbara,

Alternate Certifying Officer.

[FR Doc. 2024–00659 Filed 1–12–24; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99304; File No. SR–FINRA–2023–010]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Provide Relief Relating to Specified Option Transactions Under FINRA Rule 4210 (Margin Requirements)

January 9, 2024.

On June 30, 2023, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities and Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA Rule 4210 (Margin Requirements) to provide margin relief for specified index option transactions, known as ''protected options,'' and to make other minor conforming revisions with regard to the margin relief. The proposed rule change was published for comment in the **Federal Register** on July 19, 2023.[3]

On August 31, 2023, FINRA extended the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to October 17, 2023.[4] On September 28, 2023, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.[5]

Section 19(b)(2) of the Exchange Act [6] provides that, after initiating proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes reasons for such determination. The proposed rule change was published for notice and comment in the **Federal Register** on July 19, 2023.[7] The 180th day after publication of the proposed rule change is January 15, 2024. The Commission is extending the time period for approving or disapproving the proposed rule change for an additional 60 days.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider the proposed rule change and the issues raised therein. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Exchange Act,[8] designates March 15, 2024, as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–FINRA–2023–010).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–00631 Filed 1–12–24; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 97898 (Jul. 13, 2023), 88 FR 46204.

[4] *See* Letter from Adam Arkel, Associate General Counsel, FINRA, to Sheila Swartz, Division of Trading and Markets, Commission (Aug. 31, 2023).

[5] *See* Exchange Act Release No. 34–98628 (Sep. 28, 2023), 88 FR 68855 (Oct. 4, 2023). All comments received on the proposed rule change are available at *https://www.sec.gov/comments/sr-finra-2023-010/srfinra2023010.htm*.

[6] 15 U.S.C. 78s(b)(2).

[7] *See supra* note 3 and accompanying text.

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99302; File No. SR–CboeEDGX–2024–001]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

January 9, 2024.

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 January 2, 2024, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule, effective January 2, 2024. The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 17 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 12% of the market share.[3] Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Cboe Global Markets U.S. Options Market Monthly Volume Summary (December 19, 2023), available at *https://markets.cboe.com/us/options/market_statistics/*.

changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange's Fee Schedule sets forth standard rebates and rates applied per contract. For example, the Exchange provides standard rebates ranging from $0.01 up to $0.22 per contract for Customer orders in both Penny and Non-Penny Securities. The Fee Codes and Associated Fees section of the Fees Schedule also provides for certain fee codes associated with certain order types and market participants that provide for various other fees or rebates. For example, the Exchange assesses a fee of $0.70 per contract for Market Maker orders that remove liquidity in Non-Penny Securities, yielding fee code NT. The Exchange now proposes to decrease the standard fee for Market Maker orders that remove liquidity in Non-Penny Securities (*i.e.,* yield fee code NT) from $0.70 per contract to $0.30 per contract.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[5] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[6] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[7] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all market participants. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. The proposed fee changes reflect a competitive pricing structure designed to incentivize market participants to direct their order flow, which the Exchange believes would enhance market quality to the benefit of all Members.

The Exchange believes the proposed change to decrease the standard fee for Market Maker orders that remove liquidity in Non-Penny Securities (*i.e.,* yield fee code NT) from $0.70 to $0.30 is reasonable, equitable, and not unfairly discriminatory. The Exchange believes the proposed rate change is reasonable because, as stated above, in order to operate in the highly competitive options markets, the Exchange and its competing exchanges seek to offer similar pricing structures, including assessing comparable rates for various types of orders. Thus, the Exchange believes the proposed rate is reasonable as it is lower than the amounts assessed for similar Market Maker orders on other options exchanges.[8] The Exchange also believes that amending the standard fee amount associated with fee code NT represents an equitable allocation of fees and is not unfairly discriminatory because the fee will continue to automatically and uniformly apply to all Members' respective qualifying Market Maker orders.

The Exchange believes that the proposed change will incentivize Market Maker order flow in Non-Penny Securities, which may lead to an increase in liquidity on the Exchange. An overall increase in liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in Market Maker activity in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, as the proposed fee code change applies uniformly and automatically to all Members' respective qualifying orders. Overall, the proposed change is designed to attract additional Market Maker order flow to the Exchange and overall order flow directly to the Exchange's Book. The Exchange believes that the fee change will attract further Market Maker activity, further incentivize the provision of liquidity and continued order flow to the Book, and improve price transparency on the Exchange. Greater overall order flow and pricing transparency benefits all market participants on the Exchange by generally providing a cycle of more trading opportunities, enhancing market quality, and continuing to encourage Members to submit order flow and continue to contribute towards a robust and well-balanced market ecosystem to the benefit of all market participants.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 16 other options exchanges and off-exchange venues and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 12% of the market share.[9] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] *Id.*

[7] 15 U.S.C. 78f(b)(4).

[8] *See, e.g.,* MEMX Options Exchange Fee Schedule, Transactions Fees, which assesses a charge of $1.10 for Market Maker orders that remove liquidity in Non-Penny Securities; and NYSE Arca Fee Schedule, Transaction Fee for Electronic Executions—Per Contract, which provides Market Makers that remove liquidity are assessed $1.10 per contract in Non-Penny Issues.

[9] *See supra* note 1.

exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [10] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .''.[11] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and paragraph (f) of Rule 19b–4 [13] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will 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:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGX–2024–001 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGX–2024–001. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2024–001 and should be submitted on or before February 6, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–00640 Filed 1–12–24; 8:45 am]

BILLING CODE 8011–01–P

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[10] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[11] *See NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99298; File No. SR–NYSEARCA–2021–90]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 2 to a Proposed Rule Change To List and Trade Shares of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares)

January 9, 2024.

On October 19, 2021, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of Grayscale Bitcoin Trust (''Trust'') under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). The proposed rule change was published for comment in the **Federal Register** on November 8, 2021.[3] On December 15, 2021, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On February 4, 2022, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act [6] to determine whether to disapprove the proposed rule change.[7] On April 21, 2022, the Exchange filed Amendment

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 93504 (Nov. 2, 2021), 86 FR 61804. Comments received on the proposed rule change are available at: *https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 93788, 86 FR 72291 (Dec. 21, 2021).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 94151, 87 FR 7889 (Feb. 10, 2022).

No. 1, which amended and replaced the proposed rule change in its entirety, and on May 4, 2022, the Commission provided notice of Amendment No. 1 to the proposed rule change and designated a longer period for Commission action on the proposed rule change, as modified by Amendment No. 1.[8] On June 29, 2022, the Commission disapproved the proposed rule change, as modified by Amendment No. 1.[9] Thereafter, the U.S. Court of Appeals for the D.C. Circuit vacated the Commission's order disapproving the proposed rule change and remanded the matter to the Commission.[10] On January 5, 2024, the Exchange filed Amendment No. 2 to the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. Amendment No. 2 amended and replaced the proposed rule change, as modified by Amendment No. 1, in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the following under NYSE Arca Rule 8.201–E: Grayscale Bitcoin Trust (BTC) (the ''Trust'').[11] This Amendment No. 2 to SR–NYSEArca–2021–90 replaces SR–NYSEArca–2021–90 as originally filed and supersedes such filing in its entirety The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Under NYSE Arca Rule 8.201–E, the Exchange may propose to list and/or trade pursuant to unlisted trading privileges ''Commodity-Based Trust Shares.'' [12] The Exchange proposes to list and trade shares (''Shares'') [13] of the Trust pursuant to NYSE Arca Rule 8.201–E.[14]

The Trust is the world's largest Bitcoin investment fund by assets under management as of the date of this filing. The Trust has approximately $21.9 billion in assets under management [15]

[8] *See* Securities Exchange Act Release No. 94844, 87 FR 28043 (May 10, 2022).

[9] *See* Securities Exchange Act Release No. 95180, 87 FR 40299 (July 6, 2022).

[10] *See Grayscale Investments, LLC* v. *SEC,* 82 F.4th 1239 (D.C. Cir. 2023).

[11] The Trust was previously named Bitcoin Investment Trust, whose name was changed pursuant to a Certificate of Amendment to the Certificate of Trust of Bitcoin Investment Trust filed with the Delaware Secretary of State on January 11, 2019.

[12] Commodity-Based Trust Shares are securities issued by a trust that represent investors' discrete identifiable and undivided beneficial ownership interest in the commodities deposited into the Trust.

[13] The Shares are expected to be listed under the ticker symbol ''GBTC.''

[14] On March 22, 2016, the Trust confidentially filed its draft registration statement on Form 10 under the Securities Act of 1933 (15 U.S.C. 77a) (the ''Securities Act'' or '''33 Act'') (File No. 377–01289) (the ''Draft Registration Statement on Form S–1''). On May 31, 2016, the Trust confidentially filed Amendment No. 1 to the Draft Registration Statement on Form S–1. On July 29, 2016, the Trust confidentially filed Amendment No. 2 to the Draft Registration Statement on Form S–1. On November 2, 2016, the Trust confidentially filed Amendment No. 3 to the Draft Registration Statement on Form S–1. The Jumpstart Our Business Startups Act (the ''JOBS Act''), enacted on April 5, 2012, added Section 6(e) to the Securities Act. Section 6(e) of the Securities Act provides that an ''emerging growth company'' may confidentially submit to the Commission a draft registration statement for confidential, non-public review by the Commission staff prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4). An emerging growth company is defined in Section 2(a)(19) of the Securities Act as an issuer with less than $1,000,000,000 total annual gross revenues during its most recently completed fiscal year. The Trust meets the definition of an emerging growth company and consequently submitted its Draft Registration Statement on Form S–1 to the Commission on a confidential basis. On January 20, 2017, the Trust filed its registration statement on Form S–1 under the Securities Act (File No. 333–215627) (the ''Registration Statement on Form S–1''). On March 24, 2017, the Trust filed Amendment No. 1 to the Registration Statement on Form S–1. On May 4, 2017, the Trust filed Amendment No. 2 to the Registration Statement on Form S–1. On October 25, 2017, the Trust requested the withdrawal of the Registration Statement on Form S–1. On October 3, 2018, the Trust confidentially filed its draft registration statement on Form 10 under the Securities Act (File No. 377–02297) (the ''Draft Registration Statement on Form 10''). On December 6, 2018, the Trust confidentially filed Amendment No. 1 to the Draft Registration Statement on Form 10. On February 25, 2019 the Trust confidentially filed Amendment No. 2 to the Draft Registration Statement on Form 10. On April 15, 2019, the Trust confidentially filed Amendment No. 3 to the Draft Registration Statement on Form 10. On September 9, 2019, the Trust confidentially filed Amendment No. 4 to the Draft Registration Statement on Form 10. As noted above, the Trust meets the definition of an emerging growth company under the JOBS Act and consequently submitted its Draft Registration Statement on Form 10 to the Commission on a confidential basis. On November 19, 2019, the Trust filed its registration statement on Form 10 under the Securities Act (File No. 000–56121) (the ''Registration Statement on Form 10''). On December 31, 2019, the Trust filed Amendment No. 1 to the Registration Statement on Form 10. On January 21, 2020, the Registration Statement on Form 10 was automatically deemed effective. On March 20, 2020, March 5, 2021, February 25, 2022 and March 1, 2023, the Trust filed its annual reports on Form 10–K under the Securities Act (File No. 000–56121) (the ''Annual Reports''). On May 8, 2020, August 7, 2020, November 6, 2020, May 7, 2021, August 6, 2021, November 5, 2021, May 6, 2022, August 5, 2022, November 4, 2022, May 5, 2023, August 4, 2023, and November 3, 2023, the Trust filed its quarterly reports on Form 10–Q under the Securities Act (File No. 000–56121) (the ''Quarterly Reports''). On October 19, 2023, the Trust filed a registration statement on Form S–3 under the Securities Act (File No. 333–275079) (the ''Registration Statement''). On November 22, 2023, the Trust filed Amendment No. 1 to the Registration Statement on Form S–3. On December 26, 2023, the Trust filed Amendment No. 2 to the Registration Statement on Form S–3. On January 2, 2024, the Trust filed Amendment No. 3 to the Registration Statement on Form S–3. The descriptions of the Trust, the Shares, and Bitcoin contained herein are based, in part, on the Annual Report, Quarterly Reports and Registration Statement. On January 17, 2019, the Trust submitted to the Commission an amended Form D as a business trust. Shares of the Trust have been quoted on OTC Market's OTCQX Best Marketplace under the symbol ''GBTC'' since March 26, 2015. On February 22, 2019 and March 20, 2020, the Trust published annual reports for GBTC for the periods ended December 31, 2018 and December 31, 2019, respectively. On May 14, 2019, August 8, 2019, November 14, 2019, May 8, 2020, August 7, 2020 and November 6, 2020, the Trust published quarterly reports for GBTC for the periods ended March 31, 2019, June 30, 2019, September 30, 2019, March 31, 2020, June 30, 2020 and September 30, 2020 respectively. Reports published before January 11, 2020, the date on which the Trust's Shares became registered pursuant to Section 12(g) of the Act, can be found on OTC Market's website (*http://www.otcmarkets.com/stock/GBTC/disclosure*), and reports published on or after January 11, 2020 can be found on OTC Market's website (*http://www.otcmarkets.com/stock/GBTC/disclosure*) and the Commission's website (*https://www.sec.gov/cgi-bin/browse-edgar?CIK=gbtc&owner=exclude&action=getcompany*). The Shares will be of the same class and will have the same rights as Shares of GBTC. Effective October 28, 2014, the Trust suspended its redemption program for shares of GBTC, in which shareholders were permitted to request the redemption of their shares through Genesis Global Trading, Inc. (formerly known as SecondMarket, Inc.), an affiliate of the Sponsor and the Trust. According to the Sponsor, freely tradeable shares of GBTC will remain freely tradeable Shares on the date of the listing of the Shares that are unregistered under the Securities Act. Restricted shares of GBTC will remain subject to private placement restrictions and the holders of such restricted shares will continue to hold those Shares subject to those restrictions until they become freely tradable Shares.

[15] As of November 14, 2023.

(representing 3.1% of all Bitcoin in circulation), and its Shares trade millions of dollars in daily volume and are held by nearly a million American investor accounts seeking exposure to Bitcoin without the cost and complexity of purchasing the asset directly. However, because the Trust is not currently listed as an exchange-traded product (''ETP''), the value of the Shares has not been able to closely track the value of the Trust's underlying Bitcoin. The Sponsor thus believes that allowing Shares of the Trust to list and trade on the Exchange as an ETP (*i.e.,* converting the Trust to a spot Bitcoin ETP) would unlock over $2.9 billion of value [16] for the Trust's shareholders and provide other investors with a safe and secure way to invest in Bitcoin on a regulated national securities exchange.

The sponsor of the Trust is Grayscale Investments, LLC (''Sponsor''), a Delaware limited liability company. The Sponsor is a wholly-owned subsidiary of Digital Currency Group, Inc. (''Digital Currency Group''). The trustee for the Trust is Delaware Trust Company (''Trustee''). The custodian for the Trust's Bitcoin is Coinbase Custody Trust Company, LLC (''Custodian'').[17] The administrator and transfer agent of the Trust is BNY Mellon Asset Servicing, a division of The Bank of New York Mellon (the ''Transfer Agent''). The distribution and marketing agent for the Trust will be Foreside Fund Services, LLC (the ''Marketing Agent''). The index provider for the Trust is CoinDesk Indices, Inc. (the ''Index Provider'').

The Trust is a Delaware statutory trust, organized on September 13, 2013, that operates pursuant to a trust agreement between the Sponsor and the Trustee (''Trust Agreement''). The Trust has no fixed termination date.

Operation of the Trust

According to the Annual Report and Registration Statement, the Trust's assets consist solely of Bitcoins.[18]

Each Share represents a proportional interest, based on the total number of Shares outstanding, in the Trust's assets as determined by reference to the Index Price,[19] less the Trust's expenses and other liabilities (which include accrued but unpaid fees and expenses). The Sponsor expects that the market price of the Shares will fluctuate over time in response to the market prices of Bitcoin. In addition, because the Shares reflect the estimated accrued but unpaid expenses of the Trust, the number of Bitcoins represented by a Share will gradually decrease over time as the Trust's Bitcoins are used to pay the Trust's expenses.

The activities of the Trust will be limited to (i) issuing ''Baskets'' (as defined below) in exchange for Bitcoins transferred to the Trust as consideration in connection with creations, (ii) transferring or selling Bitcoins as necessary to cover the Sponsor's Fee [20] and/or certain Trust expenses, (iii) transferring Bitcoins in exchange for Baskets surrendered for redemption (subject to obtaining regulatory approval from the SEC and approval of the Sponsor), (iv) causing the Sponsor to sell Bitcoins on the termination of the Trust, and (v) engaging in all administrative and security procedures necessary to accomplish such activities in accordance with the provisions of the Trust Agreement, the Custodian Agreement, the Index License Agreement and the Participant Agreements (each as defined below).

The Trust will not be actively managed. It will not engage in any activities designed to obtain a profit from, or to ameliorate losses caused by, changes in the market prices of Bitcoins.

Investment Objective

According to the Annual Report and Registration Statement, the Trust's investment objective is for the value of the Shares (based on Bitcoin per Share) to reflect the value of the Bitcoins held by the Trust, determined by reference to the Index Price, less the Trust's expenses and other liabilities.

While an investment in the Shares is not a direct investment in Bitcoin, the Shares are designed to provide investors with a cost-effective and convenient way to gain investment exposure to Bitcoin. Generally speaking, a substantial direct investment in Bitcoin may require expensive and sometimes complicated arrangements in connection with the acquisition, security and safekeeping of the Bitcoin and may involve the payment of substantial fees to acquire such Bitcoin from third-party facilitators through cash payments of U.S. dollars. Because the value of the Shares is correlated with the value of Bitcoin held by the Trust, it is important to understand the investment attributes of, and the market for, Bitcoin.

The Trust uses the Index Price to calculate its ''NAV,'' which is the aggregate value, expressed in U.S. dollars, of the Trust's assets (other than U.S. dollars or other fiat currency), less the U.S. dollar value of the Trust's expenses and other liabilities calculated in the manner set forth under ''Valuation of Bitcoin and Determination of NAV.'' ''NAV per Share'' is calculated by dividing NAV by the number of Shares then outstanding.

Valuation of Bitcoin and Determination of NAV

The following is a description of the material terms of the Trust Agreement as it relates to valuation of the Trust's Bitcoin and the NAV calculations.[21]

On each business day at 4:00 p.m., New York time, or as soon thereafter as practicable (the ''Evaluation Time''), the Sponsor will evaluate the Bitcoins held by the Trust and calculate and publish the NAV of the Trust. To calculate the NAV, the Sponsor will:

1. Determine the Index Price as of such business day.

[16] Based on a discount of 13.4% as of November 14, 2023.

[17] According to the Annual Report, Digital Currency Group owns a minority interest in Coinbase, Inc., which is the parent company of the Custodian, representing less than 1.0% of its equity.

[18] The Trust may from time to time come into possession of Incidental Rights and/or IR Virtual Currency by virtue of its ownership of Bitcoins, generally through a fork in the Bitcoin Blockchain, an airdrop offered to holders of Bitcoins or other similar event. ''Incidental Rights'' are rights to acquire, or otherwise establish dominion and control over, any virtual currency or other asset or right, which rights are incident to the Trust's ownership of Bitcoins and arise without any action of the Trust, or of the Sponsor or Trustee on behalf of the Trust. ''IR Virtual Currency'' is any virtual currency tokens, or other asset or right, acquired by the Trust through the exercise (subject to the applicable provisions of the Trust Agreement) of any Incidental Right. Although the Trust is permitted to take certain actions with respect to Incidental Rights and IR Virtual Currency in accordance with its Trust Agreement, at this time the Trust will prospectively irrevocably abandon any Incidental Rights and IR Virtual Currency. In the event the Trust seeks to change this position, the Exchange would file a subsequent proposed rule change with the Commission.

[19] The ''Index Price'' means the U.S. dollar value of a Bitcoin derived from the Digital Asset Trading Platforms that are reflected in the CoinDesk Bitcoin Price Index (XBX) (the ''Index''), calculated at 4:00 p.m., New York time, each day. For purposes of the Trust Agreement, the term Bitcoin Index Price has the same meaning as the Index Price as defined herein.

[20] The Sponsor's Fee means a fee, payable in Bitcoins, which accrues daily in U.S. dollars at an annual rate of currently 2.0%, but which will be lowered in connection with the Trust becoming an ETP, of the NAV Fee Basis Amount of the Trust as of 4:00 p.m., New York time, on each day; provided that for a day that is not a business day, the calculation of the Sponsor's Fee will be based on the NAV Fee Basis Amount from the most recent business day, reduced by the accrued and unpaid Sponsor's Fee for such most recent business day and for each day after such most recent business day and prior to the relevant calculation date. The ''NAV Fee Basis Amount'' is calculated in the manner set forth under ''Valuation of Bitcoin and Determination of NAV'' below.

[21] While the Sponsor uses the terminology ''NAV'' in this filing, the term used in the Trust Agreement is ''Digital Asset Holdings.''

2. Multiply the Index Price by the Trust's aggregate number of Bitcoins owned by the Trust as of 4:00 p.m., New York time, on the immediately preceding day, less the aggregate number of Bitcoins payable as the accrued and unpaid Sponsor's Fee as of 4:00 p.m., New York time, on the immediately preceding day.

3. Add the U.S. dollar value of Bitcoins, calculated using the Index Price, receivable under pending creation orders, if any, determined by multiplying the number of the Baskets represented by such creation orders by the Basket Amount and then multiplying such product by the Index Price.[22]

4. Subtract the U.S. dollar amount of accrued and unpaid Additional Trust Expenses,[23] if any.

5. Subtract the U.S. dollar value of the Bitcoins, calculated using the Index Price, to be distributed under pending redemption orders, if any, determined by multiplying the number of Baskets to be redeemed represented by such redemption orders by the Basket Amount and then multiplying such product by the Index Price (the amount derived from steps 1 through 5 above, the ''NAV Fee Basis Amount'').

6. Subtract the U.S. dollar amount of the Sponsor's Fee that accrues for such business day, as calculated based on the NAV Fee Basis Amount for such business day.

In the event that the Sponsor determines that the primary methodology used to determine the Index Price is not an appropriate basis for valuation of the Trust's Bitcoins, the Sponsor will utilize the cascading set of rules as described in ''Determination of the Index Price When Index Price is Unavailable'' below.

[22] ''Baskets'' and ''Basket Amount'' have the meanings set forth in ''Creation and Redemption of Shares'' below.

[23] ''Additional Trust Expenses'' are any expenses incurred by the Trust in addition to the Sponsor's Fee that are not Sponsor-paid expenses, including, but not limited to, (i) taxes and governmental charges, (ii) expenses and costs of any extraordinary services performed by the Sponsor (or any other service provider) on behalf of the Trust to protect the Trust or the interests of shareholders, (iii) any indemnification of the Custodian or other agents, service providers or counterparties of the Trust, (iv) the fees and expenses related to the listing, quotation or trading of the Shares on any marketplace or other alternative trading system, as determined by the Sponsor, on which the Shares may then be listed, quoted or traded, including but not limited to, NYSE Arca, Inc. (including legal, marketing and audit fees and expenses) to the extent exceeding $600,000 in any given fiscal year and (v) extraordinary legal fees and expenses, including any legal fees and expenses incurred in connection with litigation, regulatory enforcement or investigation matters.

Bitcoin and the Bitcoin Network

According to the Annual Report, Bitcoin is a digital asset that is created and transmitted through the operations of the peer-to-peer ''Bitcoin Network,'' a decentralized network of computers that operates on cryptographic protocols. No single entity owns or operates the Bitcoin Network, the infrastructure of which is collectively maintained by a decentralized user base. The Bitcoin Network allows people to exchange tokens of value, called Bitcoin, which are recorded on a public transaction ledger known as a Blockchain. Bitcoin can be used to pay for goods and services, or it can be converted to fiat currencies, such as the U.S. dollar, at rates determined on ''Digital Asset Markets'' [24] that trade Bitcoin or in individual end-user-to-end-user transactions under a barter system.

The Bitcoin Network is decentralized in that it does not require governmental authorities or financial institution intermediaries to create, transmit or determine the value of Bitcoin. Rather, Bitcoin is created and allocated by the Bitcoin Network protocol through a ''mining'' process. The value of Bitcoin is determined by the supply of and demand for Bitcoin on the Digital Asset Markets or in private end-user-to-end-user transactions.

New Bitcoin are created and rewarded to the miners of a block in the Blockchain for verifying transactions. The Blockchain is effectively a decentralized database that includes all blocks that have been mined by miners and it is updated to include new blocks as they are solved. Each Bitcoin transaction is broadcast to the Bitcoin Network and, when included in a block, recorded in the Blockchain. As each new block records outstanding Bitcoin transactions, and outstanding transactions are settled and validated through such recording, the Blockchain represents a complete, transparent and unbroken history of all transactions of the Bitcoin Network.

[24] A ''Digital Asset Market'' is a ''Brokered Market,'' ''Dealer Market,'' ''Principal-to-Principal Market'' or ''Exchange Market,'' as each such term is defined in the Financial Accounting Standards Board Accounting Standards Codification Master Glossary. The ''Digital Asset Trading Platform Market'' is the global trading platform market for the trading of Bitcoins, which consists of transactions on electronic Digital Asset Trading Platforms. A ''Digital Asset Trading Platform'' is an electronic marketplace where participants may trade, buy and sell Bitcoins based on bid-ask trading. The largest Digital Asset Trading Platforms are online and typically trade on a 24-hour basis, publishing transaction price and volume data.

Overview of the Bitcoin Network's Operations

In order to own, transfer or use Bitcoin directly on the Bitcoin Network (as opposed to through an intermediary, such as a custodian), a person generally must have internet access to connect to the Bitcoin Network. Bitcoin transactions may be made directly between end-users without the need for a third-party intermediary. To prevent the possibility of double-spending Bitcoin, a user must notify the Bitcoin Network of the transaction by broadcasting the transaction data to its network peers. The Bitcoin Network provides confirmation against double-spending by memorializing every transaction in the Blockchain, which is publicly accessible and transparent. This memorialization and verification against double-spending is accomplished through the Bitcoin Network mining process, which adds ''blocks'' of data, including recent transaction information, to the Blockchain.

Summary of a Bitcoin Transaction

Prior to engaging in Bitcoin transactions directly on the Bitcoin Network, a user generally must first install on its computer or mobile device a Bitcoin Network software program that will allow the user to generate a private and public key pair associated with a Bitcoin address, commonly referred to as a ''wallet.'' The Bitcoin Network software program and the Bitcoin address also enable the user to connect to the Bitcoin Network and transfer Bitcoin to, and receive Bitcoin from, other users.

Each Bitcoin Network address, or wallet, is associated with a unique ''public key'' and ''private key'' pair. To receive Bitcoin, the Bitcoin recipient must provide its public key to the party initiating the transfer. This activity is analogous to a recipient for a transaction in U.S. dollars providing a routing address in wire instructions to the payor so that cash may be wired to the recipient's account. The payor approves the transfer to the address provided by the recipient by ''signing'' a transaction that consists of the recipient's public key with the private key of the address from where the payor is transferring the Bitcoin. The recipient, however, does not make public or provide to the sender its related private key.

Neither the recipient nor the sender reveal their private keys in a transaction, because the private key authorizes transfer of the funds in that address to other users. Therefore, if a user loses his private key, the user may permanently lose access to the Bitcoin contained in the associated address. Likewise, Bitcoin is irretrievably lost if the private key associated with them is deleted and no backup has been made. When sending Bitcoin, a user's Bitcoin Network software program must validate the transaction with the associated private key. In addition, since every computation on the Bitcoin Network requires processing power, there is a transaction fee involved with the transfer that is paid by the payor. The resulting digitally validated transaction is sent by the user's Bitcoin Network software program to the Bitcoin Network miners to allow transaction confirmation.

Bitcoin Network miners record and confirm transactions when they mine and add blocks of information to the Blockchain. When a miner mines a block, it creates that block, which includes data relating to (i) newly submitted and accepted transactions; (ii) a reference to the prior block in the Bitcoin Blockchain; and (iii) the satisfaction of the consensus mechanism to mine the block. The miner becomes aware of outstanding, unrecorded transactions through the data packet transmission and distribution discussed above.

Upon the addition of a block included in the Blockchain, the Bitcoin Network software program of both the spending party and the receiving party will show confirmation of the transaction on the Blockchain and reflect an adjustment to the Bitcoin balance in each party's Bitcoin Network public key, completing the Bitcoin transaction. Once a transaction is confirmed on the Blockchain, it is irreversible.

Some Bitcoin transactions are conducted ''off-blockchain'' and are therefore not recorded in the Blockchain. Some ''off-blockchain transactions'' involve the transfer of control over, or ownership of, a specific digital wallet holding Bitcoin or the reallocation of ownership of certain Bitcoin in a pooled-ownership digital wallet, such as a digital wallet owned by a Digital Asset Trading Platform. In contrast to on-blockchain transactions, which are publicly recorded on the Blockchain, information and data regarding off-blockchain transactions are generally not publicly available. Therefore, off-blockchain transactions are not truly Bitcoin transactions in that they do not involve the transfer of transaction data on the Bitcoin Network and do not reflect a movement of Bitcoin between addresses recorded in the Blockchain. For these reasons, off-blockchain transactions are subject to risks, as any such transfer of Bitcoin ownership is not protected by the protocol behind the Bitcoin Network or recorded in, and validated through, the blockchain mechanism.

Limits on Bitcoin Supply

The supply of new Bitcoin is mathematically controlled so that the number of Bitcoin grows at a limited rate pursuant to a pre-set schedule. The number of Bitcoin awarded for solving a new block is automatically halved after every 210,000 blocks are added to the Blockchain. Currently, the fixed reward for solving a new block is 6.25 Bitcoin per block and this is expected to decrease by half to become 3.125 Bitcoin after the next 210,000 blocks have entered the Bitcoin Network, which is expected to be mid-2024. This deliberately controlled rate of Bitcoin creation means that the number of Bitcoin in existence will increase at a controlled rate until the number of Bitcoin in existence reaches the pre-determined 21 million Bitcoin. As of September 30, 2023, approximately 19.5 million Bitcoins were outstanding and the date when the 21 million Bitcoin limitation will be reached is estimated to be the year 2140.

Custody of the Trust's Bitcoins

Digital assets and digital asset transactions are recorded and validated on blockchains, the public transaction ledgers of a digital asset network. Each digital asset blockchain serves as a record of ownership for all of the units of such digital asset, even in the case of certain privacy-preserving digital assets, where the transactions themselves are not publicly viewable. All digital assets recorded on a blockchain are associated with a public blockchain address, also referred to as a digital wallet. Digital assets held at a particular public blockchain address may be accessed and transferred using a corresponding private key.

Key Generation

Public addresses and their corresponding private keys are generated by the Custodian in secret key generation ceremonies at secure locations inside faraday cages, which are enclosures used to block electromagnetic fields and thus mitigate against attacks. The Custodian uses quantum random number generators to generate the public and private key pairs.

Once generated, private keys are encrypted, separated into ''shards,'' and then further encrypted. After the key generation ceremony, all materials used to generate private keys, including computers, are destroyed. All key generation ceremonies are performed offline. No party other than the Custodian has access to the private key shards of the Trust.

Key Storage

Private key shards are distributed geographically in secure vaults around the world, including in the United States. The locations of the secure vaults may change regularly and are kept confidential by the Custodian for security purposes.

The ''Digital Asset Account'' is a segregated custody account controlled and secured by the Custodian to store private keys, which allows for the transfer of ownership or control of the Trust's Bitcoins on the Trust's behalf. The Digital Asset Account uses offline storage, or ''cold'' storage, mechanisms to secure the Trust's private keys. The term cold storage refers to a safeguarding method by which the private keys corresponding to digital assets are disconnected and/or deleted entirely from the internet. Cold storage of private keys may involve keeping such keys on a non-networked (or ''air-gapped'') computer or electronic device or storing the private keys on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus, paper or a metallic object). A digital wallet may receive deposits of digital assets but may not send digital assets without use of the digital assets' corresponding private keys. In order to send digital assets from a digital wallet in which the private keys are kept in cold storage, either the private keys must be retrieved from cold storage and entered into an online, or ''hot,'' digital asset software program to sign the transaction, or the unsigned transaction must be transferred to the cold server in which the private keys are held for signature by the private keys and then transferred back to the online digital asset software program. At that point, the user of the digital wallet can transfer its digital assets.

Security Procedures

The Custodian is the custodian of the Trust's private keys (which, as noted above, facilitate the transfer of ownership or control of the Trust's Bitcoins) in accordance with the terms and provisions of the custodian agreement by and between the Custodian, the Sponsor and the Trust (the ''Custodian Agreement''). Transfers from the Digital Asset Account require certain security procedures, including, but not limited to, multiple encrypted private key shards, usernames, passwords and 2-step verification. Multiple private key shards held by the

Custodian must be combined to reconstitute the private key to sign any transaction in order to transfer the Trust's assets. Private key shards are distributed geographically in secure vaults around the world, including in the United States.

As a result, if any one secure vault is ever compromised, this event will have no impact on the ability of the Trust to access its assets, other than a possible delay in operations, while one or more of the other secure vaults is used instead. These security procedures are intended to remove single points of failure in the protection of the Trust's assets.

Transfers of Bitcoins to the Digital Asset Account will be available to the Trust once processed on the Blockchain.

Subject to obtaining regulatory approval to operate a redemption program and authorization of the Sponsor, the process of accessing and withdrawing Bitcoins from the Trust to redeem a Basket by an Authorized Participant [25] will follow the same general procedure as transferring Bitcoins to the Trust to create a Basket by an Authorized Participant, only in reverse.

The Sponsor will maintain ownership and control of the Trust's Bitcoin in a manner consistent with good delivery requirements for spot commodity transactions.

Bitcoin Value

Digital Asset Trading Platform Valuation

According to the Annual Report and Registration Statement, the value of Bitcoin is determined by the value that various market participants place on Bitcoin through their transactions. The most common means of determining the value of a Bitcoin is by surveying one or more Digital Asset Trading Platforms where Bitcoin is traded publicly (*e.g.,* Coinbase, Bitstamp, Kraken, and LMAX Digital). Additionally, there are over-the-counter dealers or market makers that transact in Bitcoin.

Digital Asset Trading Platforms Public Market Data

On each online Digital Asset Trading Platforms, Bitcoin is traded with publicly disclosed valuations for each executed trade, measured by one or more fiat currencies such as the U.S. dollar or Euro. Over-the-counter dealers or market makers do not typically disclose their trade data.

As of September 30, 2023, the Digital Asset Trading Platforms included in the Index are Coinbase, Bitstamp, Kraken and LMAX Digital. As further described below, the Sponsor and the Trust reasonably believe each of these Digital Asset Trading Platforms are in material compliance with applicable U.S. federal and state licensing requirements and maintain practices and policies designed to comply with know-your-customer (''KYC''), anti-money-laundering (''AML'') regulations.

Coinbase: A U.S.-based trading platform registered as a money services business (''MSB'') with the U.S. Department of Treasury's Financial Crimes Enforcement Network (''FinCEN'') and licensed as a virtual currency business under the New York State Department of Financial Services (''NYDFS'') BitLicense and as a money transmitter in various U.S. states.

Bitstamp: A U.K.-based trading platform registered as an MSB with FinCen and licensed as a virtual currency business under the NYDFS BitLicense and as a money transmitter in various U.S. states.

Kraken: A U.S.-based trading platform registered as an MSB with FinCEN and licensed as a money transmitter in various U.S. states. Kraken does not hold a BitLicense.

LMAX Digital: A U.K.-based trading platform registered as a broker with the Financial Conduct Authority. LMAX Digital does not hold a BitLicense.

Currently, there are several Digital Asset Trading Platforms operating worldwide, and online Digital Asset Trading Platforms represent a substantial percentage of Bitcoin buying and selling activity and provide the most data with respect to prevailing valuations of Bitcoins. These trading platforms include established trading platforms such as trading platforms included in the Index, which provide a number of options for buying and selling Bitcoins. The below table reflects the trading volume in Bitcoins and market share [26] of the BTC–U.S. dollar trading pairs of each of the Digital Asset Trading Platforms included in the Index as of September 30, 2023 [27] using data reported by the Index Provider from May 1, 2015 to September 30, 2023:

DIGITAL TRADING PLATFORMS INCLUDED IN THE INDEX AS OF SEPTEMBER 30, 2023

	Volume (BTC)	Market share (%)
Coinbase	44,082,174	24.33
Bitstamp	23,391,038	12.91
Kraken	13,173,711	7.27
LMAX Digital	8,929,858	4.93
Total BTC–U.S. dollar trading pair	89,576,781	49.44

[25] ''Authorized Participant'' has the meaning set forth in ''Creation and Redemption of Shares'' below.

[26] Market share is calculated using trading volume data (in Bitcoins) for certain Digital Asset Trading Platforms, including Coinbase, Bitstamp, Kraken, and LMAX Digital, as well as certain other large U.S.-dollar denominated Digital Asset Trading Platforms that were not included in the Index as of September 30, 2023, including Binance.US (data included from April 1, 2020), Bitfinex, Bitflyer (data included from December 24, 2018), Bittrex (data included from July 31, 2018), Cboe Digital (data included from October 1, 2020), FTX.US (data included from July 1, 2021 through November 10, 2022), Gemini (data included from October 7, 2015), itBit, LakeBTC (data included from May 1, 2015 to June 1, 2018 and from January 27, 2019 to May 6, 2021), HitBTC (data included from April 1, 2019 to March 31, 2020) and OKCoin (data included through March 31, 2023).

[27] On January 19, 2020, the Index Provider removed Bittrex due to a lack of trading volume and added LMAX Digital based on its meeting the liquidity thresholds for inclusion in the Index. On April 6, 2020, the Index Provider removed itBit due to a lack of trading volume and did not add any constituents as part of its scheduled quarterly review. On October 29, 2022, the Index Provider removed Bitstamp from the Index due to its failure to meet the minimum liquidity requirement and added Binance.US as a Constituent Trading Platform based on its satisfaction of the minimum liquidity requirement as part of its scheduled quarterly review. On June 17, 2023, the Index Provider removed Binance.US from the Index, due to Binance.US's announcement that it was suspending U.S. dollar deposits and withdrawals and planned to delist its U.S. dollar trading pairs and did not add any Constituent Trading Platforms as part of its review. Effective July 29, 2023, the Index Provider added Bitstamp to the Index based on its satisfaction of the Index Provider's minimum liquidity requirement and did not remove any Constituent Trading Platforms as part of its scheduled quarterly review. On October 28, 2023, the Index Provider added Crypto.com to the Index based on its satisfaction of the Index Provider's minimum liquidity requirement and did not remove any Constituent Trading Platforms as part of its scheduled quarterly review.

The domicile, regulation, and legal compliance of the Digital Asset Trading Platforms included in the Index varies. Information regarding each Digital Asset Trading Plaform may be found, where available, on the websites for such Digital Asset Trading Platforms, among other places.

The Index and the Index Price

The Index is a U.S. dollar-denominated composite reference rate for the price of Bitcoin. The Index is designed to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity from impacting the Bitcoin reference rate, (ii) provide a real-time, volume-weighted fair value of Bitcoin and (iii) appropriately handle and adjust for non-market related events.

The Index Price is determined by the Index Provider through a process in which trade data is cleansed and compiled in such a manner as to algorithmically reduce the impact of anomalistic or manipulative trading. This is accomplished by adjusting the weight of each data input based on price deviation relative to the observable set, as well as recent and long-term trading volume at each venue relative to the observable set.

The value of the Index is calculated and disseminated on a 24-hour basis and will be available on a continuous basis at *https://www.coindesk.com/indices*.

Constituent Trading Platform Selection

According to the Annual Report and Registration Statement, the Digital Asset Trading Platforms that are included in the Index are selected by the Index Provider utilizing a methodology that is guided by the International Organization of Securities Commissions (''IOSCO'') principles for financial benchmarks. For a trading platform to become a Digital Asset Trading Platform included in the Index (a ''Constituent Trading Platform''), it must satisfy the criteria listed below (the ''Inclusion Criteria''):

- Sufficient USD liquidity relative to the size of the listed assets;
- No evidence in the past 12 months of trading restrictions on individuals or entities that would otherwise meet the trading platform's eligibility requirements to trade;
- No evidence in the past 12 months of undisclosed restrictions on deposits or withdrawals from user accounts;
- Real-time price discovery;
- Limited or no capital controls; [28]
- Transparent ownership including a publicly-owned ownership entity;
- Publicly available language and policies addressing legal and regulatory compliance in the US, including KYC (Know Your Customer), AML (Anti-Money Laundering) and other policies designed to comply with relevant regulations that might apply to it;
- Be a US-domiciled trading platform or a non-US domiciled trading platform that is able to service US investors;
- Offer programmatic spot trading of the trading pair,[29] and reliably publish trade prices and volumes on a real-time basis through Rest and Websocket APIs.

A Digital Asset Trading Platform is removed from the Constituent Trading Platforms when it no longer satisfies the Inclusion Criteria. The Index Provider does not currently include data from non-Digital Asset Trading Platforms (or over-the-counter markets) or derivatives platforms among the Constituent Trading Platforms. According to the Annual Report and Registration Statement, over-the-counter data is not currently included because of the potential for trades to include a significant premium or discount paid for larger liquidity, which creates an uneven comparison relative to more active markets. There is also a higher potential for over-the-counter transactions to not be arms-length, and thus not be representative of a true market price. Bitcoin derivative markets data, including Bitcoin futures markets and perpetuals markets data, are also not currently included as the markets remain relatively thin. The Index Provider will consider IOSCO principles for financial benchmarks and the management of trading venues of Bitcoin derivatives and the aforementioned Inclusion Criteria when considering inclusion of over-the-counter or derivative platform data in the future.

The Index Provider and the Sponsor have entered into the index license agreement, dated as of February 1, 2022 (as amended, the ''Index License Agreement''), governing the Sponsor's use of the Index Price.[30] Pursuant to the terms of the Index License Agreement, the Index Provider may adjust the calculation methodology for the Index Price without notice to, or consent of, the Trust or its shareholders. The Index Provider may decide to change the calculation methodology to maintain the integrity of the Index Price calculation should it identify or become aware of previously unknown variables or issues with the existing methodology that it believes could materially impact its performance and/or reliability. The Index Provider has sole discretion over the determination of Index Price and may change the methodologies for determining the Index Price from time to time. Shareholders will be notified of any material changes to the calculation methodology or the Index Price in the Trust's current reports and will be notified of all other changes that the Sponsor considers significant in the Trust's periodic or current reports. The Trust will determine the materiality of any changes to the Index Price on a case-by-case basis, in consultation with external counsel.

The Index Provider may change the trading venues that are used to calculate the Index or otherwise change the way in which the Index is calculated at any time. For example, the Index Provider has scheduled quarterly reviews in which it may add or remove Constituent Trading Platforms that satisfy or fail the Inclusion Criteria. The Index Provider does not have any obligation to consider the interests of the Sponsor, the Trust, the shareholders, or anyone else in connection with such changes. Although the Index Provider is not required to publicize or explain the changes or to alert the Sponsor to such changes, it has historically notified the Trust (and other subscribers to the Index) of any material changes to the Constituent Trading Platforms, including any additions or removals, contemporaneous with its issuance of press releases in connection with the same. The Sponsor will notify investors of any such material event by filing a current report on Form 8–K. Although the Index methodology is designed to operate without any manual intervention, rare events would justify manual intervention. Intervention of this kind would be in response to non-market-related events, such as the halting of deposits or withdrawals of funds on a Digital Asset Trading Platform, the unannounced closure of operations on a Digital Asset Trading Platform, insolvency or the compromise of user funds. In the event that such an intervention is necessary, the Index Provider would issue a public announcement through its website, API and other established communication channels with its clients.

[28] ''Capital controls'' in this context means governmental sanctions that would limit the movement of capital into, or out of, the jurisdiction in which such Digital Asset Trading Platforms operate.

[29] Trading platforms with programmatic trading offer traders an application programming interface that permits trading by sending programmed commands to the trading platform.

[30] Upon entering into the Index License Agreement, the Sponsor and the Index Provider terminated the license agreement between the parties dated as of February 28, 2019.

Determination of the Index Price

The Index applies an algorithm to the price of Bitcoin on the Constituent Trading Platforms calculated on a per second basis over a 24-hour period. The Index's algorithm is expected to reflect a four-pronged methodology to calculate the Index Price from the Constituent Trading Platforms:

- *Volume Weighting:* Constituent Trading Platforms with greater liquidity receive a higher weighting in the Index, increasing the ability to execute against (*i.e.,* replicate) the Index in the underlying spot markets.
- *Price-Variance Weighting:* The Index Price reflects data points that are discretely weighted in proportion to their variance from the rest of the Constituent Trading Platforms. As the price at a particular trading platform diverges from the prices at the rest of the Constituent Trading Platforms, its weight in the Index Price consequently decreases.
- *Inactivity Adjustment:* The Index Price algorithm penalizes stale activity from any given Constituent Trading Platform. When a Constituent Trading Platform does not have recent trading data, its weighting in the Index Price is gradually reduced until it is de-weighted entirely. Similarly, once trading activity at a Constituent Trading Platform resumes, the corresponding weighting for that Constituent Trading Platform is gradually increased until it reaches the appropriate level.
- *Manipulation Resistance:* In order to mitigate the effects of wash trading and order book spoofing, the Index only includes executed trades in its calculation. Additionally, the Index only includes Constituent Trading Platforms that charge trading fees to its users in order to attach a real, quantifiable cost to any manipulation attempts.

The Index Provider re-evaluates the weighting algorithm on a periodic basis, but maintains discretion to change the way in which an Index Price is calculated based on its periodic review or in extreme circumstances and does not make the exact methodology to calculate the Index Price publicly available. Nonetheless, the Sponsor believes that, the Index is designed to limit exposure to trading or price distortion of any individual Digital Asset Trading Platform that experiences periods of unusual activity or limited liquidity by discounting, in real-time, anomalous price movements at individual Digital Asset Trading Platforms.

The Sponsor believes the Index Provider's selection process for Constituent Trading Platforms as well as the methodology of the Index Price's algorithm provides a more accurate picture of Bitcoin price movements than a simple average of Digital Asset Trading Platform spot prices, and that the weighting of Bitcoin prices on the Constituent Trading Platforms limits the inclusion of data that is influenced by temporary price dislocations that may result from technical problems, limited liquidity or fraudulent activity elsewhere in the Bitcoin spot market. By referencing multiple trading venues and weighting them based on trade activity, the Sponsor believes that the impact of any potential fraud, manipulation or anomalous trading activity occurring on any single venue is reduced.

If the Index Price becomes unavailable, or if the Sponsor determines in good faith that such Index Price does not reflect an accurate price for Bitcoin, then the Sponsor will, on a best efforts basis, contact the Index Provider to obtain the Index Price directly from the Index Provider. If after such contact such Index Price remains unavailable or the Sponsor continues to believe in good faith that such Index Price does not reflect an accurate price for the relevant digital asset, then the Sponsor will employ a cascading set of rules to determine the Index Price, as described below in ''Determination of the Index Price When Index Price is Unavailable.''

The Trust values its Bitcoin for operational purposes by reference to the Index Price. The Index Price is the value of a Bitcoin as represented by the Index, calculated at 4:00 p.m., New York time, on each business day.

Illustrative Example

For the purposes of illustration, outlined below are examples of how the attributes that impact weighting and adjustments in the aforementioned methodology may be utilized to generate the Index Price for a digital asset. For example, the Constituent Trading Platforms for the Index Price for a digital asset are Coinbase, Kraken, LMAX Digital and Bitstamp.

The Index Price algorithm, as described above, accounts for manipulation at the outset by only including data from executed trades on Constituent Trading Platforms that charge trading fees. Then, the below-listed elements may impact the weighting of the Constituent Trading Platforms on the Index price as follows:

- *Volume Weighting:* Each Constituent Trading Platform will be weighted to appropriately reflect the trading volume share of the Constituent Trading Platform relative to all the Constituent Trading Platforms during this same period. For example, an average hourly weighting of 67.06%, 14.57%, 11.88% and 6.49% for Coinbase, Kraken, LMAX Digital and Bitstamp, respectively, would represent each Constituent Trading Platform's share of trading volume during the same period.
- *Inactivity Adjustment:* Assume that a Constituent Trading Platform represented a 14% weighting on the Index Price of the digital asset, which is based on the per-second calculations of its trading volume and price-variance relative to the cohort of Constituent Trading Platforms included in such Index, and then went offline for approximately two hours. The index algorithm would automatically recognize inactivity and start de-weighting the Constituent Trading Platform at the 3-minute mark and continue to do so over a 7-minute period until its influence was effectively zero, 10 minutes after becoming inactive. As soon as trading activity resumed at the Constituent Trading Platform, the index algorithm would re-weight it to the appropriate weighting based on trading volume and price-variance relative to the cohort of Constituent Trading Platforms included in the Index. Due to the period of inactivity, it would re-weight the Constituent Trading Platform activity to a weight lower than its original weighting—for example, to 12%.
- *Price-Variance Weighting:* Assume that for a one-hour period, the digital asset's execution prices on one Constituent Trading Platform were trading more than 7% higher than the average execution prices on another Constituent Trading Platform. The algorithm will automatically detect the anomaly and reduce that specific Constituent Trading Platform's weighting to 0% for that one-hour period, ensuring a reliable spot reference unaffected by the localized event.

Determination of the Index Price When Index Price Is Unavailable

The Sponsor uses the following cascading set of rules to calculate the Index Price when the Index Price is unavailable.[31] For the avoidance of doubt, the Sponsor will employ the below rules sequentially and in the order as presented below, should one or more specific rule(s) fail.

1. Index Price = The price set by the Index as of 4:00 p.m., New York time,

[31] The Sponsor updated these rules on January 11, 2022.

on the valuation date.[32] If the Index becomes unavailable, or if the Sponsor determines in good faith that the Index does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Index Provider to obtain the Index Price directly from the Index Provider. If after such contact the Index remains unavailable or the Sponsor continues to believe in good faith that the Index does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

2. Index Price = The price set by Coin Metrics Real-Time Rate (the ''Secondary Index'') as of 4:00 p.m., New York time, on the valuation date (the ''Secondary Index Price''). The Secondary Index Price is a real-time reference rate price, calculated using trade data from constituent markets selected by Coin Metrics (the ''Secondary Index Provider''). The Secondary Index Price is calculated by applying weighted-median techniques to such trade data where half the weight is derived from the trading volume on each constituent market and half is derived from inverse price variance, where a constituent market with high price variance as a result of outliers or market anomalies compared to other constituent markets is assigned a smaller weight. If the Secondary Index becomes unavailable, or if the Sponsor determines in good faith that the Secondary Index does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Secondary Index Provider to obtain the Secondary Index Price directly from the Secondary Index Provider. If after such contact the Secondary Index remains unavailable or the Sponsor continues to believe in good faith that the Secondary Index does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

3. Index Price = The price set by the Trust's principal market (as defined in the Annual Report) (the ''Tertiary Pricing Option'') as of 4:00 p.m., New York time, on the valuation date. The Tertiary Pricing Option is a spot price derived from the principal market's public data feed that is believed to be consistently publishing pricing information as of 4:00 p.m., New York time, and is provided to the Sponsor via an application programming interface. If the Tertiary Pricing Option becomes unavailable, or if the Sponsor determines in good faith that the Tertiary Pricing Option does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Tertiary Pricing Provider to obtain the Tertiary Pricing Option directly from the Tertiary Pricing Provider. If after such contact the Tertiary Pricing Option remains unavailable after such contact or the Sponsor continues to believe in good faith that the Tertiary Pricing Option does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

4. Index Price = The Sponsor will use its best judgment to determine a good faith estimate of the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

In the event of a fork, the Index Provider may calculate the Index Price based on a digital asset that the Sponsor does not believe to be an appropriate asset of the Trust (*i.e.,* a digital asset other than Bitcoin).[33] In this event, the Sponsor has full discretion to use a different index provider or calculate the Index Price itself using its best judgment. In such an event, the Exchange will submit a proposed rule filing to contemplate the assets that would subsequently be held by the Trust.[34]

The Sponsor may, in its sole discretion, select a different index provider, select a different index price provided by the Index Provider, calculate the Index Price by using the cascading set of rules set forth above, or change the cascading set of rules set forth above at any time.[35]

The Impact of the Approval of Bitcoin Futures ETFs and ETPs on Spot Bitcoin ETPs Like the Trust

On October 19, 2021, the date of the Exchange's initial submission of this proposed rule change,[36] the first Bitcoin-based exchange-traded fund (''ETF'') was approved by the Commission for trading.[37] Additional Bitcoin-based ETFs and ETPs were subsequently approved for trading.[38] All of those approved ETFs and ETPs hold Bitcoin futures contracts that trade on the CME and many settle using the CME CF Bitcoin Reference Rate (''BRR''), which is priced based on the spot Bitcoin markets Coinbase, Kraken, LMAX, Bitstamp, Gemini, and itBit, essentially the same spot markets that are included in the Index that the Trust uses to value its Bitcoin holdings. Given that the Commission has approved ETFs

[32] The valuation date is any day for which the value of the Bitcoin in the Trust may be calculated utilizing the Index Price. This calculation may be performed on business days for creation or redemption procedures or on non-business days in relation to calculating information that may be included in SEC reports comparing the GAAP and non-GAAP prices on period end dates that are non-business days. The cascading rule set is consistent for determining the value of the Bitcoin in the Trust on both business days and non-business days.

[33] According to the Annual Report, when a modification is introduced and a substantial majority of users and miners consent to the modification, the change is implemented and the network remains uninterrupted. However, if less than a substantial majority of users and miners consent to the proposed modification, and the modification is not compatible with the software prior to its modification, the consequence would be what is known as a ''hard fork'' of the Bitcoin Network, with one group running the pre-modified software and the other running the modified software. The effect of such a fork would be the existence of two versions of Bitcoin running in parallel, yet lacking interchangeability. For example, in August 2017, Bitcoin ''forked'' into Bitcoin and a new digital asset, Bitcoin Cash, as a result of a several-year dispute over how to increase the rate of transactions that the Bitcoin Network can process. In the event of a hard fork of the Bitcoin Network, the Sponsor will, consistent with its obligations pursuant to the Trust Agreement, use its discretion to determine, in good faith, which peer-to-peer network, among a group of incompatible forks of the Bitcoin Network, is generally accepted as the Bitcoin Network and should therefore be considered the appropriate network for the Trust's purposes. The Sponsor will base its determination on a variety of then relevant factors, including, but not limited to, the Sponsor's beliefs regarding expectations of the core developers of Bitcoin, users, services, businesses, miners, and other constituencies, as well as the actual continued acceptance of, mining power on, and community engagement with, the Bitcoin Network. There is no guarantee that the Sponsor will choose the digital asset that is ultimately the most valuable fork, and the Sponsor's decision may adversely affect the value of the Shares as a result. The Sponsor may also disagree with shareholders, security vendors, and the Index Provider on what is generally accepted as Bitcoin and should therefore be considered ''Bitcoin'' for the Trust's purposes, which may also adversely affect the value of the Shares as a result.

[34] *See supra* note 18.

[35] The Sponsor will provide notice of any such changes in the Trust's periodic or current reports and, if the Sponsor makes such a change other than on an ad hoc or temporary basis, it will file a proposed rule change under Section 19(b) with the Commission.

[36] *See* Securities Exchange Act Release No. 93504 (November 2, 2021), 86 FR 61804 (November 8, 2021) (Notice of Filing of Proposed Rule Change to List and Trade Shares of the Grayscale Bitcoin Trust (BTC) Under NYSE Arca Rule 8.201–E).

[37] ProShares Bitcoin Strategy ETF (BITO).

[38] *See, e.g.,* Securities Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (SR–NYSEArca–2021–53) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the Teucrium Bitcoin Futures Fund under NYSE ARCA Rule 8.200–E, Commentary .02 (Trust Issued Receipts)) (''Teucrium Order''); VanEck Bitcoin Strategy ETF (XBTF); Valkyrie Bitcoin Strategy ETF (BTF).

and ETPs that offer exposure to Bitcoin futures, which themselves are priced based on the underlying spot Bitcoin market, the Sponsor believes that the Commission must also approve ETPs that offer exposure to spot Bitcoin, like the Trust.

The Commission has historically sought to justify treating futures-based ETFs and ETPs differently from spot-based ETPs because of (i) distinctions between the regulations under which the two products would be registered (the Investment Company Act of 1940 (the ''40 Act'') for digital-asset futures ETFs and '33 Act for spot digital-asset ETPs) and/or (ii) the existence of regulation and surveillance-sharing over the CME digital-asset futures market through the Intermarket Surveillance Group (''ISG''), as compared to the spot market for those digital assets.[39] The Sponsor believes that this reasoning is unsupported for the following reasons.

The '40 Act Offers No More Investor Protections Than the '33 Act in the Context of Bitcoin-Based ETF and ETP Proposals

While the '40 Act has certain added investor protections that the '33 Act does not require, these protections do not seek to allay harms arising from underlying assets or markets of assets that ETFs hold, such as the potential for fraud or manipulation in such markets. In other words, the Sponsor does not believe that the application of the '40 Act supports the purported justifications the Commission has made in denying other spot digital asset ETPs. Instead, the '40 Act seeks to remedy certain abusive practices in the *management* of investment companies such as ETFs, and thus places certain restrictions on ETFs and ETF sponsors. The '40 Act explicitly lists out the types of abuses it seeks to prevent, and places certain restrictions related to accounting, borrowing, custody, fees, and independent boards, among others. Notably, none of these restrictions address an ETF's underlying assets, whether Bitcoin futures or spot Bitcoin, or the markets from which such assets' pricing is derived, whether the CME Bitcoin futures market or spot Bitcoin markets. As a result, the Sponsor believes that the distinction between registration of Bitcoin futures ETFs under the '40 Act and the registration of spot Bitcoin ETPs under the '33 Act is one without a difference in the context of Bitcoin-based ETP proposals.

Indeed, the Sponsor believes that the Commission implicitly confirmed as much in the April 2022 Teucrium Order.[40] Much like prior approved Bitcoin-based ETFs, the Teucrium ETP holds only Bitcoin futures, rather than spot Bitcoin. *Unlike* previous filings, however, the Teucrium ETP was filed under the '33 Act, rather than the '40 Act. The Sponsor believes that, by approving the Teucrium ETP, the Commission has indicated that registration under the '40 Act and the registration under the '33 Act is a distinction without a difference.

Surveillance-Sharing With the CME Bitcoin Futures Market Is Sufficient To Protect Against Fraud and Manipulation in the Underlying Spot Bitcoin Market

The Sponsor believes that, because the CME Bitcoin futures market is priced based on the underlying spot Bitcoin market, any fraud or manipulation in the spot market would necessarily affect the price of Bitcoin futures, thereby affecting the net asset value of an ETP holding spot Bitcoin or an ETF holding Bitcoin futures, as well as the price investors pay for such product's shares.

This conclusion has been corroborated by a study conducted by Professor Robert E. Whaley, a finance professor and expert on derivative contract valuation, which found that the BRR, the index underlying many of the Bitcoin-futures based ETFs, and the Index underlying the Trust, are near perfect substitutes.[41] In fact, according to the study, there is a 99.9% correlation between prices in the Bitcoin futures market and the spot Bitcoin market.

Nevertheless, the Commission denied the Exchange's original proposed rule change.[42] In its petition for review in the D.C. Circuit challenging the Grayscale Order, the Sponsor argued that the Trust and the approved Bitcoin futures ETPs (the Teucrium and Valkyrie Futures ETPs) rely on nearly identical sets of spot-market Bitcoin pricing data to calculate the value of their holdings.[43] The D.C. Circuit agreed—in the court's unanimous decision vacating the Grayscale Order, the Court held the Sponsor ''presented uncontested evidence that there is a 99.9 percent correlation between bitcoin's spot market and CME futures contract prices'' and that the ''tight correlation is not a coincidence: bitcoin futures prices are ultimately based on spot market prices.'' [44] In fact, the Court held the Sponsor's proposed spot Bitcoin ETP and approved Bitcoin futures ETPs, were ''materially similar across relevant regulatory factors.'' [45]

Given the similarity between the two types of products, the Sponsor believes that it must be the case that CME surveillance can either detect spot-market fraud that affects both futures ETFs and spot ETPs, or that such surveillance cannot do so for either type of product. Having approved Bitcoin futures ETFs in part on the basis of such surveillance, the Commission has clearly determined that CME surveillance can detect spot-market fraud that would affect spot ETPs, and

[39] *See, e.g.,* Chair Gary Gensler Public Statement, ''Remarks Before the Aspen Security Forum,'' (August 3, 2021), stating that the Chair looked forward to the Commission's review of Bitcoin-based ETF proposals registered under the '40 Act, ''particularly if those are limited to [the] CME-traded Bitcoin futures,'' noting the ''significant investor protection'' offered by the '40 Act, *https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03;* Securities Exchange Act Release No. 93559 (November 12, 2021), 86 FR 64539 (November 18, 2021) (SR–CboeBZX–2021–019) (Order Disapproving a Proposed Rule Change to List and Trade Shares of the VanEck Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares) (''VanEck Order'') (denying the first spot bitcoin ETP registered under the '33 Act following the first approval of a bitcoin futures ETF registered under the '40 Act, noting the differences in the standard of review that applies to such products); Teucrium Order (approving the first bitcoin futures ETP registered under the '33 Act).

[40] Teucrium Order, 87 FR 21678 (''With respect to the proposed ETP, the underlying bitcoin assets are CME bitcoin futures contracts. The relevant analysis, therefore, is whether Arca has a comprehensive surveillance sharing agreement with a regulated market of significant size related to CME bitcoin futures contracts. As discussed below, taking into consideration the direct relationship between the regulated market with which Arca has a surveillance-sharing agreement and the assets held by the proposed ETP, as well as developments with respect to the CME bitcoin futures market—including the launch of exchange-traded funds registered under the Investment Company Act of 1940 ('1940 Act') that hold CME bitcoin futures ('Bitcoin Futures ETFs')—the Commission concludes that the Exchange has the requisite surveillance-sharing agreement.'').

[41] *See* Comment Letter from Robert E. Whaley (May 25, 2022), available at: *https://www.sec.gov/comments/sr-nysearca-2021-90/srnysearca202190-20129557-295794.pdf.*

[42] *See* Securities Exchange Act Release No. 95180 (June 29, 2022), 87 FR 40299 (July 6, 2022) (SR–NYSEArca–2021–90) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Share of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares)) (''Grayscale Order'').

[43] *Grayscale Investments, LLC* v. *Securities and Exchange Commission* (''*Grayscale* v. *SEC*''), No. 22–1142, Brief of Petitioner Grayscale Investments, LLC (October 11, 2022).

[44] *Grayscale* v. *SEC*, No. 22–1142, Opinion at 10 (August 29, 2023) (''Grayscale presented uncontested evidence that there is a 99.9 percent correlation between bitcoin's spot market and CME futures contract prices. This tight correlation is not a coincidence: bitcoin futures prices are ultimately based on spot market prices. Bitcoin futures trade based on predicted settlement prices that are in turn calculated using the Bitcoin Reference Rate. The Reference Rate, like the CoinDesk Index, aggregates spot prices from multiple exchanges. Four of the six exchanges are shared between the indexes. A study conducted by a finance professor and expert on derivative contract valuation found the CoinDesk Index and the Reference Rate are 'near perfect substitutes.''') (internal citations omitted).

[45] *Id.* at 11.

the Sponsor thus believes that it must also approve spot Bitcoin ETPs on that basis.

* * * * *

In summary, the Sponsor believes that the distinctions between the '40 Act and the '33 Act, and the surveillance-sharing available for the CME Bitcoin futures market versus the spot Bitcoin market, are not meaningful in the context of Bitcoin-based ETF and ETP proposals, and that such reasoning cannot be a basis for the Commission treating Bitcoin futures ETFs differently from spot Bitcoin ETPs like the Trust. The Sponsor believes that the Commission's approval of Bitcoin futures ETFs means it must also approve spot Bitcoin ETPs like the Trust.

The Structure and Operation of the Trust Protects Investors and Satisfies Commission Requirements for Bitcoin-Based Exchange Traded Products

Even if the Commission had not approved Bitcoin futures ETFs and ETPs, the Sponsor still believes the Commission should approve the listing and trading of Shares of the Trust. The Commission has expressed legitimate concerns about the underlying Digital Asset Market due to the potential for fraud and manipulation and has clearly outlined the reasons why prior Bitcoin-based ETP proposals have been unable to satisfy these concerns in orders disapproving the proposed listing and trading of the Winklevoss Bitcoin Trust, Bitwise Bitcoin ETF Trust, United States Bitcoin and Treasury Investment Trust, and various Bitcoin-based trust issued receipts.[46]

In these disapproval orders, the Commission outlined that a proposal relating to a Bitcoin-based ETP could satisfy its concerns regarding potential for fraud and manipulation by demonstrating:

(1) *Inherent Resistance to Fraud and Manipulation:* that the underlying commodity market is inherently resistant to fraud and manipulation;

(2) *Other Means to Prevent Fraud and Manipulation:* that there are other means to prevent fraudulent and manipulative acts and practices that are sufficient; or

(3) *Surveillance Sharing:* that the listing exchange has entered into a surveillance sharing agreement with a regulated market of significant size relating to the underlying or reference assets.

As described below, the Sponsor believes the structure and operation of the Trust are designed to prevent fraudulent and manipulative acts and practices, to protect investors and the public interest, and to respond to the specific concerns that the Commission has identified with respect to potential fraud and manipulation in the context of a Bitcoin-based ETP.

How the Trust Meets Standards in the Winklevoss Order, Bitwise Order and Wilshire Phoenix Order and Vacated Grayscale Order

1. Resistance to or Prevention of Fraud and Manipulation

In the Bitwise Order, the Commission disagreed with the proposition that Bitcoin's fungibility, transportability and exchange tradability combine to provide unique protections against, and allow Bitcoin to be uniquely resistant to, attempts at price manipulation. The Commission reached its conclusion based on concessions by Bitwise that 95% of the reported trading in Bitcoin is ''fake'' or non-economic, effectively admitting that the properties of Bitcoin do not make it inherently resistant to manipulation. Bitwise's concessions were further compounded by evidence of potential and actual fraud and manipulation in the historical trading of Bitcoin on certain marketplaces such as (1) ''wash'' trading, (2) trading based on material, non-public information, including the dissemination of false and misleading information, (3) manipulative activity involving Tether, and (4) fraud and manipulation.[47]

The Sponsor acknowledges the possibility that fraud and manipulation may exist and that Bitcoin trading *on any given exchange* may be no more uniquely resistant to fraud and manipulation than other commodity markets.[48] However, the Sponsor believes that the fundamental features of Bitcoin's fungibility, transportability and exchange tradability offer novel protections beyond those that exist in traditional commodity markets or equity markets when combined with other means, as discussed further below.

2. Other Means To Prevent Fraud and Manipulation

The Commission has recognized that a listing exchange could demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement.[49] In evaluating the effectiveness of this type of resistance, the Commission does not apply a ''cannot be manipulated'' standard. Instead, the Commission requires that such resistance to fraud and manipulation be novel and beyond those protections that exist in traditional commodity markets or equity markets for which the Commission has long required surveillance-sharing agreements in the context of listing derivative securities products.[50]

The Sponsor believes the Index represents a novel means to prevent fraud and manipulation from impacting a reference price for Bitcoin and that it offers protections beyond those that exist in traditional commodity markets or equity markets. Specifically, Bitcoin is novel and exists outside traditional commodity markets. It therefore stands to reason that the methods in which it

[46] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (Aug. 1, 2018) (SR–BatsBZX–2016–30) (the ''Winklevoss Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 87267 (Oct. 9, 2019), 84 FR 55382 (Oct. 16, 2019) (SR–NYSEArca–2019–01) (the ''Bitwise Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR–NYSEArca–2019–39) (the ''Wilshire Phoenix Order''); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (Aug. 22, 2018), 83 FR 43934 (Aug. 28, 2018) (SR–NYSEArca–2017–139) (the ''ProShares Order''); Order Disapproving a Proposed Rule Change Relating to Listing and Trading of the Direxion Daily Bitcoin Bear 1X Shares, Direxion Daily Bitcoin 1.25X Bull Shares, Direxion Daily Bitcoin 1.5X Bull Shares, Direxion Daily Bitcoin 2X Bull Shares, and Direxion Daily Bitcoin 2X Bear Shares Under NYSE Arca Rule 8.200–E, Securities Exchange Act Release No. 83912 (Aug. 22, 2018), 83 FR 43912 (Aug. 28, 2018) (SR–NYSEArca–2018–02) (the ''Direxion Order''); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (Aug. 22, 2018), 83 FR 43923 (Aug. 28, 2018) (SR–CboeBZX–2018–01) (the ''GraniteShares Order'').

[47] *See* Bitwise Order, 84 FR 55383 (discussing analysis of the Bitcoin spot market that asserts that 95% of the spot market is dominated by fake and non-economic activity, such as wash trades), 55391 (discussing possible sources of fraud and manipulation in the bitcoin spot market). *See also* Winklevoss Order, 83 FR 37585–86 (discussing pending litigation against a Bitcoin trading platform for fraudulent conduct relating to Tether); Bitwise Order, 84 FR 55391 n.140, 55402 & n.331 (same); Winklevoss Order, 83 FR 37584–86 (discussing potential types of manipulation in the Bitcoin spot market). The Commission has also noted that fraud and manipulation in the Bitcoin spot market could persist for a significant duration. *See, e.g.,* Bitwise Order, 84 FR 55405 & n.379.

[48] *See generally* Bitwise Order.

[49] *See* Winklevoss Order, 84 FR 37580, 37582–91; Bitwise Order, 84 FR 55383, 55385–406; Wilshire Phoenix Order, 85 FR 12597.

[50] *See* Winklevoss Order, 84 FR 37582; Wilshire Phoenix Order, 85 FR 12597.

trades will be novel and that the market for Bitcoin will have different attributes than traditional commodity markets. Bitcoin was only introduced within the past decade, twenty years after the first U.S. ETFs were offered [51] and 150 years after the first futures were offered.[52] In contrast to older commodities such as gold, silver, platinum, palladium or copper, which the Commission has noted all had at least one significant, regulated market for trading futures on the underlying commodity at the time commodity trust ETPs were approved for listing and trading, the first trading in Bitcoin took place entirely in an open, transparent and online setting where other commodities cannot trade.

The Trust has priced its Shares consistently for more than seven years based on the Index. The Sponsor believes the Trust's use of the Index specifically addresses the Commission's concerns in that the Index serves as an alternative means to prevent fraud and manipulation. Specifically, the Index can (i) mitigate the effects of fraud, manipulation and other anomalous trading activity on the Bitcoin reference rate, (ii) provide a real-time, volume-weighted fair value of Bitcoin and (iii) appropriately handle and adjust for non-market related events.

As described in more detail below, the Sponsor believes that the Index accomplishes those objectives in the following ways:

1. The Index tracks the Digital Asset Trading Platform Market price through trading activity at ''U.S.-Compliant Trading Platforms''; [53]

2. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity in real-time through systematic adjustments;

3. The Index is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events; and

4. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific trading platform through a cross-trading platform composite index rate.

1. The Index tracks the Digital Asset Trading Platform Market price through trading activity at ''U.S.-Compliant Trading Platforms''.

To reduce the risk of fraud, manipulation, and other anomalous trading activity from impacting the Index, only U.S.-Compliant Trading Platforms are eligible to be included in the Index.

The Index maintains a minimum number of three trading platforms and a maximum number of five trading platforms to track the Digital Asset Trading Platform Market while offering replicability for traders and market makers.[54]

U.S.-Compliant Trading Platforms possess safeguards that protect against fraud and manipulation. For example, U.S.-Compliant Trading Platforms regulated by the NYDFS under the BitLicense program have regulatory requirements to implement measures designed to effectively detect, prevent, and respond to fraud, attempted fraud, market manipulation, and similar wrongdoing, and to monitor, control, investigate and report back to the NYDFS regarding any wrongdoing.[55] These trading platforms also have the following obligations: [56]

• Submission of audited financial statements including income statements, statements of assets/liabilities, insurance, and banking;

• Compliance with capitalization requirements set at NYDFS's discretion;

• Prohibitions against the sale or encumbrance to protect full reserves of custodian assets;

• Fingerprints and photographs of employees with access to customer funds;

• Retention of a qualified Chief Information Security Officer and annual penetration testing/audits;

• Documented business continuity and disaster recovery plan, independently tested annually; and

• Participation in an independent exam by NYDFS.

Other U.S.-Compliant Trading Platforms have voluntarily implemented measures to protect against common forms of market manipulation.[57]

Furthermore, all U.S.-Compliant Trading Platforms are considered MSBs that are subject to FinCEN's federal and state reporting requirements that provide additional safeguards. For example, unscrupulous traders may be less likely to engage in fraudulent or manipulative acts and practices on trading platforms that (1) report suspicious activity to FinCEN as money services businesses, (2) report to state regulators as money transmitters, and/or (3) require customer identification through KYC procedures. U.S.-Compliant Trading Platforms are required to: [58]

• Identify people with ownership stakes or controlling roles in the MSB;

• Establish a formal AML policy in place with documentation, training, independent review, and a named compliance officer;

• Implement strict customer identification and verification policies and procedures;

[51] SEC, ''Investor Bulletin: Exchange-Traded Funds (ETFs),'' August 2012, *https://www.sec.gov/investor/alerts/etfs.pdf.*

[52] Commodity Futures Trading Commission (''CFTC''), ''History of the CFTC,'' *https://www.cftc.gov/About/HistoryoftheCFTC/history_precftc.html.*

[53] ''U.S.-Compliant Trading Platforms'' are trading platforms in the Digital Asset Trading Platform Market are in material compliance with applicable U.S. federal and state licensing requirements and maintain practices and policies designed to comply with AML and KYC regulations. All Constituent Trading Platforms are U.S.-Compliant Trading Platforms. ''Non-U.S.-Compliant Trading Platforms'' are all other trading platforms in the Digital Asset Trading Platform Market. As of September 30, 2023, the U.S.-Compliant Trading Platforms that the Index Provider considered for inclusion in the Index were Coinbase, Bitstamp, Kraken and LMAX Digital. On October 29, 2022, the Index Provider removed Bitstamp due to its failure to meet the minimum liquidity requirement and added Binance.US as a Constituent Trading Platform based on its satisfaction of the minimum liquidity requirement as part of its scheduled quarterly review. On June 17, 2023, the Index Provider removed Binance.US from the Index, due to Binance.US's announcement that it was suspending U.S. dollar deposits and withdrawals and planned to delist its U.S. dollar trading pairs and did not add any Constituent Trading Platforms as part of its review. On July 29, 2023, the Index Provider added Bitstamp to the Index based on its satisfaction of the Index Provider's minimum liquidity requirement and did not remove any Constituent Trading Platforms as part of its scheduled quarterly review. On October 28, 2023, the Index Provider added Crypto.com to the Index based on its satisfaction of the Index Provider's minimum liquidity requirement and did not remove any Constituent Trading Platforms as part of its scheduled quarterly review. From these U.S.-Compliant Trading Platforms, the Index Provider then applies additional Inclusion Criteria to determine the Constituent Trading Platforms. As of September 30, 2023, the Constituent Trading Platforms were Coinbase, Bitstamp, Kraken, and LMAX Digital. As of the date of filing, the Constituent Trading Platforms were Coinbase, Bitstamp, Crypto.com, Kraken, and LMAX Digital.

[54] According to the Sponsor, the more trading platforms included in the Index, the more ability there is for traders and market makers to arbitrage price differences. For example, in the event of variances between Bitcoin prices on Constituent Trading Platforms and non-Constituent Trading Platforms, arbitrage trading opportunities would exist. These discrepancies generally consolidate over time, as traders and market makers trade against the Index to realize price differences across trading platforms and capitalize upon arbitrage opportunities.

[55] *See, e.g.,* ''DFS Takes Action to Deter Fraud and Manipulation in Virtual Currency Markets,'' *available at: https://www.dfs.ny.gov/about/press/pr1802071.htm.*

[56] *See* ''New York's Final ''BitLicense'' Rule: Overview and Changes from July 2014 Proposal,'' June 5, 2015, Davis Polk, *available at: https://www.davispolk.com/files/new_yorks_final_bitlicense_rule_overview_changes_july_2014_proposal.pdf.*

[57] As of the date of filing, two of the five Constituent Trading Platforms, Coinbase and Bitstamp, are regulated by NYDFS.

[58] *See* BSA Requirements for MSBs, FinCEN website: *https://www.fincen.gov/bsarequirements-msbs.*

• File Suspicious Activity Reports (SARs) for suspicious customer transactions;

• File Currency Transaction Reports (CTRs) for cash-in or cash-out transactions greater than $10,000; and

• Maintain a five-year record of currency exchanges greater than $1,000 and money transfers greater than $3,000.

Lastly, because of Bitcoin's classification as a commodity,[59] the CFTC has authority to police fraud and manipulation on U.S.-Compliant Trading Platforms.

The Sponsor acknowledges that there are substantial differences between FinCEN and New York state regulations and the Commission's regulation of the national securities exchanges.[60] The Sponsor does not believe the inclusion of U.S.-Compliant Trading Platforms is in and of itself sufficient to prove that the Index is an alternative means to prevent fraud and manipulation such that surveillance sharing agreements are not required, but does believe that the inclusion of only U.S.-Compliant Trading Platforms in the Index is one significant way in which the Index is protected from the potential impacts of fraud and manipulation.

2. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity in real-time through systematic adjustments.

The Index is calculated once every second according to a systematic methodology that relies on observed trading activity on the Constituent Trading Platforms. While the precise methodology underlying the Index is currently proprietary, the key elements of the Index are outlined below:

• *Volume Weighting:* Constituent Trading Platforms with greater liquidity receive a higher weighting in the Index, increasing the ability to execute against (*i.e.,* replicate) the Index in the underlying spot markets.

• *Price-Variance Weighting:* The Index reflects data points that are discretely weighted in proportion to their variance from the rest of the Constituent Trading Platforms. As the price at a Constituent Trading Platform diverges from the prices at the rest of the Constituent Trading Platforms, its weight in the Index consequently decreases.

• *Inactivity Adjustment:* The Index algorithm penalizes stale activity from any given Constituent Trading Platform. When a Constituent Trading Platform does not have recent trading data, its weighting in the Index is gradually reduced, until it is de-weighted entirely. Similarly, once trading activity at the Constituent Trading Platform resumes, the corresponding weighting for that Constituent Trading Platform is gradually increased until it reaches the appropriate level.

• *Manipulation Resistance:* In order to mitigate the effects of wash trading and order book spoofing, the Index only includes executed trades in its calculation. Additionally, the Index only includes Constituent Trading Platforms that charge trading fees to its users in order to attach a real, quantifiable cost to any manipulation attempts.

3. The Index is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events.

The Index Provider reviews and periodically updates which trading platforms are included in the Index by utilizing a methodology that is guided by the IOSCO principles for financial benchmarks.

For a trading platform to become a Constituent Trading Platform, it must satisfy the following Inclusion Criteria:

• Sufficient USD liquidity relative to the size of the listed assets;

• No evidence in the past 12 months of trading restrictions on individuals or entities that would otherwise meet the trading platform's eligibility requirements to trade;

• No evidence in the past 12 months of undisclosed restrictions on deposits or withdrawals from user accounts;

• Real-time price discovery;

• Limited or no capital controls;

• Transparent ownership including a publicly-owned ownership entity;

• Publicly available language and policies addressing legal and regulatory compliance in the US, including KYC (Know Your Customer), AML (Anti-Money Laundering) and other policies designed to comply with relevant regulations that might apply to it;

• Be a US-domiciled trading platform or a non-US domiciled trading platform that is able to service US investors;

• Offer programmatic spot trading of the trading pair, and reliably publish trade prices and volumes on a real-time basis through Rest and Websocket APIs.

Although the Index methodology is designed to operate without any human interference, rare events would justify manual intervention. Manual intervention would only be in response to ''non-market-related events'' (*e.g.,* halting of deposits or withdrawals of funds, unannounced closure of trading platform operations, insolvency, compromise of user funds, etc.). In the event that such an intervention is necessary, the Index Provider would issue a public announcement through its website, API and other established communication channels with its clients.[61]

4. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific trading platform through a cross-trading platform composite index rate.

The Index is based on the price and volume data of multiple U.S.-Compliant Trading Platforms that satisfy the Index Provider's Inclusion Criteria. By referencing multiple trading venues and weighting them based on trade activity, the impact of any potential fraud, manipulation, or anomalous trading activity occurring on any single venue is reduced. Specifically, the effects of fraud, manipulation, or anomalous trading activity occurring on any single venue are de-weighted and consequently diluted by non-anomalous trading activity from other Constituent Trading Platforms.

Although the Index is designed to accurately capture the market price of Bitcoin, third parties may be able to purchase and sell Bitcoin on public or private markets included or not included among the Constituent Trading Platforms, and such transactions may take place at prices materially higher or lower than the Index Price. For example, based on data provided by the Index Provider, on any given day during the twelve months ended September 30, 2023, the maximum differential between the 4:00 p.m., New York time spot price of any single Digital Asset Trading Platform included in the Index and the Index Price was 3.18% and the average of the maximum differentials of the 4:00 p.m., New York time spot price of each Digital Asset Trading Platform included in the Index and the Index Price was 0.83%. During this same period, the average differential between the 4:00 p.m., New York time spot prices of all the Digital Asset Trading Platforms included in the Index and the Index Price was 0.01%.[62]

Since November 1, 2014, the Trust has consistently priced its Shares at 4:00 p.m., New York time based on the Index Price.[63] While that pricing would be

[59] CFTC, What is a Bitcoin Futures ETF?, *https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/BitcoinFuturesETF.html.*

[60] *See* Bitwise Order, 84 FR 55392; Wilshire Phoenix Order, 85 FR 12603.

[61] To the extent any such intervention has a material impact on the Trust, the Sponsor will also issue a public announcement.

[62] All Digital Asset Trading Platforms that were included in the Index throughout the period were considered in this analysis.

[63] Prior to February 1, 2022, the Trust valued its Bitcoins for operational purposes by reference to

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known to the market, the Sponsor believes that, even if efforts to manipulate the price of Bitcoin at 4:00 p.m., E.T. were successful on any trading platform, such activity would have had a negligible effect on the pricing of the Trust, due to the controls embedded in the structure of the Index.

Accordingly, the Sponsor believes that the Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity on the Bitcoin reference rate, (ii) provide a real-time, volume-weighted fair value of Bitcoin and (iii) appropriately handle and adjust for non-market related events. For these reasons, the Sponsor believes that the Index represents an effective alternative means to prevent fraud and manipulation and the Trust's reliance on the Index addresses the Commission's concerns with respect to potential fraud and manipulation.

3. A Significant, Regulated and Surveilled Market Exists and Is Closely Connected With Spot Market for Bitcoin

In the Winklevoss Order, Bitwise Order, Wilshire Phoenix Order and vacated Grayscale Order, the Commission described both the need for and the definition of a surveilled market of significant size for commodity-trust ETPs like the Trust to date.[64] Specifically, the Commission explained that:

> for the commodity-trust ETPs approved to date for listing and trading, there has been in every case at least one significant, regulated market for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group membership in common with, that market.[65]

Further, the Commission stated that its interpretation of the term ''market of significant size'' depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.[66] Accordingly, the terms ''significant market'' and ''market of significant size'' could mean:

> a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[67]

In the context of Bitcoin-based ETPs specifically, the Commission has stated that establishing a lead-lag relationship between the Bitcoin futures market and the spot market is central to understanding whether it is reasonably likely that a would-be manipulator of the ETP would need to trade on the Bitcoin futures market to successfully manipulate prices on those spot platforms that feed into the proposed ETP's pricing mechanism such that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct.[68] In particular, if the spot market leads the futures market, this would indicate that it would not be necessary to trade on the futures market to manipulate the proposed ETP, even if arbitrage worked efficiently, because the futures price would move to meet the spot price.

While studies have found that the CME futures market does lead the spot Bitcoin market,[69] as explained in the Sponsor's briefs and argument in its prevailing case before the D.C. Circuit Court of Appeals regarding its Bitcoin-based ETP proposal, the Sponsor believes that the lead/lag question is irrelevant. If a would-be manipulator were to attempt to manipulate either a spot ETP or futures ETP by trading futures on the CME, then a surveillance-sharing agreement with the CME would provide access to information concerning that activity.[70] If, on the other hand, a would-be manipulator were to attempt to manipulate either a spot ETP or a futures ETP by trading on the spot market, then a surveillance-sharing agreement with the CME would also be able to provide access to information concerning that activity. If that were not true, the Commission could not have approved the Bitcoin futures ETPs. Given that the Commission has approved Bitcoin futures ETPs, the Commission must have concluded that the CME is capable of detecting manipulation attempts in the spot bitcoin market.

Regardless of the irrelevance of the lead/lag relationship and the mixed findings regarding the lead/lag relationship between the CME futures and Bitcoin spot markets, the Sponsor believes that the CME futures market represents a large, surveilled and regulated market and meets the Commission's definition of a ''significant market.'' For example, from November 1, 2019 to September 30, 2023, the CME futures market trading volume was over $1.4 trillion, compared to $1.15 trillion in trading volume across the Constituent Trading Platforms included in the Index. With over 121% of the Index trading volume, the CME futures market represents significant coverage of U.S.-Compliant Trading Platforms in the Bitcoin market. In addition, the CME futures market trading volume from November 1, 2019 to September 30, 2023 was approximately equal to trading volume of the U.S. dollar-denominated Bitcoin spot markets referenced in the Bitwise Order.[71]

Given the size of the CME futures markets, the Sponsor believes such markets meet the Commission's definition of ''significant market'' because there is a reasonable likelihood

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the volume-weighted average Index Price (the ''Old Index Price''). The Old Index Price was calculated by applying a weighting algorithm to the price and trading volume data for the immediately preceding 24-hour period as of 4:00 p.m., New York time, derived from the Constituent Trading Platforms reflected in the Index on such trade date, and overlaying an averaging mechanism to the price produced. Thus, whereas the Old Index Price reflected the price of a Bitcoin at 4:00 p.m., New York time, calculated by taking the average of each price of a Bitcoin produced by the Index over the preceding 24-hour period, the Index Price now is the price of a Bitcoin at 4:00 p.m., New York time, calculated based on the price and trading volume data of the Digital Asset Trading Platforms included in the Index over the preceding 24-hour period. The Index Price differs from the Old Index Price only in that it does not use an additional averaging mechanism; the Index Price otherwise uses the same methodology as the Old Index Price, and there has been no change to the Index used to determine the Index Price or the criteria used to select the Constituent Trading Platforms.

[64] *See* Winklevoss Order, 83 FR 37593–94; Bitwise Order, 84 FR 55383, 55410; Wilshire Phoenix Order, 85 FR 12609; Grayscale Order, 87 FR 40300.

[65] *See* Winklevoss Order, 83 FR 37594.

[66] *See* Winklevoss Order, 83 FR 37594; Bitwise Order, 84 FR 55410; ProShares Order, 83 FR 43936; GraniteShares Order, 83 FR 43925; Direxion Order, 83 FR 43914; Wilshire Phoenix Order, 85 FR 12609.

[67] *See* Winklevoss Order, 83 FR 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that will provide guidance to market participants.

[68] *See* Bitwise Order, 84 FR 55411; Wilshire Phoenix Order, 85 FR 12612.

[69] *See* Memorandum to File from Neel Maitra, Senior Special Counsel (Fintech & Crypto Specialist), Division of Trading and Markets, U.S. Securities and Exchange Commission re: Meeting with Representatives from Fidelity Digital Assets, et al. and attachment (SR–CboeBZX–2021–039) (September 8, 2021), *available at: https://www.sec.gov/comments/sr-cboebzx-2021-039/srcboebzx2021039-250110.pdf;* Letter from Bitwise Asset Management, Inc. re: File Number SR–NYSEArca–2021–89 (February 25, 2022), *available at: https://www.sec.gov/comments/sr-nysearca-2021-89/srnysearca202189-20117902-270822.pdf;* Letter from Wilson Sonsini Goodrich and Rosati, P.C. and Chapman and Cutler LLP, on behalf of Bitwise Asset Management, Inc. re: File No. SR–NYSEArca–2021–89 (March 7, 2022), *available at: https://www.sec.gov/comments/sr-nysearca-2021-89/srnysearca202189-20118794-271630.pdf.*

[70] *Grayscale* v. *SEC*, No. 22–1142, Commission Reply Brief at 27 (February 3, 2023).

[71] These Bitcoin spot markets include Binance.US, Coinbase, Bitfinex, Kraken, Bitstamp, BitFlyer, Poloniex, Bittrex and itBit.

that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, since arbitrage between the derivative and spot markets would tend to counter an attempt to manipulate the spot market alone. As a result, the Exchange's ability to obtain information regarding trading in the Shares and futures from markets and other entities that are members of the ISG, including the CME, would assist the Exchange in detecting and deterring misconduct.

The Sponsor also believes it is unlikely that the ETP would become the predominant influence on prices in the market.

While future inflows to the proposed Trust cannot be predicted, to provide comparable data, the Sponsor examined the change in market capitalization of Bitcoin with net inflows into the Trust, which currently trades on OTC Markets and is the largest and most liquid Bitcoin investment product in the world.[72] From November 1, 2019 to September 30, 2023, the market capitalization of Bitcoin grew from $166 billion to $527 billion, a $361 billion increase. Over the same period, the Trust experienced $6.6 billion of inflows. The cumulative inflow into the Trust over the stated time period was only 1.8% of the aggregate growth of Bitcoin's market capitalization.

Additionally, the Trust experienced approximately $153 billion of trading volume from November 1, 2019 to September 30, 2023, only 11% of the CME futures market and 13% of the Index over the same period.

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In summary, the Sponsor believes that the foregoing addresses concerns the Commission may have with respect to Bitcoin-based ETPs, based on the Commission's articulated concerns with respect to potential fraud and manipulation in Bitcoin-based ETPs. Specifically, the Sponsor believes that, although Bitcoin is not itself inherently resistant to fraud and manipulation, the Index represents an effective means to prevent fraudulent and manipulative acts and practices. As discussed above, the Trust has used the Index to price the Shares for more than seven years, and the Sponsor believes that the Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity on the Bitcoin reference rate, (ii) provide a real-time, volume-weighted fair value of Bitcoin and (iii) appropriately handle and adjust for non-market related events. The Sponsor also believes that the CME futures market is a significant, surveilled and regulated market that is closely connected with the spot market for Bitcoin fulfills the requirements for surveillance sharing given the Exchange's ability to obtain information from markets and other entities that are members of the ISG to assist in detecting and deterring misconduct.

Creation and Redemption of Shares

Authorized Participants may submit orders to create or redeem Shares under procedures for ''Cash Orders.''

The Authorized Participants will deliver only cash to create Shares and will receive only cash when redeeming Shares. Further, Authorized Participants will not directly or indirectly purchase, hold, deliver, or receive Bitcoin as part of the creation or redemption process or otherwise direct the Trust or a third party with respect to purchasing, holding, delivering, or receiving Bitcoin as part of the creation or redemption process.

The Trust will create Shares by receiving Bitcoin from a third party that is not the Authorized Participant and the Trust, or an affiliate of the Trust (and in any event not the Authorized Participant), is responsible for selecting the third party to deliver the Bitcoin. Further, the third party will not be acting as an agent of the Authorized Participant with respect to the delivery of the Bitcoin to the Trust or acting at the direction of the Authorized Participant with respect to the delivery of the Bitcoin to the Trust. The Trust will redeem Shares by delivering Bitcoin to a third party that is not the Authorized Participant and the Trust, or an affiliate of the Trust (and in any event not the Authorized Participant), is responsible for selecting the third party to receive the Bitcoin. Further, the third party will not be acting as an agent of the Authorized Participant with respect to the receipt of the Bitcoin from the Trust or acting at the direction of the Authorized Participant with respect to the receipt of the Bitcoin from the Trust.

Cash Orders are made through the participation of a Liquidity Provider[73] who obtains or receives Bitcoin in exchange for cash, and are facilitated by the Transfer Agent and Grayscale Investments, LLC, acting in its capacity as the Liquidity Engager. Liquidity Providers are not party to the Participant Agreements and are engaged separately by the Liquidity Engager.

According to the Registration Statement, the Trust creates Baskets (as described below) of Shares only upon receipt of Bitcoins and redeems Shares only by distributing Bitcoins. ''Authorized Participants'' are the only persons that may place orders to create and redeem Baskets. Each Authorized Participant must (i) be a registered broker-dealer and (ii) enter into an agreement with the Sponsor and Transfer Agent that provides the procedures for the creation and redemption of Baskets and for the delivery of Bitcoins required for the creation and redemption of Baskets via a Liquidity Provider (each, a ''Participant Agreement''). An Authorized Participant may act for its own account or as agent for broker-dealers, custodians and other securities market participants that wish to create or redeem Baskets. Shareholders who are not Authorized Participants will only be able to create or redeem their Shares through an Authorized Participant.

The Trust issues Shares to and redeems Shares from Authorized Participants on an ongoing basis, but only in one or more ''Baskets'' (with a Basket being a block of 10,000 Shares). The Trust will not issue fractions of a Basket.

The creation and redemption of Baskets will be made only in exchange for the delivery to the Trust, or the distribution by the Trust, of the number of whole and fractional Bitcoins represented by each Basket being created or redeemed, which is determined by dividing (x) the number of Bitcoins owned by the Trust at 4:00 p.m., New York time, on the trade date of a creation or redemption order, after deducting the number of Bitcoins representing the U.S. dollar value of accrued but unpaid fees and expenses of the Trust (converted using the Index

[72] To further illustrate the size and liquidity of the Trust, as of September 30, 2023, compared with global commodity ETPs, the Trust would rank third in assets under management and fourth in notional trading volume from November 1, 2019 to September 30, 2023.

[73] A ''Liquidity Provider'' means one or more eligible companies that facilitate the purchase and sale of Bitcoins in connection with creations or redemptions pursuant to Cash Orders. The Liquidity Providers with which Grayscale Investments, LLC, acting other than in its capacity as the Sponsor (in such other capacity, the ''Liquidity Engager'') will engage in Bitcoin transactions are third parties that are not affiliated with the Sponsor or the Trust and are not acting as agents of the Trust, the Sponsor, or any Authorized Participant, and all transactions will be done on an arms-length basis. Except for the contractual relationships between each Liquidity Provider and Grayscale Investments, LLC in its capacity as the Liquidity Engager, there is no contractual relationship between each Liquidity Provider and the Trust, the Sponsor, or any Authorized Participant. When seeking to buy Bitcoin in connection with creations or sell Bitcoin in connection with redemptions, the Liquidity Engager will seek to obtain commercially reasonable prices and terms from the approved Liquidity Providers. Once agreed upon, the transaction will generally occur on an ''over-the-counter'' basis.

Price at such time, and carried to the eighth decimal place), by (y) the number of Shares outstanding at such time (with the quotient so obtained calculated to one one-hundred-millionth of one Bitcoin (*i.e.,* carried to the eighth decimal place)), and multiplying such quotient by 10,000 (the ''Basket Amount''). The U.S. dollar value of a Basket is calculated by multiplying the Basket Amount by the Index Price as of the trade date (the ''Basket NAV''). The Basket NAV multiplied by the number of Baskets being created or redeemed is referred to as the ''Total Basket NAV.'' All questions as to the calculation of the Basket Amount will be conclusively determined by the Sponsor and will be final and binding on all persons interested in the Trust. The number of Bitcoins represented by a Share will gradually decrease over time as the Trust's Bitcoins are used to pay the Trust's expenses. As of September 30, 2023, each Share represented approximately 0.0009 of one Bitcoin.

The creation of Baskets requires the delivery to the Trust of the Total Basket Amount and the redemption of Baskets requires the distribution by the Trust of the Total Basket Amount.

Although the Trust creates Baskets only upon the receipt of Bitcoins, and redeems Baskets only by distributing Bitcoins, an Authorized Participant will submit Cash Orders, pursuant to which the Authorized Participant will deposit cash with, or accept cash from, the Transfer Agent in connection with the creation and redemption of Baskets.

Cash Orders will be facilitated by the Transfer Agent and Liquidity Engager, acting other than in its capacity as Sponsor. On an order-by-order basis, the Liquidity Engager will engage one or more Liquidity Providers to obtain or receive Bitcoin in exchange for cash in connection with such order, as described in more detail below.

Each Authorized Participant that submits a Cash Order to create or redeem Baskets will pay a fee based on the Total Basket NAV (the ''Variable Fee''). The Variable Fee is intended to cover all of a Liquidity Provider's expenses in connection with the creation or redemption order, including any Bitcoin trading platform fees that the Liquidity Provider incurs in connection with buying or selling Bitcoins, and the risk of intervening spot Bitcoin market movements. The amount may be changed by the Sponsor in its sole discretion at any time.

In the case of creations, to transfer the Total Basket Amount to the Trust's Digital Asset Account, the Liquidity Provider will transfer Bitcoin to one of the public key addresses associated with the Digital Asset Account and as provided by the Sponsor. In the case of redemptions, the same procedure is conducted, but in reverse, using the public key addresses associated with the wallet of the Liquidity Provider and as provided by such party. All such transactions will be conducted on the Blockchain and parties acknowledge and agree that such transfers may be irreversible if done incorrectly.

Authorized Participants do not pay a transaction fee to the Trust in connection with the creation or redemption of Baskets, but there may be transaction fees associated with the validation of the transfer of Bitcoins by the Bitcoin Network, which will be paid by the Custodian in the case of redemptions and the Authorized Participant or the Liquidity Provider in the case of creations. Service providers may charge Authorized Participants administrative fees for order placement and other services related to creation of Baskets. As discussed above, Authorized Participants will also pay the Variable Fee. Authorized Participants will receive no fees, commissions or other form of compensation or inducement of any kind from either the Sponsor or the Trust and no such person has any obligation or responsibility to the Sponsor or the Trust to effect any sale or resale of Shares.

The following is a summary of the procedures for the creation and redemption of Baskets.

Creation Procedures

On any business day, an Authorized Participant may place an order with the Transfer Agent to create one or more Baskets.

Cash Orders for creation must be placed with the Transfer Agent no later than 1:59:59 p.m., New York time.

The Sponsor may in its sole discretion limit the number of Shares created pursuant to Cash Orders on any specified day without notice to the Authorized Participants and may direct the Marketing Agent to reject any Cash Orders in excess of such capped amount. In exercising its discretion to limit the number of Shares created pursuant to Cash Orders, the Sponsor expects to take into consideration a number of factors, including the availability of Liquidity Providers to facilitate Cash Orders and the cost of processing Cash Orders.

Creations under Cash Orders will take place as follows, where ''T'' is the trade date and each day in the sequence must be a business day:

T	T+1, or T+2, as established at the time of order placement
• The Authorized Participant places a creation order with the Transfer Agent. • The Marketing Agent accepts (or rejects) the creation order, which is communicated to the Authorized Participant by the Transfer Agent. • The Sponsor notifies the Liquidity Provider of the creation order. • The Sponsor determines the Total Basket NAV and any Variable Fee as soon as practicable after 4:00 p.m., New York time.	• The Authorized Participant delivers the Total Basket NAV and any Variable Fee to the Cash Account.[1] • The Liquidity Provider transfers the Total Basket Amount to the Trust's Digital Asset Account. The Trust issues the aggregate number of Shares corresponding to the Baskets ordered by the Authorized Participant, which the Transfer Agent holds for the benefit of the Authorized Participant. • Cash equal to the U.S. dollar value of the Total Basket NAV, plus any Variable Fee, is delivered to the Liquidity Provider from the Cash Account. • The Transfer Agent delivers Shares to the Authorized Participant by crediting the number of Baskets created to the Authorized Participant's DTC account.

[1] The ''Cash Account'' means the account maintained by the Transfer Agent in the name of Grayscale Securities, LLC, designated as ''Special Account for the Exclusive Benefit of Customers of Grayscale Securities, LLC,'' for purposes of receiving cash from, and distributing cash to, Authorized Participants in connection with creations and redemptions pursuant to Cash Orders. For the avoidance of doubt, the Trust shall have no interest (beneficial, equitable or otherwise) in the Cash Account or any cash held therein.

Redemption Procedures

The procedures by which an Authorized Participant can redeem one or more Baskets mirror the procedures for the creation of Baskets. On any business day, an Authorized Participant may place a redemption order specifying the number of Baskets to be redeemed.

The redemption of Shares pursuant to Cash Orders will only take place if approved by the Sponsor in writing, in its sole discretion and on a case-by-case basis. In exercising its discretion to approve the redemption of Shares pursuant to Cash Orders, the Sponsor expects to take into consideration a number of factors, including the availability of Liquidity Providers to facilitate Cash Orders and the cost of processing Cash Orders

Cash Orders for redemption must be placed no later than 1:59:59 p.m., New York time on each business day. The Authorized Participants may only redeem Baskets and cannot redeem any Shares in an amount less than a Basket.

Redemptions under Cash Orders will take place as follows, where ''T'' is the trade date and each day in the sequence must be a business day:

T	T+2 (or T+1 on case-by-case basis, as approved by Sponsor)
• The Authorized Participant places a redemption order with the Transfer Agent. • The Marketing Agent accepts (or rejects) the redemption order, which is communicated to the Authorized Participant by the Transfer Agent. • The Sponsor notifies the Liquidity Provider(s) of the redemption order. • The Sponsor determines the Total Basket NAV and any Variable Fee as soon as practicable after 4:00 p.m., New York time.	• The Authorized Participant delivers Baskets to be redeemed from its DTC account to the Transfer Agent. • The Liquidity Provider delivers the Total Basket NAV, less any Variable Fee, to the Cash Account. • The Transfer Agent cancels the Shares comprising the number of Baskets redeemed by the Authorized Participant. • The Custodian sends the Liquidity Provider the Total Basket Amount and cash equal to the U.S. dollar value of the Total Basket NAV, less any Variable Fee and any other charges and fees payable in connection with the redemption order, is delivered to the Authorized Participant from the Cash Account.

Suspension or Rejection of Orders and Total Basket Amount

The creation or redemption of Shares may be suspended generally, or refused with respect to particular requested creations or redemptions, during any period when the transfer books of the Transfer Agent are closed or if circumstances outside the control of the Sponsor or its delegates make it for all practicable purposes not feasible to process creation orders or redemption orders or for any other reason at any time or from time to time.[74] The Transfer Agent may reject an order or, after accepting an order, may cancel such order if: (i) such order is not presented in proper form as described in the Participant Agreement, (ii) the transfer of the Total Basket Amount comes from an account other than a Bitcoin wallet address that is known to the Custodian as belonging to a Liquidity Provider or (iii) the fulfillment of the order, in the opinion of counsel, might be unlawful, among other reasons. None of the Sponsor or its delegates will be liable for the suspension, rejection or acceptance of any creation order or redemption order.

Availability of Information

The Trust's website (*https://grayscale.com/crypto-products/grayscale-bitcoin-trust/*) will include quantitative information on a per Share basis updated on a daily basis, including, (i) the current NAV per Share daily and the prior business day's NAV per Share and the reported closing price of the Shares; (ii) the mid-point of the bid-ask price[75] as of the time the NAV per Share is calculated (''Bid-Ask Price'') and a calculation of the premium or discount of such price against such NAV per Share; and (iii) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid-Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters (or for as long as the Trust has been trading as an ETP if shorter). In addition, on each business day the Trust's website will provide pricing information for the Shares.

One or more major market data vendors, will provide an intra-day indicative value (''IIV'') per Share updated every 15 seconds, as calculated by the Exchange or a third party financial data provider during the Exchange's Core Trading Session (9:30 a.m. to 4:00 p.m., E.T.).[76] The IIV will be calculated using the same methodology as the NAV per Share of the Trust (as described above), specifically by using the prior day's closing NAV per Share as a base and updating that value during the NYSE Arca Core Trading Session based on the value of the Index during the trading day.

The IIV disseminated during the NYSE Arca Core Trading Session should not be viewed as an actual real-time update of the NAV per Share, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the NYSE Arca Core Trading Session by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The NAV for the Trust will be calculated by the Sponsor once a day and will be disseminated daily to all market participants at the same time. To the extent that the Sponsor has utilized the cascading set of rules described in ''Index Price'' above, the Trust's website will note the valuation methodology used and the price per Bitcoin resulting from such calculation. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association (''CTA'').

Quotation and last sale information for Bitcoin will be widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. In addition, real-time price

[74] Extenuating circumstances outside of the control of the Sponsor and its delegates or that could cause the transfer books of the Transfer Agent to be closed are outlined in the Participant Agreement and include, for example, public service or utility problems, power outages resulting in telephone, telecopy and computer failures, acts of God such as fires, floods or extreme weather conditions, market conditions or activities causing trading halts, systems failures involving computer or other information systems, including any failures or outages of the Bitcoin Network, affecting the Authorized Participant, the Sponsor, the Trust, the Transfer Agent, the Marketing Agent and the Custodian and similar extraordinary events.

[75] The bid-ask price of the Trust is determined using the highest bid and lowest offer on the Consolidated Tape as of the time of calculation of the closing day NAV.

[76] The IIV on a per Share basis disseminated during the Core Trading Session should not be viewed as a real-time update of the NAV, which is calculated once a day.

(and volume) data for Bitcoin is available by subscription from Reuters and Bloomberg. The spot price of Bitcoin is available on a 24-hour basis from major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and volume information, in Bitcoin will be available from major market data vendors and from the trading platforms on which Bitcoin is traded. The normal trading hours for Digital Asset Trading Platforms are 24-hours per day, 365-days per year.

On each business day, the Sponsor will publish the Index Price, the Trust's NAV, and the NAV per Share on the Trust's website as soon as practicable after its determination. If the NAV and NAV per Share have been calculated using a price per Bitcoin other than the Index Price for such Evaluation Time, the publication on the Trust's website will note the valuation methodology used and the price per Bitcoin resulting from such calculation.

The Trust will provide website disclosure of its NAV and NAV per Share daily. The website disclosure of the Trust's NAV and NAV per Share will occur at the same time as the disclosure by the Sponsor of the NAV and NAV per Share to Authorized Participants so that all market participants are provided such portfolio information at the same time. Therefore, the same portfolio information will be provided on the public website as well as in electronic files provided to Authorized Participants. Accordingly, each investor will have access to the current NAV and NAV per Share of the Trust through the Trust's website, as well as from one or more major market data vendors.

The value of the Index, as well as additional information regarding the Index, will be available on a continuous basis at *https://www.coindesk.com/indices.*

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m., E.T. in accordance with NYSE Arca Rule 7.34–E (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6–E, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00, for which the MPV for order entry is $0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.201–E. The trading of the Shares will be subject to NYSE Arca Rule 8.201–E(g), which sets forth certain restrictions on Equity Trading Permit Holders (''ETP Holders'') acting as registered Market Makers in Commodity-Based Trust Shares to facilitate surveillance. The Exchange represents that, for initial and continued listing, the Trust will be in compliance with Rule 10A–3 [77] under the Act, as provided by NYSE Arca Rule 5.3–E. A minimum of 100,000 Shares of the Trust will be outstanding at the commencement of trading on the Exchange.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Trust.[78] Trading in Shares of the Trust will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

The Exchange may halt trading during the day in which an interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV per Share is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV per Share is available to all market participants.

Surveillance

The Exchange represents that trading in the Shares of the Trust will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[79] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement (''CSSA'').[80] The Exchange is also able to obtain information regarding trading in the Shares and the underlying Bitcoin, Bitcoin futures contracts, options on Bitcoin futures, or any other Bitcoin derivative in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market.

Under NYSE Arca Rule 8.201–E(g), an ETP Holder acting as a registered Market Maker in the Shares is required to provide the Exchange with information relating to its accounts for trading in the

[77] 17 CFR 240.10A–3.

[78] *See* NYSE Arca Rule 7.12–E.

[79] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[80] For a list of the current members of ISG, *see www.isgportal.org.* The Exchange notes that not all components of the Trust may trade on markets that are members of ISG or with which the Exchange has in place a CSSA.

underlying commodity, related futures or options on futures, or any other related derivatives. Commentary .04 of NYSE Arca Rule 11.3–E requires an ETP Holder acting as a registered Market Maker, and its affiliates, in the Shares to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments (including the Shares). As a general matter, the Exchange has regulatory jurisdiction over its ETP Holders and their associated persons, which include any person or entity controlling an ETP Holder. To the extent the Exchange may be found to lack jurisdiction over a subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the index, portfolio or reference asset, (b) limitations on index or portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

The Sponsor has represented to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an ''Information Bulletin'' of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) the procedures for creations of Shares in Baskets; (2) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) information regarding how the value of the Index and NAV are disseminated; (4) the possibility that trading spreads and the resulting premium or discount on the Shares may widen during the Opening and Late Trading Sessions, when an updated IIV will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction and (6) trading information.

In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses as described in the Annual Report. The Information Bulletin will disclose that information about the Shares of the Trust is publicly available on the Trust's website. The Information Bulletin will also reference the fact that there is no regulated source of last sale information regarding Bitcoin, that the Commission has no jurisdiction over the trading of Bitcoin as a commodity, and that the CFTC has regulatory jurisdiction over the trading of Bitcoin futures contracts and options on Bitcoin futures contracts.

The Information Bulletin will also discuss any relief, if granted, by the Commission or the staff from any rules under the Act.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) [81] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.201–E. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets. In addition, the Exchange may obtain information regarding trading in the Shares from markets that are members of ISG or with which the Exchange has in place a CSSA. Also, pursuant to NYSE Arca Rule 8.201–E(g), the Exchange is able to obtain information regarding Market Maker accounts for trading in the Shares and the underlying Bitcoin or any Bitcoin derivative through ETP Holders acting as registered Market Makers, in connection with such ETP Holders' proprietary or customer trades through ETP Holders which they effect on any relevant market.

The proposed rule change is also designed to prevent fraudulent and manipulative acts and practices because, although the Digital Asset Trading Platform Market is not inherently resistant to fraud and manipulation, the Index serves as a means sufficient to mitigate the impact of instances of fraud and manipulation on a reference price for Bitcoin. Specifically, the Index provides a better benchmark for the price of Bitcoin than the Digital Asset Trading Platform Market price because it (1) tracks the Digital Asset Trading Platform Market price through trading activity at U.S.-Compliant Trading Platforms; (2) mitigates the impact of instances of fraud, manipulation and other anomalous trading activity in real-time through systematic adjustments; (3) is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events; and (4) mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific trading platform through a cross-trading platform composite index rate. The Trust has used the Index to price the Shares for more than seven years, and the Sponsor believes the Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity from impacting the Bitcoin reference rate, (ii) provide a real-time, volume-weighted fair value of Bitcoin and (iii) appropriately handle and adjust for non-market related events, such that efforts to manipulate the price of Bitcoin would have had a negligible effect on the pricing of the Trust, due to the controls embedded in the structure of the Index. In addition,

[81] 15 U.S.C. 78f(b)(5).

certain of the Index's Constituent Trading Platforms also have or have begun to implement market surveillance infrastructure to further detect, prevent, and respond to fraud, attempted fraud, and similar wrongdoing, including market manipulation. The proposed rule change is also designed to prevent fraudulent and manipulative acts and practices based on the existence of the CME futures market as a large, surveilled and regulated market that is closely connected with the spot market for Bitcoin and through which the Exchange could obtain information to assist in detecting and deterring potential fraud or manipulation.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that there is a considerable amount of Bitcoin price and market information available on public websites and through professional and subscription services. Investors may obtain, on a 24-hour basis, Bitcoin pricing information based on the spot price for Bitcoin from various financial information service providers. The closing price and settlement prices of Bitcoin are readily available from the Digital Asset Trading Platforms and other publicly available websites. In addition, such prices are published in public sources, or on-line information services such as Bloomberg and Reuters. The NAV per Share will be calculated daily and made available to all market participants at the same time. The Trust will provide website disclosure of its NAV and NAV per Share daily. One or more major market data vendors will disseminate for the Trust on a daily basis information with respect to the most recent NAV per Share and Shares outstanding. In addition, if the Exchange becomes aware that the NAV per Share is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV per Share is available to all market participants. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The IIV will be widely disseminated on a per Share basis every 15 seconds during the NYSE Arca Core Trading Session (normally 9:30 a.m., E.T., to 4:00 p.m., E.T.) by one or more major market data vendors. The Exchange represents that the Exchange may halt trading during the day in which an interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a CSSA. In addition, as noted above, investors will have ready access to information regarding the Trust's NAV per Share, IIV, and quotation and last sale information for the Shares.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of an additional type of exchange-traded product, and the first such product based on Bitcoin, which will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSEARCA–2021–90 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–NYSEARCA–2021–90. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NYSEARCA–2021–90 and should be submitted on or before February 6, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[82]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–00636 Filed 1–12–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2 p.m. on Thursday, January 18, 2024.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

[82] 17 CFR 200.30–3(a)(12).

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov*.

The General Counsel of the Commission, or her designee, has certified that, in her opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to examinations and enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

(Authority: 5 U.S.C. 552b)

Dated: January 11, 2024.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2024–00756 Filed 1–11–24; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99301; File No. SR–CBOE–2024–001]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule

January 9, 2024.

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 January 2, 2023, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule in connection with certain Lead Market-Maker (''LMM'') Incentive Programs, effective January 2, 2024. Specifically, the Exchange proposes to amend the following: the Mini Russell 2000 Index (''MRUT'') options LMM Incentive Program; the Nanos S&P 500 (''NANOS'') Index options LMM Incentive Program; the Global Trading Hours (''GTH'') Cboe Volatility Index (''VIX'') options and VIX Weekly (''VIXW'') options LMM Incentive Programs; and the GTH Mini-SPX Index (''XSP'') LMM Incentive Programs.

Each LMM Incentive Program provides a rebate to Trading Permit Holders (''TPHs'') with LMM appointments to the respective incentive program that meet certain quoting standards in the applicable series in a month. The Exchange notes that meeting or exceeding the quoting standards (both current and as proposed; described in further detail below) in each of the LMM Incentive Program products to receive the applicable rebate (both currently offered and as proposed; described in further detail below) is optional for an LMM appointed to a program. Particularly, an LMM appointed to an incentive program is eligible to receive the corresponding rebate if it satisfies the applicable quoting standards, which the Exchange believes encourages appointed LMMs to provide liquidity in the applicable class and trading session (*i.e.,* Regular Trading Hours (''RTH'') or GTH). The Exchange may consider other exceptions to the programs' quoting standards based on demonstrated legal or regulatory requirements or other mitigating circumstances. In calculating whether an LMM appointed to an incentive program meets the applicable program's quoting standards each month, the Exchange excludes from the calculation in that month the business day in which the LMM missed meeting or exceeding the quoting standards in the highest number of the applicable series.

MRUT LMM Incentive Program

The Exchange first proposes to amend the current MRUT LMM Incentive Program. Currently, the program provides that if the appointed LMM in MRUT provides continuous electronic quotes during RTH that meet or exceed the program's heightened quoting standards[3] in at least 97% of the series 90% of the time in a given month, the LMM will receive a rebate for that month in the amount of $15,000 (or pro-rated amount if an appointment begins after the first trading day of the month or ends prior to the last trading day of the month). In addition to the rebate, if the appointed LMM meets or exceeds the above heightened quoting standards in a given month, the LMM will receive the Monthly average daily volume (''ADV'') Payment amount that corresponds to the level of ADV provided by the LMM in MRUT for that

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Located in the ''MRUT LMM Incentive Program'' table in the Fees Schedule.

month per the program's Volume Incentive Pool.

The Exchange now proposes to amend the time qualification requirement for the MRUT LMM Incentive Program. Specifically, the Exchange proposes to update the time qualification requirement to require the appointed LMM to provide continuous electronic quotes during RTH that meet or exceed the heightened quoting standards in at least 97% the MRUT series 88% of the time in a given month in order to receive the rebate, thereby decreasing the time qualification requirement by 2%.

The Exchange also proposes to update the rebate amount received for meeting the heightened quoting standards, as proposed, in a given month in MRUT, by decreasing the rebate amount from $15,000 to $5,000.

Additionally, the Exchange proposes to remove the MRUT Volume Incentive Pool program from the Fees Schedule, as the Exchange no longer wishes to offer the additional volume-based incentive program.

NANOS LMM Incentive Program

Next, the Exchange proposes to amend the current NANOS LMM Incentive Program.[4] Currently, the NANOS LMM Incentive Program provides that, for NANOS, if the appointed LMM provides continuous electronic quotes during RTH that meet or exceed the heightened quoting standards [5] in at least 98% of the NANOS series 90% of the time in a given month, the LMM will receive a rebate for that month in the amount of $17,500 (or pro-rated amount if an appointment begins after the first trading day of the month or ends prior to the last trading day of the month). The heightened quoting standards are based on the VIX Index value at the prior market close, with three separate value categories (*i.e.,* VIX value at prior close less than 20, VIX value at prior close from 20 to 30, and VIX value at prior close greater than 30). In addition to the rebate, if the appointed LMM meets or exceeds the above heightened quoting standards in a given month, the LMM will receive the Monthly ADV Payment amount that corresponds to the level of ADV provided by the LMM in NANOS for that month per the program's Volume Incentive Pool.

The Exchange proposes to restructure the NANOS LMM Incentive Program and adopt a new set of heightened quoting standards. The VIX Index value categories and heightened quoting standards proposed for NANOS options are as follows in the table below:

Premium level	Width	Size
VIX Value at Prior Close <30		
$0.00–$2.00	$0.10	500
$2.01–$5.00	0.12	500
$5.01–$15.00	0.20	250
Greater than $15.00	0.31	100
VIX Value at Prior Close from ≥30		
$0.00–$2.00	0.16	300
$2.01–$5.00	0.17	300
$5.01–$15.00	0.31	150
Greater than $15.00	0.38	100

The Exchange also proposes to amend the series qualification requirement for the NANOS LMM Incentive Program. Specifically, the Exchange proposes to update the series qualification requirement to require the appointed LMM to provide continuous electronic quotes during RTH that meet or exceed the heightened quoting standards in at least 97% the NANOS series 90% of the time in a given month in order to receive the rebate, thereby decreasing the series qualification requirement by 1%.

The Exchange proposes to update the rebate amount received for meeting the heightened quoting standards in a given month in NANOS options, by decreasing the rebate amount from $17,500 to $5,000. Additionally, the Exchange proposes to remove the NANOS Volume Incentive Pool program from the Fees Schedule, as the Exchange no longer wishes to offer the additional volume-based incentive program.

VIX/VIXW LMM Incentive Programs

The Exchange proposes to amend its GTH VIX/VIXW LMM Incentive Programs. Currently, the first GTH VIX/VIXW LMM Incentive Program ("GTH1 VIX/VIXW LMM Incentive Program") provides that if an LMM in VIX/VIXW provides continuous electronic quotes during GTH from 7:15 p.m. CST to 2:00 a.m. CST ("GTH1") that meet or exceed the basic quoting standards [6] in at least 99% of each of the VIX and VIXW series, 90% of the time in a given month, the LMM will receive a rebate for that month in the amount of $20,000 for VIX and $15,000 for VIXW (or pro-rated amount if an appointment begins after the first trading day of the month or ends prior to the last trading day of the month) for that month. Additionally, if the appointed LMM provides continuous electronic quotes during GTH that meet or exceed the heightened quoting standards [7] in at least 99% of the VIX series, 90% of the time in a given month, the LMM will receive a rebate for that month of $0.02 per VIX/VIXW contract executed in its Market-Maker capacity during RTH.

The second GTH VIX/VIXW LMM Incentive Program ("GTH2 VIX/VIXW LMM Incentive Program") provides that if the appointed LMM provides continuous electronic quotes during GTH from 2:00 a.m. CST to 8:15 a.m. CST ("GTH2") that meet or exceed the basic quoting standards [8] in at least 99% of each of the VIX and VIXW series, 90% of the time in a given month, the LMM will receive a rebate for that month in the amount of $20,000 for VIX and $15,000 for VIXW (or pro-rated amount if an appointment begins after the first trading day of the month or ends prior to the last trading day of the

[4] As part of the proposed changes, the Exchange proposes to remove a reference to heightened quoting standards specific to March 2022, as such reference is now outdated.

[5] Located in the "NANOS LMM Incentive Program" table in the Fees Schedule.

[6] Located in the "GTH1 VIX/VIXW LMM Incentive Program" table in the Fees Schedule.

[7] *Id.*

[8] Located in the "GTH2 LMM Incentive Program" table in the Fees Schedule.

month) for that month. Additionally, if the appointed LMM provides continuous electronic quotes during GTH that meet or exceed the heighted quoting standards [9] in at least 99% of the VIX series, 90% of the time in a given month, the LMM will receive a rebate for that month of $0.02 per VIX/VIXW contract executed in its Market-Maker capacity during RTH.

The Exchange proposes to restructure the GTH1 and GTH2 VIX/VIXW LMM Incentive Programs by combining the two GTH programs into a singular GTH VIX/VIXW LMM Incentive Program, with one set of basic quoting standards for VIX options and one set of basic quoting standards for VIXW options. The proposed program provides that, if the appointed LMM provides continuous electronic quotes during GTH (*i.e.,* from 7:15 p.m. CT to 8:15 a.m. CT the next day) that meet or exceed the basic quoting standards [10] in at least 95% of each of the VIX and VIXW series, 90% of the time in a given month, the LMM will receive a rebate for that month in the amount of $25,000 for VIX and $10,000 for VIXW (or pro-rated amount if an appointment begins after the first trading day of the month or ends prior to the last trading day of the month) for that month.

The Exchange notes that the current basic quoting standards for the GTH1 VIX/VIXW LMM Incentive Program (which are substantially similar to the basic quoting standards for the GTH2 VIX/VIXW LMM Incentive Program, the only difference being that the current GTH1 basic quoting standards (*i.e.,* the proposed GTH basic quoting standards) have slightly lower size requirements in certain instances than the current GTH2 basic quoting standards) will be the basic quoting standards for the new combined GTH VIX/VIXW LMM Incentive Program. The new proposed rebate amounts represent a slight increase of $5,000 for VIX options and a slight decrease of $5,000 for VIXW options, as compared to the current rebates in place for the GTH1 and GTH2 VIX/VIXW LMM Incentive Programs. There are no additional heightened quoting standards with additional rebate(s) under the proposed program.

The proposed basic quoting standards for VIX options are as follows in the table below:

Premium level	Expiring less than 15 days		Near term 15 days to 60 days		Mid term 61 days to 180 days		Long term 181 days or greater	
	Width	Size	Width	Size	Width	Size	Width	Size
VIX Value at Prior Close <18								
$0.00–$1.00	$0.35	30	$0.25	40	$0.35	30	$0.80	5
$1.01–$3.00	0.50	15	0.35	25	0.50	15	0.90	5
$3.01–$5.00	0.60	15	0.35	15	0.60	10	1.00	5
$5.01–$10.00	1.00	10	0.80	10	1.30	10	2.00	5
$10.01–$30.00	2.00	5	1.50	5	2.00	5	3.00	3
Greater than $30.00	5.00	3	3.00	3	5.00	3	5.00	3
VIX Value at Prior Close from 18–25								
$0.00–$1.00	0.50	15	0.35	30	0.50	15	1.00	5
$1.01–$3.00	0.50	10	0.50	20	0.70	10	1.00	5
$3.01–$5.00	0.80	5	0.50	15	0.80	5	1.30	5
$5.01–$10.00	1.50	5	1.00	5	2.00	5	2.20	5
$10.01–$30.00	3.00	1	2.50	1	3.00	1	5.00	1
Greater than $30.00	5.00	1	5.00	1	5.00	1	10.00	1
VIX Value at Prior Close from >25								
$0.00–$1.00	0.80	10	0.50	10	0.60	10	1.20	5
$1.01–$3.00	1.00	10	0.75	10	1.00	10	1.20	5
$3.01–$5.00	1.20	5	0.90	10	1.20	5	1.80	5
$5.01–$10.00	2.00	5	1.50	5	2.50	5	3.00	3
$10.01–$30.00	5.00	1	5.00	1	5.00	1	7.00	1
Greater than $30.00	10.00	1	10.00	1	10.00	1	10.00	1

The proposed basic quoting standards for VIXW options are as follows in the table below:

Premium level	Less than 21 days to expiration		21 days or greater to expiration	
	Width	Size	Width	Size
$0.00–$1.00	$1.00	10	$1.50	10
$1.01–$3.00	1.50	10	2.50	10
$3.01–$5.00	2.50	3	4.00	3
$5.01–$10.00	4.00	1	6.00	1
$10.01–$30.00	6.00	1	10.00	1

[9] *Id.*

[10] Located in the proposed ''GTH VIX/VIXW LMM Incentive Program'' table in the Fees Schedule.

Premium level	Less than 21 days to expiration		21 days or greater to expiration	
	Width	Size	Width	Size
Greater than $30.00	10.00	1	10.00	1
VIX Value at Prior Close from 18–25				
$0.00–$1.00	1.50	5	2.00	5
$1.01–$3.00	2.50	5	4.00	5
$3.01–$5.00	4.00	1	5.00	1
$5.01–$10.00	6.00	1	8.00	1
$10.01–$30.00	10.00	1	10.00	1
Greater than $30.00	10.00	1	10.00	1
VIX Value at Prior Close from >25				
$0.00–$1.00	10.00	1	10.00	1
$1.01–$3.00	10.00	1	10.00	1
$3.01–$5.00	10.00	1	10.00	1
$5.01–$10.00	10.00	1	10.00	1
$10.01–$30.00	10.00	1	10.00	1
Greater than $30.00	10.00	1	10.00	1

GTH1 and GTH2 XSP LMM Incentive Programs

Lastly, the Exchange proposes to amend the XSP LMM Incentive Programs. The GTH1 XSP LMM Incentive Program provides that if the appointed LMM provides continuous electronic quotes during GTH1 that meet or exceed the heightened quoting standards [11] in at least 85% of the series 90% of the time in a given month, the LMM will receive (i) a rebate for that month in the amount of $20,000 (or pro-rated amounts if an appointment begins after the first trading day of the month or ends prior to the last trading day of the month) and (ii) a rebate for that month of $0.03 per XSP contract executed in a Market-Maker capacity which provide liquidity in the Simple Book during RTH. The GTH2 XSP LMM Incentive Program provides that if an LMM appointed to the Program provides continuous electronic quotes during GTH2 that meet or exceed the heightened quoting standards [12] (which are the same as the heightened quoting standards in the GTH1 XSP LMM Incentive Program) in at least 85% of the series 90% of the time in a given month, the LMM will receive a payment for that month in the amount of $25,000 (or pro-rated amount if an appointment begins after the first trading day of the month or ends prior to the last trading day of the month). For each of the XSP LMM Incentives Programs, the heightened quoting standards are based on the VIX Index value at the prior market close, with three separate value categories (*i.e.,* VIX value at prior close less than 20, VIX value at prior close from 20 to 30, and VIX value at prior close greater than 30).

The Exchange proposes to restructure the GTH1 and GTH2 XSP LMM Incentive Programs and adopt a new set of heightened quoting standards (which will apply to both programs). The proposed VIX Index value categories and heightened quoting standards for XSP options during each of GTH1 and GTH2 are as follows in the table below:

Premium level	Expiring 7 days or less		Near term 8 days to 60 days		Mid term 61 days to 270 days		Long term 271 to 500 days	
	Width	Size	Width	Size	Width	Size	Width	Size
VIX Value at Prior Close <30								
$0.01–$1.00	$0.10	5	$0.11	5	$0.15	5	$0.25	5
$1.01–$5.00	0.15	5	0.15	5	0.20	5	0.30	5
$5.01–$8.00	0.25	5	0.30	5	0.40	5	0.60	5
$8.01–$12.00	0.60	5	0.80	5	1.10	5	1.35	5
$12.01–$20.00	1.00	5	1.30	5	1.80	5	2.20	5
Greater than $20.00	2.00	5	2.40	5	2.80	5	3.60	5
VIX Value at Prior Close ≥30								
$0.01–$1.00	0.15	5	0.16	5	0.20	5	0.30	5
$1.01–$5.00	0.18	5	0.20	5	0.25	5	0.40	5
$5.01–$8.00	0.25	5	0.30	5	0.45	5	0.70	5
$8.01–$12.00	0.60	5	0.90	5	1.20	5	1.50	5
$12.01–$20.00	1.20	5	1.50	5	2.00	5	2.40	5
Greater than $20.00	2.40	5	2.80	5	3.20	5	4.00	5

[11] Located in the ''GTH1 XSP LMM Incentive Program'' table in the Fees Schedule.

[12] Located in the ''GTH2 XSP LMM Incentive Program'' table in the Fees Schedule.

The Exchange also proposes to increase the rebates offered by the GTH1 and GTH2 XSP LMM Incentive Programs to an LMM appointed to the program for meeting the heightened quoting standards in a given month. The Exchange proposes to decrease such rebates from $20,000 to $15,000 for the GTH1 XSP LMM Incentive Program, and from $25,000 to $15,000 for the GTH2 XSP LMM Incentive Program. Additionally, for the GTH1 XSP LMM Incentive Program, the Exchange proposes to eliminate the additional credit of $0.03 per contract applied to all XSP contracts executed in a Market-Maker capacity which provide liquidity in the Simple Book during RTH.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[13] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[14] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[15] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[16] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes that it is reasonable to amend the monthly rebate amounts applicable to the MRUT, NANOS, GTH VIX/VIXW, and GTH1 and GTH2 XSP LMM Incentive Programs. The Exchange notes that LMMs appointed to the respective programs will continue to receive a monthly rebate. The Exchange believes that the proposed rebate amounts are reasonably designed to continue to incentivize an LMM appointed to the respective program to meet the applicable quoting standards for MRUT, NANOS, VIX/VIXW, and XSP options, thereby providing liquid and active markets, which facilitates tighter spreads, increased trading opportunities, and overall enhanced market quality to the benefit of all market participants.

The Exchange further believes that the proposed rule change to amend the rebate amounts received for MRUT ($5,000), NANOS ($5,000), VIX ($25,000), VIXW ($10,000), XSP ($15,000 for each of GTH1 and GTH2) options is reasonable because they are comparable to the rebates offered by other LMM Incentive Programs offered by the Exchange. For example, the SPESG LMM Program currently offers $10,000 to appointed LMMs for SPESG options if the heightened quoting standards are met in a given month. The Exchange believes the amount of the rebate for each LMM Program remains commiserate with the quoting requirements of each of the LMM Incentive Programs, of which some standards are being restructured, as proposed.

Similarly, the Exchange believes that the proposed rule changes to eliminate the volume incentive pool programs for the MRUT and NANOS LMM Incentive Programs and to eliminate the additional per contract credit incentives for the GTH VIX/VIXW and GTH1 XSP LMM Incentive Programs are reasonable because it is consistent with the rebate structures currently in place for other LMM Incentive Programs, in that most do not offer a volume incentive pool program or additional per contract credit incentive. The Exchange notes that it is not required to maintain the volume incentive pool or additional per contract credit incentive, and now wishes to eliminate them from the respective programs.

The Exchange believes it is reasonable to decrease the series requirement for the NANOS and VIX/VIXW LMM Incentive Programs, and decrease the time requirement for MRUT LMM Incentive Program, as such changes are reasonably designed to slightly ease the difficulty in meeting the heightened quoting standards offered under these programs (for which an appointed LMM receives the respective rebates), which, in turn, provides increased incentive for LMMs appointed to these programs to provide significant liquidity in NANOS, VIX/VIXW, and MRUT options. Such liquidity benefits all market participants by providing more trading opportunities, tighter spreads, and added market transparency and price discovery, and signals to other market participants to direct their order flow to those markets, thereby contributing to robust levels of liquidity.

Additionally, the Exchange believes that it is reasonable to restructure the VIX Index value categories and amend widths and sizes in the heightened quoting standards under the NANOS, VIX/VIXW and XSP LMM Incentive Programs, as these proposed new quoting requirements are overall reasonably designed to continue to encourage LMMs appointed to the respective incentive programs to provide significant liquidity in NANOS, VIX/VIXW and XSP options, which benefits investors overall by providing more trading opportunities, tighter spreads, and added market transparency and price discovery. Further, by restructuring the programs, the Exchange believes that the proposed rule changes are reasonably designed to reflect then-current market conditions and market characteristics in NANOS, VIX/VIXW and XSP options where the VIX Index may be experiencing higher volatility, and thus encourage LMMs appointed to the programs to meet the quoting standards to receive a rebate. Additionally, the proposed rule change is, in light of the restructuring of VIX Index value categories, generally designed to further align the lesser premium quote widths and size standards for NANOS, VIX/VIXW and XSP options with the more expensive premium quote width and size standards, in order to incentivize an increase in quoting activity and the provision of tighter markets for all premium levels.

The Exchange also believes the proposed change to adopt a singular GTH VIX/VIXW LMM Incentive Program (as compared to separate GTH1 and GTH2 VIX/VIXW LMM Incentive Programs) is reasonable. The Exchange believes the proposed changes are reasonably designed to continue to incentivize appointed LMMs to meet the proposed quoting standards for VIX/VIXW, thereby providing liquid and active markets, which facilitates tighter spreads, increased trading opportunities, and overall enhanced market quality to the benefit of all market participants. Additionally, the Exchange believes that the proposed widths and sizes for the singular program are reasonable because they remain aligned with the current heightened standards in each program.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] *Id.*

[16] 15 U.S.C. 78f(b)(4).

The Exchange believes that the proposed changes to the LMM Incentive Programs are equitable and not unfairly discriminatory. Specifically, the changes to the LMM Incentive Program will apply equally to any and all TPHs with LMM appointments to the MRUT, NANOS, GTH VIX/VIXW, and GTH1 and GTH2 XSP LMM Incentive Programs, as applicable, that seek to meet the programs' quoting standards in order to receive the rebates (as proposed) offered under each respective program. The Exchange additionally notes that, if an LMM appointed to any of the LMM Incentive Programs does not satisfy the corresponding heightened quoting standard for any given month, then it simply will not receive the rebate offered by the respective program for that month.

Regarding each of the LMM Incentive Programs generally, the Exchange believes it is reasonable, equitable and not unfairly discriminatory to continue to offer these financial incentives, including as amended, to LMMs appointed to the programs, because it benefits all market participants trading in the corresponding products during RTH (for MRUT and NANOS) and GTH (for VIX/VIXW and XSP). These incentive programs encourage the LMMs appointed to such programs to satisfy the applicable quoting standards, which may increase liquidity and provide more trading opportunities and tighter spreads. Indeed, the Exchange notes that these LMMs serve a crucial role in providing quotes and the opportunity for market participants to trade MRUT, NANOS, VIX/VIXW, and XSP options, as applicable, which can lead to increased volume, providing for robust markets. The Exchange ultimately offers the LMM Incentive Programs, as amended, to sufficiently incentivize LMMs appointed to each incentive program to provide key liquidity and active markets in the corresponding program products during the corresponding trading sessions, and believes that these incentive programs, as amended, will continue to encourage increased quoting to add liquidity in each of the corresponding program products, thereby protecting investors and the public interest. The Exchange also notes that an LMM appointed to an incentive program may undertake added costs each month to satisfy that heightened quoting standards (*e.g.,* having to purchase additional logical connectivity).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. First, the Exchange believes the proposed rule change does impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed changes to existing LMM Incentive Programs will apply to all LMMs appointed to the applicable program classes (*i.e.,* MRUT, NANOS, VIX/VIXW, and XSP) in a uniform manner. To the extent these LMMs appointed to an incentive program receive a benefit that other market participants do not, as stated, these LMMs in their role as Mark-Makers on the Exchange have different obligations and are held to different standards. For example, Market-Makers play a crucial role in providing active and liquid markets in their appointed products, thereby providing a robust market which benefits all market participants. Such Market-Makers also have obligations and regulatory requirements that other participants do not have. The Exchange also notes that an LMM appointed to an incentive program may undertake added costs each month to satisfy that heightened quoting standards (*e.g.,* having to purchase additional logical connectivity). The Exchange also notes that the incentive programs are designed to attract additional order flow to the Exchange, wherein greater liquidity benefits all market participants by providing more trading opportunities, tighter spreads, and added market transparency and price discovery, and signals to other market participants to direct their order flow to those markets, thereby contributing to robust levels of liquidity. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small." [17]

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as the LMM Incentive Programs apply only to transactions in products exclusively listed on the Exchange. As noted above, the incentive programs are designed to attract additional order flow to the Exchange, wherein greater liquidity benefits all market participants by providing more trading opportunities, tighter spreads, and added market transparency and price discovery, and signals to other market participants to direct their order flow to those markets, thereby contributing to robust levels of liquidity. The Exchange notes that it operates in a highly competitive market. TPHs have numerous alternative venues that they may participate on and direct their order flow, including 16 other options exchanges, as well as off-exchange venues, where competitive products are available for trading. Based on publicly available information, no single options exchange has more than 12% of the market share.[18] Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange, and, additionally off-exchange venues, if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies." [19] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .".[20] Accordingly, the Exchange does not believe its proposed

[17] *See* Securities Exchange Act Release No. 51808, 70 FR 37495, 37498–99 (June 29, 2005) (S7–10–04) (Final Rule).

[18] *See* Cboe Global Markets U.S. Options Market Volume Summary, Month-to-Date (December 18, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[19] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[20] *See NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [21] and paragraph (f) of Rule 19b–4 [22] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will 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:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CBOE–2024–001 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–CBOE–2024–001. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CBOE–2024–001 and should be submitted on or before February 6, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–00639 Filed 1–12–24; 8:45 am]

BILLING CODE 8011–01–P

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. IC–35087; 812–15495]

Elevation Series Trust and Sovereign's Capital Management, LLC

January 9, 2024.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 15(a) of the Act, as well as from certain disclosure requirements in rule 20a–1 under the Act, Item 19(a)(3) of Form N–1A, Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A under the Securities Exchange Act of 1934, and Sections 6–07(2)(a), (b), and (c) of Regulation S–X (''Disclosure Requirements'').

SUMMARY OF APPLICATION: The requested exemption would permit Applicants to enter into and materially amend subadvisory agreements with certain subadvisors without shareholder approval and grant relief from the Disclosure Requirements as they relate to fees paid to the subadvisors.

APPLICANTS: Elevation Series Trust and Sovereign's Capital Management, LLC.

FILING DATES: The application was filed on August 10, 2023, and amended on November 30, 2023.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on February 5, 2024, and should be accompanied by proof of service on the Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: JoAnn M. Strasser, *JoAnn.Strasser@thompsonhine.com* and Christopher Moore, Elevation Series Trust c/o Sovereign's Capital Management, LLC, 1700 Broadway, Suite 1850, Denver, CO 80290.

FOR FURTHER INFORMATION CONTACT: Jean E. Minarick, Senior Counsel, or Kyle R. Ahlgren, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' amended application, dated November 30, 2023, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field on the SEC's EDGAR system.

The SEC's EDGAR system may be searched at *https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99299; File No. SR–CboeBZX–2023–107]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Make Permanent Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options

January 9, 2024.

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 December 26, 2023, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to make permanent the operation of its programs that allow the Exchange to list options on the Mini-SPX Index (''XSP options'') with P.M.-settlement and to list broad-based index options with nonstandard expirations (''Nonstandard Expirations Pilot Program'').

The text of the proposed rule change is available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make permanent its XSPPM Pilot Program and its Nonstandard Expirations Pilot Program. Specifically, the Exchanges proposes to be permitted to list on a permanent basis (1) XSP options with third-Friday-of-the-month expiration dates whose exercise settlement value is derived from closing prices on the last trading day prior to expiration (''P.M.-settled'') (''XSPPM options'') and (2) options on broad-based indexes that are P.M.-settled and expire (a) on any Monday, Wednesday, or Friday (other than the third Friday-of-the-month or days that coincide with an end-of-month (''EOM'') expiration) (''Weekly Expirations'') and (b) on the last day of the trading month (''EOM Expirations'').[3] The Securities and Exchange Commission (the ''Commission'') approved a rule change that established a pilot program under which the Exchange is permitted to list (1) XSP options with third-Friday-of-the-month expiration dates that are P.M.-settled (the ''XSPPM Pilot Program'') and (2) options on broad-based indexes with Weekly Expirations and Monthly Expirations (the ''Nonstandard Expirations Pilot Program'' and, with the XSPPM Pilot Program, the ''Pilot Programs'').[4] XSPPM Options, Weekly Expirations, and EOMs are cash-settled and have European-style exercise. The Pilot Programs became effective on a pilot basis for a period of twelve months from the date of the approval of the Pilot Programs[5] and were subsequently extended.[6] Pursuant to Rule 29.11(a)(6) and (j)(3), the Pilot Programs are scheduled to expire on May 6, 2024. The Exchange hereby requests that the Commission approve the Pilot Programs on a permanent basis.

By way of background, when cash-settled[7] index options were first introduced in the 1980s, settlement was based on the closing value of the underlying index on the option's expiration date. The Commission later became concerned about the impact of P.M.-settled, cash-settled index options

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In addition to proposing to delete the language in Rule 29.11(a)(6) and (j)(3) regarding the expiration date of the Pilot Programs (and renumbering Rule 29.11(j)(4) to be subparagraph (3)), the Exchange proposes to delete the word ''pilot'' from the heading of Rule 29.11(j) and make a corresponding change to Rules 29.11(c)(5)(C). The Exchange also proposes a nonsubstantive change to the introductory paragraph of Rule 29.11(c) to change an incorrect semicolon to a colon.

[4] *See* Securities Exchange Act Release No. 85181 (February 22, 2019), 84 FR 6842 (February 28, 2019) (SR–CboeBZX–2018–066) (''Pilot Programs Approval Order''). Under the terms of the Nonstandard Expirations Pilot Program, Weekly Expirations and EOMs are permitted on any broad-based index that is eligible for regular options trading.

[5] *See id.*

[6] *See* Securities Exchange Act Release Nos. 88052 (January 27, 2020), 85 FR 5753 (January 31, 2020) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeBZX–2020–004); 88788 (April 30, 2020), 85 FR 27008 (May 6, 2020) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeBZX–2020–038); 90255 (October 22, 2020), 85 FR 68378 (October 28, 2020) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeBZX–2020–076); 91699 (April 28, 2021), 86 FR 23767 (May 4, 2021) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeBZX–2021–031); 93454 (October 28, 2021), 86 FR 60727 (November 3, 2021) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeBZX–2021–072); 94802 (April 27, 2022), 87 FR 26240 (May 3, 2022) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeBZX–2022–029); 96208 (November 2, 2022), 87 FR 67524 (November 8, 2022) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeBZX–2022–052); 97442 (May 5, 2023), 88 FR 30362 (May 11, 2023) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeBZX–2023–034); and 98635 (September 28, 2023), 88 FR 68715 (October 4, 2023) (SR–CboeBZX–2023–073) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options).

[7] The seller of a ''cash-settled'' index option pays out the cash value of the applicable index on expiration or exercise. A ''physically settled'' option, like equity and ETF options, involves the transfer of the underlying asset rather than cash. *See* Characteristics and Risks of Standardized Options, available at: *https://www.theocc.com/Company-Information/Documents-and-Archives/Options-Disclosure-Document.*

on the markets for the underlying stocks at the close on expiration Fridays. Specifically, certain episodes of price reversals around the close on quarterly expiration dates attracted the attention of regulators to the possibility that the simultaneous expiration of index futures, futures options, and options might be inducing abnormal volatility in the index value around the close.[8] Academic research at the time provided at least some evidence suggesting that futures and options expirations contributed to excess volatility and reversals around the close on those days.[9] In light of the concerns with P.M. settlement and to help ameliorate the price effects associated with expirations of P.M.-settled, cash-settled index products, in 1987, the Commodity Futures Trading Commission (''CFTC'') approved a rule change by the Chicago Mercantile Exchange (''CME'') to provide for A.M. settlement [10] for index futures, including futures on the S&P 500.[11] The Commission subsequently approved a rule change by Cboe Options, Inc. (''Cboe Options'') to list and trade A.M.-settled SPX options.[12] In 1992, the Commission approved Cboe Options' proposal to transition all of its European-style cash-settled options on the S&P 500 Index to A.M. settlement;[13] however, in 1993, the Commission approved a rule allowing Cboe Options to list P.M.-settled options on certain broad-based indices, including the S&P 500, expiring at the end of each calendar quarter (''Quarterly Index Expirations'') (since adopted as permanent).[14] Starting in 2006, the Commission approved numerous rule changes, on a pilot basis, permitting the Cboe Options to introduce other index options, including SPX options, with P.M.-settlement. These include P.M.-settled index options expiring weekly (other than the third Friday of the month) and at the end of each month (''EOM''),[15] P.M.-settled options on the S&P 500 Index that expire on the third Friday-of-the-month (''SPXPM''),[16] as well as P.M.-settled Mini-SPX Index (''XSP'') options and Mini-Russell 2000 Index (''MRUT'') options expiring on the third Friday of the month.[17] As noted above, the Commission approved a rule to allow the Exchange to list XSPPM options and broad-based index options with Weekly and EOM Expirations.[18] The Commission recently approved proposed rule changes to make Cboe Options' pilot programs to list P.M.-settled index options (including pilot programs substantively the same as the Pilot Programs) permanent.[19]

As stated above, since its inception in 2019, the Exchange has continuously extended the Pilot Program periods and, during the course of the Pilot Programs and in support of the extensions of the Pilot Programs, the Exchange has submitted reports to the Commission regarding the Pilot Programs that detail the Exchange's experience with the Pilot Programs, pursuant to the Pilot Programs Approval Order.[20] Specifically, the Exchange has submitted annual Pilot Program reports to the Commission that contain an analysis of volume, open interest, and trading patterns. In addition, for series that exceed certain minimum open interest parameters, the annual report would provide analysis of index price volatility and, if needed, share trading activity. The Exchange has also submitted periodic interim reports that contain some, but not all, of the information contained in the annual reports (together with the periodic interim reports, the ''pilot reports'').[21]

The pilot reports for the XSPPM Pilot Program contained the following volume and open interest data:

(1) monthly volume aggregated for all trades;

(2) monthly volume aggregated by expiration date;

(3) monthly volume for each individual series;

(4) month-end open interest aggregated for all series;

(5) month-end open interest for all series aggregated by expiration date; and

(6) month-end open interest for each individual series.

The pilot reports for the Nonstandard Expirations Pilot Program contained the following volume and open interest data:

(1) monthly volume aggregated for all Weekly and EOM trades;

(2) volume in Weekly and EOM series aggregated by expiration date;

(3) month-end open interest aggregated for all Weekly and EOM series;

(4) month-end open interest for EOM series aggregated by expiration date and week-ending open interest for Weekly series aggregated by expiration date;

(5) ratio of monthly aggregate volume in Weekly and EOM series to total monthly class volume; and

(6) ratio of month-end open interest in EOM series to total month-end class open interest and ratio of week-ending open interest in EOW series to total week-ending open interest.

The annual reports for the Pilot Programs also contained the information noted in respective Items (1) through (6) above for Expiration Friday, A.M.-settled series, if applicable, for the

[8] The close of trading on the quarterly expiration Friday (*i.e.,* the third Friday of March, June, September and December), when options, index futures, and options on index futures all expire simultaneously, became known as the ''triple witching hour.''

[9] *See* Securities and Exchange Commission, Division of Economic Risk and Analysis, Memorandum, Cornerstone Analysis of PM Cash-Settled Index Option Pilots (February 2, 2021) (''DERA Staff PM Pilot Memo'') at 5, available at: *https://www.sec.gov/files/Analysis_of_PM_Cash_Settled_Index_Option_Pilots.pdf.*

[10] The exercise settlement value for an A.M.-settled index option is determined by reference to the reported level of the index as derived from the opening prices of the component securities on the business day before expiration.

[11] *See* Securities Exchange Act Release No. 24367 (April 17, 1987), 52 FR 13890 (April 27, 1987) (SR–CBOE–87–11) (noting that CME moved S&P 500 futures contract's settlement value to opening prices on the delivery date).

[12] *See id.*

[13] *See* Securities Exchange Act Release No. 30944 (July 21, 1992), 57 FR 33376 (July 28, 1992) (SR–CBOE–92–09). Thereafter, the Commission approved proposals by the options markets to transfer most of their cash-settled index products to A.M. settlement.

[14] *See* Securities Exchange Act Release No. 31800 (February 1, 1993), 58 FR 7274 (February 5, 1993) (SR–CBOE–92–13); *see also* Securities Exchange Act Release Nos. 54123 (July 11, 2006), 71 FR 40558 (July 17, 2006) (SR–CBOE–2006–65); *and* 60164 (June 23, 2009), 74 FR 31333 (June 30, 2009) (SR–CBOE–2009–029).

[15] *See* Securities Exchange Act Release Nos. 62911 (September 14, 2010), 75 FR 57539 (September 21, 2010) (SR–CBOE–2009–075); 76529 (November 30, 2015), 80 FR 75695 (December 3, 2015) (SR–CBOE–2015–106); 78132 (June 22, 2016), 81 FR 42018 (June 28, 2016) (SR–CBOE–2016–046); *and* 78531 (August 10, 2016), 81 FR 54643 (August 16, 2016) (SR–CBOE–2016–046).

[16] *See* Securities Exchange Act Release No. 68888 (February 8, 2013), 78 FR 10668 (February 14, 2013) (SR–CBOE–2012–120). Pursuant to Securities Exchange Act Release No. 80060 (February 17, 2017), 82 FR 11673 (February 24, 2017) (SR–CBOE–2016–091), the Exchange moved third-Friday P.M.-settled options into the S&P 500 Index options class, and as a result, the trading symbol for P.M.-settled S&P 500 Index options that have standard third Friday-of-the-month expirations changed from ''SPXPM'' to ''SPXW.'' This change went into effect on May 1, 2017, pursuant to Cboe Options Regulatory Circular RG17–054.

[17] *See* Securities Exchange Act Release Nos. 70087 (July 31, 2013), 78 FR 47809 (August 6, 2013) (SR–CBOE–2013–055); *and* 91067 (February 5, 2021) 86 FR 9108 (February 11, 2021) (SR–CBOE–2020–116).

[18] *See supra* note 4.

[19] *See* Securities Exchange Act Release Nos. 98454 (September 20, 2023) (SR–CBOE–2023–005) (order approving proposed rule change to make permanent the operation of a program that allows the Exchange to list p.m.-settled third Friday-of-the-month SPX options series); 98455 (September 20, 2023) (SR–CBOE–2023–019) (order approving proposed rule change to make permanent the operation of a program that allows the Exchange to list p.m.-settled third Friday-of-the-month XSP and MRUT options series); and 98456 (September 20, 2023) (SR–CBOE–2023–020) (order approving proposed rule change to make the nonstandard expirations pilot program permanent).

[20] *See supra* note 4.

[21] In providing the pilot reports to the Commission, the Exchange previously requested confidential treatment of the pilot reports under the Freedom of Information Act (''FOIA''). *See* 5 U.S.C. 552.

period covered in the pilot report. With respect to the Nonstandard Expirations Pilot Program, upon request by the Commission, the Exchange provided data files containing: (1) Weekly and EOM option volume data aggregated by series, and (2) Weekly week-ending open interest for expiring series and EOM month-end open interest for expiring series. In the annual reports, the Exchange also provided the following analyses of trading patterns in XSPPM options and index options with Weekly and EOM Expirations:

- with respect to the XSPPM Pilot Program, a time series analysis of open interest and an analysis of the distribution of trade sizes; and
- with respect to the Nonstandard Expirations Pilot Program, Weekly and EOM option volume data aggregated by series, and Weekly open interest for expiring series and EOM month-end open interest for expiring series.

Finally, for series that exceed certain minimum parameters,[22] the annual reports contained the following analysis related to index price changes and underlying share trading volume at the close on Expiration Fridays:

(1) a comparison of index price changes at the close of trading on a given Expiration Friday with comparable price changes from a control sample. The data includes a calculation of percentage price changes for various time intervals and compare that information to the respective control sample. Raw percentage price change data as well as percentage price change data normalized for prevailing market volatility, as measured by the Cboe Volatility Index (VIX), is provided; and

(2) a calculation of share volume for a sample set of the component securities representing an upper limit on share trading that could be attributable to expiring in-the-money series. The data includes a comparison of the calculated share volume for securities in the sample set to the average daily trading volumes of those securities over a sample period.

Also, during the course of the Pilot Programs, the Exchange provided the Commission with any additional data or analyses the Commission requested if it deemed such data or analyses necessary to determine whether the Nonstandard Expirations Pilot Program was consistent with the Exchange Act. The Exchange has made public on its website all data and analyses previously submitted to the Commission under the Nonstandard Expirations Pilot Program,[23] and will continue to make public any data and analyses it submits to the Commission while the Pilot Programs is still in effect.

The Exchange has concluded that the Pilot Programs do not negatively impact market quality or raise any unique or prohibitive regulatory concerns. The Exchange has not identified any evidence from the pilot data indicating that the trading of XSPPM, Weekly options, and EOM options has any adverse impact on fair and orderly markets on Expiration Fridays for the underlying indexes or the underlying securities comprising those indexes, nor have there been any observations of abnormal market movements attributable to XSPPM, Weekly and EOM options from any market participants that have come to the attention of the Exchange.

Based on a study conducted by the Commission's Division of Economic and Risk Analysis (''DERA'') staff on the pilot data from 2006 through 2018,[24] and the Exchange's review of the pilot data from 2019 through 2021, the size of the market for P.M.-settled SPX options (including quarterly, weekly, EOM and third Friday expirations) since 2007 has grown from a trivial portion of the overall market to a substantial share (from around 0.1% of open interest in 2007 to 30% in 2021).[25] Notional value of open interest in P.M.-settled SPX options increased from approximately a median of $1.5 billion in 2007 to $1.9 trillion in 2021, approximately 1260 times its value in 2007. Notional open interest in A.M.-settled SPX options was already hovering around a median of $1.4 trillion in 2007, and it has since increased to approximately $4.4 trillion in 2021. It is also important to note that open interest on expiring P.M.-settled SPX options, as compared to A.M.-settled options, is spread out across a greater number of expiration dates, which results in a smaller percentage of open interest expiring on any one date, thus mitigating concerns that SPXPM option expiration may have a disruptive effect on the market.[26] Daily trading volume in P.M.-settled SPX options has increased from a median of about 700 contracts in 2007 to nearly 1.9 million contracts in 2021,[27] and now exceeds trading volume in A.M.-settled SPX options.

Moreover, the DERA staff study of the P.M.-settled SPX options pilot data (2006 through 2018) did not identify any significant economic impact on S&P 500 futures,[28] the S&P 500, or the underlying component securities of the S&P 500 surrounding the close. For purposes of the study, volatility was by and large measured by using the standard deviation [29] of one-minute returns of S&P 500 futures values and the index value during regular hours on each day reviewed (excluding the first and last 15 minutes of trading) and then compared with the standard deviation of one-minute returns (for S&P 500 futures, the S&P 500, and the underlying component securities of the S&P 500) over the last 15 minutes of a trading day.[30] Using this as a general measure,[31] the DERA staff study then reviewed whether, and to what extent, the settlement quantity of SPXPM options and the levels of open interest in SPXPM options on expiration days (as

[22] The Exchange and the Commission determined the minimum open interest parameters, control sample, time intervals, method for randomly selecting the component securities, and sample periods.

[23] Available at *https://www.cboe.com/aboutcboe/legal-regulatory/national-market-system-plans/pm-settlement-spxpm-data.*

[24] *See* DERA Staff PM Pilot Memo, at 13 (''Option settlement quantity data for A.M.- and P.M.-settled options were obtained from the Cboe, including the number of contracts that settled in-the-money for each exchange-traded option series on the S&P 500 index . . . on expiration days from January 20, 2006 through December 31, 2018. Daily open interest and volume data for [SPX] option series were also obtained from Cboe, including open interest data from January 3, 2006 through December 31, 2018 and trading volume data from January 3, 2006 through December 31, 2018.'')

[25] The DERA staff study reviewed and provided statistics for market share, median notional value of open interest and median volume in 2007 and in 2018. The Exchange provides updated statistics for market share, median notional value of open interest and median volume in 2021, replacing the 2018 statistics provided in the Commission staff study.

[26] *See* DERA Staff PM Pilot Memo, at 2.

[27] The Exchange notes that the DERA staff study used two-sided volume data for the median volume in 2007 and in 2018; therefore, the Exchange provides two-sided volume data for the median volume in 2021.

[28] Futures on the S&P 500 experience high volume and liquidity both before and after the close of the underlying market. Therefore, futures are a useful measure of abnormal volatility surrounding the close and the open. *See* DERA Staff PM Pilot Memo, at 14. The Exchange agrees with this approach.

[29] Standard deviation applied to a rate of return (in this case, one-minute) of an instrument can indicate that instrument's historical volatility. The greater the standard deviation, the greater the variance between price and the mean, which indicates a larger price range, *i.e.,* higher volatility.

[30] For example, if on a particular day the standard deviation of one-minute returns between 3:45 p.m. ET and 4:00 p.m. ET is 0.004 and the standard deviation of returns from 9:45 a.m. ET to 3:45 p.m. ET is 0.002, this metric would take on a value of 2 for that day, indicating that volatility during the last 15 minutes of the trading day was twice as high as it was during the rest of the trading day. *See* DERA Staff PM Pilot Memo, at 15; *see also* DERA Staff PM Pilot Memo, at Section V, which discusses in detail the metrics used to measure, for the purposes of the study, the extent to which the market may experience abnormal volatility surrounding SPXPM option settlement.

[31] *See* DERA Staff PM Pilot Memo, at Section V, which discusses in detail the metrics used to measure, for the purposes of the study, the extent to which the market may experience abnormal volatility surrounding SPXPM option settlement.

compared to non-expiration days) may be associated with general price volatility and price reversals for S&P 500 futures, the S&P 500, and the underlying component securities of the S&P 500 near the close. From its review of the study, the Exchange agrees that, although volatility before the market close is generally higher than during the rest of the trading day, there is no evidence of any significant adverse economic impact to the futures, index, or underlying index component securities markets as a result of the quantity of P.M.-settled SPX options that settle at the close or the amount of expiring open interest in P.M.-settled SPX options. For example, the largest settlement event that occurred during the time period of the study (a settlement of $100.4 billion of notional on December 29, 2017) had an estimated impact on the futures price of only approximately 0.02% (a predicted impact of $0.54 relative to a closing futures price of $2,677).

In particular, the DERA staff study found that an additional P.M.-settled SPX options settlement quantity equal to $10 billion in notional value is associated with a marginal impact on futures prices during the last 15 minutes of the trading day of only about $0.06 (where the hypothetical index level is 2,500), additional expiring open interest in P.M.-settled SPX options equal to $10 billion in notional value is associated with a marginal impact on futures prices during the last 15 minutes of the trading day of only about $0.05 (assumed index level is 2,500). Also, an additional increase in settlement quantity or in expiring open interest, each equal to $20 million in notional value, did not result in any meaningful futures price reversals near the close (neither was found to cause a price reversal of over one standard deviation.[32])

Likewise, the study identified that an additional total P.M.-settled SPX options settlement quantity equal to $10 billion in notional value corresponds to price movement in the S&P 500 of only about $0.08 (assuming an index level of 2,500) during the last 15 minutes of the trading day, and that additional expiring open interest equal to $10 billion in notional value corresponds to a price movement in the S&P 500 of only about $0.06 (assuming an index level of 2,500) during the last 15 minutes of the trading day. The study also identified that it would take an increase of $34 billion in notional value of total settlement quantity and of expiring open interest for one additional S&P 500 price reversal of greater than two standard deviations to occur in the last 15 minutes before the market close. Also, regarding potential impact to S&P 500 component securities, it would take an increase in total P.M.-settled SPX options settlement quantity equal to $20 billion to effect a price movement of only approximately $0.03 for a $200 stock, an increase in expiring open interest in P.M.-settled SPX options equal to $10 billion to effect a price movement less than half a standard deviation, and an increase in total P.M.-settled SPX settlement quantity equal to $7 billion to achieve a price reversal greater two standard deviations.

The study employed the same metrics to determine whether there is greater price volatility for S&P 500 futures, the S&P 500, and the component securities of the S&P 500 related to SPXPM option settlements during an environment of high market volatility (*i.e.,* on days in which the VIX Index was in the top 10% of closing index values) and did not identify indicators of any significant economic impact on these markets near the close as a result of the P.M.-settled SPX options settlement.[33] In addition to this, the DERA staff study, applying the same metrics and analysis as for P.M.-settled SPX options to A.M.-settled SPX options, did not identify any evidence of a statistically significant relationship between settlement quantity or expiring open interest of A.M.-settled options and volatility near the open.

Upon review of the results of the DERA staff study, the Exchange agrees that each of the above-described marginal price movements in S&P 500 futures, the S&P 500, and the S&P 500 component securities affected by increases in P.M.-settled SPX options settlement quantity and expiring open interest appear to be de minimis pricing changes from those that occur over regular trading hours (outside of the last 15 minutes of the trading day). Further, the Exchange has not observed any significant economic impact or other adverse effects on the market from similar reviews of its pilot reports and data submitted after 2018.[34] In its review of a sample of the pilot data from 2019 through 2021, the Exchange similarly measured volatility over the final fifteen minutes of each trading day by taking the standard deviation of rolling one-minute returns of the S&P 500 level (excluding the first and last fifteen minutes of trading) and comparing such with the standard deviation of one-minute returns[35] of the S&P 500 level, over the last 15 minutes of a trading day. The Exchange identified an average standard deviation ratio of 1.42 for the S&P 500 on non-expiration days and an average standard deviation ratio of 1.54 for the S&P 500 on expiration days (a ratio between expiration days and non-expiration days of 1.09). The Exchange also notes that, using the same methodology, it observed that, from 2015 through 2019,[36] the average standard deviation ratio for the S&P 500 on non-expiration days was 1.11 and the average standard deviation ratio for the S&P 500 on expiration days was 1.22 (a ratio between expiration days and non-expiration days of 1.10). While the average standard deviation ratio on both expiration and non-expiration days was higher in 2019 through 2021 due to overall market volatility, the ratios between the standard deviation ratios on expiration days and non-expirations days remained nearly identical between the 2015 through 2019 timeframe and the 2019 through 2021. This shows that, in cases where overall market volatility may increase, the normalized impact on expiration days to non-expiration days generally remains consistent.

In addition to this, the Exchange notes that the S&P 500 Index is rebalanced quarterly. The changes resulting from each rebalancing coincide with the third-Friday of the quarterly rebalancing month (*i.e.,* March, June, September, October and December)[37] and generally drive an increase in trading activity from investors that seek to track the S&P 500. As such, the Exchange measured volatility on quarterly rebalancing dates and found that the average standard deviation ratio was 1.62, which suggests more closing volatility on quarterly rebalance dates compared to non-quarterly expiration dates (for which the average standard deviation ratio was 1.22), thus indicating that the impact rebalancing may have on the S&P 500 is greater than any impact that P.M.-settled SPX options may have on the S&P 500.

The Exchange additionally focused its study of the post-2018 sample pilot data on reviewing for potential correlation between excess market volatility and price reversals and the hedging activity of liquidity providers. As explained in

[32] *See supra* note 29.

[33] The Exchange also notes that the study did not identify any evidence that less liquid S&P 500 constituent securities experienced any greater impact from the settlement of P.M.-settled SPX options.

[34] Total SPX open interest volumes were examined for expiration dates over a roughly two-year period between October 2019 and November 2021.

[35] Calculated at every tick for the prior minute.

[36] November 2015 through November 2021.

[37] *See* S&P Dow Jones Indices, Equity Indices Policies & Practices, Methodology (August 2021), at 15, available at *https://www.spglobal.com/spdji/en/documents/methodologies/methodology-sp-equity-indices-policies-practices.pdf.*

the DERA staff study, potential impact of P.M.-settled SPX options on the correlated equity markets is thought to stem from the hedging activity of liquidity providers in such options.[38] To determine any such potential correlation, the Exchange studied the expected action of liquidity providers that are the primary source of the hedging on settlement days. These liquidity providers generally delta-hedge their S&P 500 index exposure via S&P 500 futures and on settlement day unwind their futures positions that correspond with the delta of their in-the-money (ITM) expiring P.M.-settled SPX options. Assuming such behavior, the Exchange estimated the Market-On-Close (''MOC'') [39] volume for the shares of the S&P 500 component securities (*i.e.,* ''MOC share volume'') that could ultimately result from the unwinding of the liquidity providers' futures positions by equating the notional value of the futures positions that correspond to expiring ITM open interest to the number S&P 500 component security contracts (based on the weight of each S&P 500 component security). That is, the Exchange calculated (an estimate) of the amount of MOC volume in the S&P 500 component markets attributable hedging activity as a result of expiring ITM P.M.-settled SPX options (*i.e.,* ''hedging MOC''). The Exchange then: (1) compared the hedging MOC share volume to all MOC share volume on expiration days and non-expiration trading days; and (2) compared the notional value of the hedging futures positions (*i.e.,* that correspond to expiring ITM P.M.-settled SPX options open interest) to the notional value of expiring ITM P.M.-settled SPX options open interest, the notional value of all expiring P.M.-settled SPX options open interest and the notional value of all P.M.-settled SPX options open interest.

The Exchange observed that, on average, there were approximately 25% more MOC shares executed on expiration days (332 expiration days) than non-expiration days (209 non-expiration days). While, at first glance, the volume of MOC shares executed on expiration days seems much greater than the volume executed on non-expiration days, the Exchange notes that much of this difference is attributable to just eight expiration days—the quarterly index rebalancing dates captured within the scope of the post-2018 sample pilot data. The average MOC share volume on the eight quarterly rebalancing dates was approximately 4.8 times the average MOC share volume on the non-quarterly rebalancing expiration dates; again, indicating that the impact rebalancing may have on the S&P 500 Index is greater than any impact that P.M.-settled SPX options may have on the S&P 500 Index. That is, the Exchange observed that the majority of closing volume on quarterly rebalance dates is driven by rebalancing of shares in in the S&P 500, and not by P.M.-settled SPX options expiration-related hedging activity. Notwithstanding the MOC share volume on quarterly rebalancing dates, the volume of MOC shares executed on expiration days (324 expiration days) was only approximately 13% more than that on non-expiration days, substantially less than the increase in volume over non-expiration days wherein the eight index rebalancing dates are included in expiration day volume. In addition to this, the Exchange observed that the hedging MOC share volume (*i.e.,* the expected MOC share volume resulting from hedging activity in connection with expiring ITM P.M.-settled SPX options) was, on average, less than the MOC share volume on non-expiration days, and was only approximately 20% of the total MOC share volume on expiration days, indicating that other sources of MOC share volume generally exceed the volume resulting from hedging activity of expiring ITM P.M.-settled SPX options and would more likely be a source of any potential market volatility.

The Exchange also observed that, across all third-Friday expirations, the notional value of the hedging futures positions was approximately 25% of the notional value of expiring ITM P.M.-settled SPX options, approximately 3.8% of the notional value of all expiring P.M.-settled SPX options, and approximately only 0.5% of the notional value of all P.M.-settled SPX options. As such, the estimated hedging activity from liquidity providers on expiration days is a fraction of the expiring open interest in P.M.-settled SPX options, which, the Exchange notes, is only 14% of the total open interest in P.M.-settled SPX options; thus, indicating negligible capacity for hedging activity to increase volatility in the underlying markets.

While unrelated to the initial concerns of P.M.-settlement as described above, at the request of the Commission, the Exchange recently completed an analysis intended to evaluate whether the Pilot Programs impacted the quality of the A.M.-settled option market. Specifically, the Exchange compared values of key market quality indicators (specifically, the bid-ask spread [40] and effective spread) [41] in SPXW options (which trade on Cboe Options, an affiliated of the Exchange, pursuant to a nonstandard expiration program substantively similar to the Nonstandard Expiration Pilot Program) both before and after the introduction of Tuesday expirations and Thursday expirations for SPXW options on April 18 and May 11, 2022, respectively.[42] Options on the Standard & Poor's Depositary Receipts S&P 500 ETF (''SPY'') were used as a control group to account for any market factors that might influence key market quality indicators. The Exchange used data from January 3, 2022 through March 4, 2022 (the two-month period prior to the introduction of SPXW options with Tuesday expirations) and data from May 11, 2022 to July 10, 2022 (the two-month period following the introduction of SPXW options with Thursday expirations).[43]

Given the time that as passed since the implementation of the Pilot Programs, as well as the fact that when the Exchange began offering XSPPM, Weekly and EOM options, XSPPM, Weekly, and EOM options had already been trading on other exchanges for nearly a decade, the Exchange is unable to analyze whether the introduction of those options significantly impacted the market quality of corresponding A.M.-settled options. The Exchange believes analyzing whether the introduction of new SPXW P.M.-settled expirations (*i.e.,* SPXW options with Tuesday and Thursday expirations) impacted the market quality of then-existing SPXW P.M.-settled expirations (*i.e.,* SPXW options with Monday, Wednesday, and Friday expirations) provides a reasonable substitute to evaluate whether the introduction of XSPPM, Weekly and EOM options impacted the

[38] *See* DERA Staff PM Pilot Memo, at 10–12.

[39] MOC orders allow a market participant to trade at the closing price. Market participants generally utilize MOC orders to ensure they exit positions at the end of the trading day.

[40] The Exchange calculated for each of SPXW options (with Monday, Wednesday, and Friday expirations) and SPY Weekly options (with Monday, Wednesday, and Friday expirations) the daily time-weighted bid-ask spread on the Exchange during its regular trading hours session, adjusted for the difference in size between SPXW options and SPY options (SPXW options are approximately ten times the value of SPY options).

[41] The Exchange calculated the volume-weighted average daily effective spread for simple trades for each of SPXW options (with Monday, Wednesday, and Friday expirations) and SPY Weekly options (with Monday, Wednesday, and Friday expirations) as twice the amount of the absolute value of the difference between an order execution price and the midpoint of the national best bid and offer at the time of execution, adjusted for the difference in size between SPXW options and SPY options.

[42] For purposes of comparison, the Exchange paired SPXW options and SPY options with the same moneyness and same days to expiration.

[43] The Exchange observed comparable market volatility levels during the pre-intervention and post-intervention time ranges.

market quality of any corresponding A.M.-settled options when the pilot began.[44]

As a result of this analysis, the Exchange believes the introduction of SPX options with Tuesday and Thursday options had no significant impact on the market quality of SPXW options with Monday, Wednesday, and Friday expirations. With respect to the majority of series analyzed, the Exchange observed no statistically significant difference in the bid-ask spread or the effective spread of the series in the period prior to introduction of the Tuesday and Thursday expirations and the period following the introduction of the Tuesday and Thursday expirations. While statistically insignificant, the Exchange notes that in many series, particularly as they were closer to expiration, the Exchange observed that the values of these spreads decreased during the period following the introduction of the Tuesday and Thursday expirations.[45]

To further note, given the significant changes in the closing procedures of the primary markets in recent decades, including considerable advances in trading systems and technology, the Exchange believes that the risks of any potential impact of Weekly and EOM options on the underlying cash markets are also de minimis.

The Exchange proposes to make the Pilot Programs permanent as P.M.-settled index products have become a part of the Exchange's product offerings, providing investors with greater trading opportunities and flexibility. As indicated by the significant growth in the size of the market for P.M.-settled options, such options have been, and continue to be, well-received and widely used by market participants. Therefore, the Exchange wishes to be able to have the authority to continue to provide investors with the ability to trade XSPPM, Weekly, and EOM options on a permanent basis. The Exchange believes that the permanent continuation of the Pilot Programs will serve to maintain the status quo by continuing to offer a product to which investors have become accustomed and have incorporated into their business models and day-to-day trading methodologies for nearly 14 years (and for nearly 5 years on the Exchange). As such, the Exchange also believes that ceasing to have the authority to offer XSPPM, Weekly, and EOM options may result in market disruption and investor confusion. The Exchange has not identified any significant impact on market quality nor any unique or prohibitive regulatory concerns as a result of the Pilot Programs, and, as such, the Exchange believes that the continuation of the Pilot Programs as a pilot, including the use of time and resources to compile and analyze interim and annual pilot reports and pilot data, is no longer necessary and that making the Pilot Programs permanent will allow the Exchange to otherwise allocate time and resources to other industry initiatives.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[46] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [47] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that the making the Pilot Programs permanent will allow the Exchange to be able to have the authority to continue to offer XSPPM, Weekly, and EOM options—products that have become a part of the Exchange's offerings—on a continuous and permanent basis. Since their reintroduction beginning in 2006,[48] P.M.-settled options have been, and continue to be, well-received and widely used by market participants, providing investors with greater trading opportunities and flexibility. The Exchange believes that the permanent continuation of the Pilot Programs will 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 by continuing to offer a product to which investors have become accustomed and have incorporated into their business models and day-to-day trading strategies for nearly 14 years (including nearly 5 years on the Exchange). As indicated by the significant growth in the size of the market for P.M.-settled options, such options have been, and continue to be, well-received and widely used by market participants. Conversely, the Exchange believes ceasing to offer the Pilot Programs may result in market disruption and investor confusion, as P.M.-settled index products have become a part of the Exchange's product offerings, providing investors with greater trading opportunities and flexibility.

The Exchange further believes that making the Pilot Programs permanent will remove impediments to and perfect the mechanism of a free and open market and a national market system and protect investors, while maintaining a fair and orderly market, as the Exchange believes that previous concerns (arising in the 1980s) regarding options expirations potentially contributing to excess volatility and reversals around the close have been adequately diminished. As described in detail above, the Exchange has observed no significant adverse market impact or identified any meaningful regulatory concerns during the approximately 5-year operation of the Pilot Programs as pilots nor during the nearly years since P.M.-settled SPX options were reintroduced to the marketplace.[49] Notably, the Exchange did not identify any significant economic impact (including on pricing or volatility or in connection with reversals) on related futures, the underlying indexes, or the underlying component securities of the underlying indexes surrounding the close as a result of the quantity of XSPPM, Weekly, and EOM options that settle at the close or the amount of expiring open interest in XSPPM, Weekly, and EOM options, nor any demonstrated capacity for options hedging activity to impact volatility in the underlying markets. While the DERA staff study and corresponding Exchange study described above specifically evaluated SPX options, because XSPPM, Weekly, and EOM options may only overly broad-based index options, the Exchange believes it is appropriate to extrapolate the data to apply to the XSPPM, Weekly, and EOM options, as SPX options also overlay a broad-based index. Additionally, with respect to XSP options, XSP options overly the same index comprised of the same securities (just one tenth the size). This is particularly true given that the

[44] The full analysis is included in Exhibit 3 of this rule filing.

[45] In any series in which the Exchange observed an increase in the market quality indicators, the Exchange notes any such increase was also statistically insignificant.

[46] 15 U.S.C. 78f(b).

[47] 15 U.S.C. 78f(b)(5).

[48] *See supra* notes 24–44. As described above, the Exchange's conclusion is consistent with the analysis in the DERA Staff PM Pilot Memo.

[49] *See supra* notes 24–44.

reports submitted by the Exchange during the pilot period have similarly demonstrated no significant economic impact on the respective underlying indexes or other products.

The Exchange also believes the introduction of XSPPM, Weekly, and EOM options had no significant impact on the market quality of corresponding A.M.-settled options (which the Exchange does not list) or other options. The Exchange believes this as a result of its analysis conducted after the introduction of SPXW options with Tuesday and Thursday expirations, which demonstrated no statistically significant impact on the bid-ask or effective spreads of SPXW options with Monday, Wednesday, and Friday expirations after trading in the SPXW options with Tuesday and Thursday expirations began. While SPXW options are P.M.-settled and SPX options are A.M.-settled, they are otherwise nearly identical products. As noted above, XSPPM options are nearly identical to P.M.-settled and A.M.-settled SPX options, as they are based on an index comprised of the same securities, just 1/10th the size. Additionally, Weekly, and EOM options may only overly broad-based indexes, including the Mini-SPX Index. Therefore, the Exchange believes analyzing the impact of new SPXW options on then-existing SPXW options permit the Exchange to extrapolate from this data that it is unlikely the introduction of any other XSPPM, Weekly, or EOM options significantly impacted the market quality of A.M.-settled options when the pilots began.

Additionally, the significant changes in the closing procedures of the primary markets in recent decades, including considerable advances in trading systems and technology, has significantly minimized risks of any potential impact of XSPPM, Weekly, or EOM options on the underlying cash markets. As such, the Exchange believes that permanent Pilot Programs do not raise any unique or prohibitive regulatory concerns and that such trading has not, and will not, adversely impact fair and orderly markets on Expiration Fridays for the underlying indexes and their component securities. Further, as the Exchange has not identified any significant impact on market quality or any unique or prohibitive regulatory concerns as a result of offering XSPPM, Weekly, and EOM options, the Exchange believes that the continuation of the Pilot Programs as pilots, including the gathering, submission and review of the pilot reports and data, is no longer necessary and that making the Pilot Programs permanent will allow the Exchange to otherwise allocate time and resources to other industry initiatives.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that making the Pilot Programs permanent will impose any unnecessary or inappropriate burden on intramarket competition because XSPPM, Weekly, and EOM options will continue to be available to all market participants who wish to participate in the markets for those options. The Exchange believes that the growth the market of P.M.-settled options products, including XSPPM, Weekly, and EOM options, has experienced since their reintroduction through pilot programs indicates strong, continued investor interest and demand, warranting a permanent Pilot Program. The Exchange believes that, for the period that XSPPM, Weekly, and EOM options have been in operation as pilot programs, they have provided investors with a desirable product with which to trade and wishes to permanently offer this product to investors. Furthermore, during the pilot period, the Exchange has not observed any significant adverse market effects nor identified any regulatory concerns as a result of the Pilot Programs, and, as such, the continuation of the Pilot Programs as pilots, including the gathering, submission and review of the pilot reports and data, is no longer necessary. Permanent Pilot Programs will allow the Exchange to otherwise allocate time and resources to other industry initiatives.

The Exchange further does not believe that making the Pilot Programs permanent will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because other exchanges are free to and do offer competing products.[50] To the extent that the permanent offering and continued trading of XSPPM, Weekly, and EOM options may make the Exchange a more attractive marketplace to market participants at other exchanges, such market participants may elect to become Exchange market participants.

[50] *See, e.g.,* Cboe Options Rule 4.13(e) and Interpretation and Policy .13.

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 written comments on the proposed rule change.

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 Exchange consents, the Commission will:

A. by order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2023–107 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–CboeBZX–2023–107. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2023–107 and should be submitted on or before February 6, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[51]

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

Release No. 34–99300; File No. SR–CboeEDGX–2023–083]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Make Permanent Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options

January 9, 2024.

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 December 26, 2023, Cboe EDGX Exchange, Inc. (''Exchange'' or ''EDGX'') 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to make permanent the operation of its programs that allow the Exchange to list options on the Mini-SPX Index (''XSP options'') with P.M.-settlement and to list broad-based index options with nonstandard expirations (''Nonstandard Expirations Pilot Program'').

The text of the proposed rule change is available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/EDGX/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make permanent its XSPPM Pilot Program and its Nonstandard Expirations Pilot Program. Specifically, the Exchanges proposes to be permitted to list on a permanent basis (1) XSP options with third-Friday-of-the-month expiration dates whose exercise settlement value is derived from closing prices on the last trading day prior to expiration (''P.M.-settled'') (''XSPPM options'') and (2) options on broad-based indexes that are P.M.-settled and expire (a) on any Monday, Wednesday, or Friday (other than the third Friday-of-the-month or days that coincide with an end-of-month (''EOM'') expiration) (''Weekly Expirations'') and (b) on the last day of the trading month (''EOM Expirations'').[3] The Securities and Exchange Commission (the ''Commission'') approved a rule change that established a pilot program under which the Exchange is permitted to list (1) XSP options with third-Friday-of-the-month expiration dates that are P.M.-settled (the ''XSPPM Pilot Program'') and (2) options on broad-based indexes with Weekly Expirations and Monthly Expirations (the ''Nonstandard Expirations Pilot Program'' and, with the XSPPM Pilot Program, the ''Pilot Programs'').[4] XSPPM Options, Weekly Expirations, and EOMs are cash-settled and have European-style exercise. The Pilot Programs became effective on a pilot basis for a period of twelve months from the date of the approval of the Pilot Programs [5] and were subsequently extended.[6] Pursuant to Rule 29.11(a)(6) and (j)(3), the Pilot Programs are scheduled to expire on May 6, 2024.

[51] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In addition to proposing to delete the language in Rule 29.11(a)(6) and (j)(3) regarding the expiration date of the Pilot Programs, the Exchange proposes to delete the word ''pilot'' from the heading of Rule 29.11(j) and make a corresponding change to Rules 29.11(c)(5)(C).

[4] *See* Securities Exchange Act Release No. 85182 (February 22, 2019), 84 FR 6846 (February 28, 2019) (SR–CboeEDGX–2018–037) (''Pilot Programs Approval Order''). Under the terms of the Nonstandard Expirations Pilot Program, Weekly Expirations and EOMs are permitted on any broad-based index that is eligible for regular options trading.

[5] *See id.*

[6] *See* 88054 (January 27, 2020), 85 FR 5761 (January 31, 2020) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeEDGX–2020–002); 88787 (April 30, 2020), 85 FR 26995 (May 6, 2020) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeEDGX–2020–019); 90253 (October 22, 2020) 85 FR 68390 (October 28, 2020) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeEDGX–2020–050); 91700 (April 28, 2021), 86 FR 23770 (May 4, 2021) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeEDGX–2021–022); 93453 (October 28, 2021), 86 FR 60667 (November 3, 2021) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeEDGX–2021–047); 94803 (April 27, 2022), 87 FR 26237 (May 3, 2022) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeEDGX–2022–025); 96209 (November 2, 2022), 87 FR 67520 (November 8, 2022) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Pilot Programs in Connection with the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeEDGX–2022–047); 97443 (May 5, 2023) 88 FR 30356 (May 11, 2023) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options) (SR–CboeEDGX–2023–035); and 98640 (September 28, 2023), 88 FR 68846 (October 4, 2023) (SR–CboeEDGX–2023–061) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs in Connection With the Listing and Trading of P.M.-Settled Series on Certain Broad-Based Index Options).

The Exchange hereby requests that the Commission approve the Pilot Programs on a permanent basis.

By way of background, when cash-settled[7] index options were first introduced in the 1980s, settlement was based on the closing value of the underlying index on the option's expiration date. The Commission later became concerned about the impact of P.M.-settled, cash-settled index options on the markets for the underlying stocks at the close on expiration Fridays. Specifically, certain episodes of price reversals around the close on quarterly expiration dates attracted the attention of regulators to the possibility that the simultaneous expiration of index futures, futures options, and options might be inducing abnormal volatility in the index value around the close.[8] Academic research at the time provided at least some evidence suggesting that futures and options expirations contributed to excess volatility and reversals around the close on those days.[9] In light of the concerns with P.M. settlement and to help ameliorate the price effects associated with expirations of P.M.-settled, cash-settled index products, in 1987, the Commodity Futures Trading Commission (''CFTC'') approved a rule change by the Chicago Mercantile Exchange (''CME'') to provide for A.M. settlement[10] for index futures, including futures on the S&P 500.[11] The Commission subsequently approved a rule change by Cboe Options, Inc. (''Cboe Options'') to list and trade A.M.-settled SPX options.[12] In 1992, the Commission approved Cboe Options' proposal to transition all of its European-style cash-settled options on the S&P 500 Index to A.M. settlement;[13] however, in 1993, the Commission approved a rule allowing Cboe Options to list P.M.-settled options on certain broad-based indices, including the S&P 500, expiring at the end of each calendar quarter (''Quarterly Index Expirations'') (since adopted as permanent).[14] Starting in 2006, the Commission approved numerous rule changes, on a pilot basis, permitting the Cboe Options to introduce other index options, including SPX options, with P.M.-settlement. These include P.M.-settled index options expiring weekly (other than the third Friday of the month) and at the end of each month (''EOM''),[15] P.M.-settled options on the S&P 500 Index that expire on the third Friday-of-the-month (''SPXPM''),[16] as well as P.M.-settled Mini-SPX Index (''XSP'') options and Mini-Russell 2000 Index (''MRUT'') options expiring on the third Friday of the month.[17] As noted above, the Commission approved a rule to allow the Exchange to list XSPPM options and broad-based index options with Weekly and EOM Expirations.[18] The Commission recently approved proposed rule changes to make Cboe Options' pilot programs to list P.M.-settled index options (including pilot programs substantively the same as the Pilot Programs) permanent.[19]

As stated above, since its inception in 2019, the Exchange has continuously extended the Pilot Program periods and, during the course of the Pilot Programs and in support of the extensions of the Pilot Programs, the Exchange has submitted reports to the Commission regarding the Pilot Programs that detail the Exchange's experience with the Pilot Programs, pursuant to the Pilot Programs Approval Order.[20] Specifically, the Exchange has submitted annual Pilot Program reports to the Commission that contain an analysis of volume, open interest, and trading patterns. In addition, for series that exceed certain minimum open interest parameters, the annual report would provide analysis of index price volatility and, if needed, share trading activity. The Exchange has also submitted periodic interim reports that contain some, but not all, of the information contained in the annual reports (together with the periodic interim reports, the ''pilot reports'').[21]

The pilot reports for the XSPPM Pilot Program contained the following volume and open interest data:

(1) monthly volume aggregated for all trades;

(2) monthly volume aggregated by expiration date;

(3) monthly volume for each individual series;

(4) month-end open interest aggregated for all series;

(5) month-end open interest for all series aggregated by expiration date; and

(6) month-end open interest for each individual series.

The pilot reports for the Nonstandard Expirations Pilot Program contained the following volume and open interest data:

(1) monthly volume aggregated for all Weekly and EOM trades;

(2) volume in Weekly and EOM series aggregated by expiration date;

[7] The seller of a ''cash-settled'' index option pays out the cash value of the applicable index on expiration or exercise. A ''physically settled'' option, like equity and ETF options, involves the transfer of the underlying asset rather than cash. *See* Characteristics and Risks of Standardized Options, available at: *https://www.theocc.com/Company-Information/Documents-and-Archives/Options-Disclosure-Document.*

[8] The close of trading on the quarterly expiration Friday (*i.e.,* the third Friday of March, June, September and December), when options, index futures, and options on index futures all expire simultaneously, became known as the ''triple witching hour.''

[9] *See* Securities and Exchange Commission, Division of Economic Risk and Analysis, Memorandum, Cornerstone Analysis of PM Cash-Settled Index Option Pilots (February 2, 2021) (''DERA Staff PM Pilot Memo'') at 5, available at: *https://www.sec.gov/files/Analysis_of_PM_Cash_Settled_Index_Option_Pilots.pdf.*

[10] The exercise settlement value for an A.M.-settled index option is determined by reference to the reported level of the index as derived from the opening prices of the component securities on the business day before expiration.

[11] *See* Securities Exchange Act Release No. 24367 (April 17, 1987), 52 FR 13890 (April 27, 1987) (SR–CBOE–87–11) (noting that CME moved S&P 500 futures contract's settlement value to opening prices on the delivery date).

[12] *See id.*

[13] *See* Securities Exchange Act Release No. 30944 (July 21, 1992), 57 FR 33376 (July 28, 1992) (SR–CBOE–92–09). Thereafter, the Commission approved proposals by the options markets to transfer most of their cash-settled index products to A.M. settlement.

[14] *See* Securities Exchange Act Release No. 31800 (February 1, 1993), 58 FR 7274 (February 5, 1993) (SR–CBOE–92–13); *see also* Securities Exchange Act Release Nos. 54123 (July 11, 2006), 71 FR 40558 (July 17, 2006) (SR–CBOE–2006–65); *and* 60164 (June 23, 2009), 74 FR 31333 (June 30, 2009) (SR–CBOE–2009–029).

[15] *See* Securities Exchange Act Release Nos. 62911 (September 14, 2010), 75 FR 57539 (September 21, 2010) (SR–CBOE–2009–075); 76529 (November 30, 2015), 80 FR 75695 (December 3, 2015) (SR–CBOE–2015–106); 78132 (June 22, 2016), 81 FR 42018 (June 28, 2016) (SR–CBOE–2016–046); *and* 78531 (August 10, 2016), 81 FR 54643 (August 16, 2016) (SR–CBOE–2016–046).

[16] *See* Securities Exchange Act Release No. 68888 (February 8, 2013), 78 FR 10668 (February 14, 2013) (SR–CBOE–2012–120). Pursuant to Securities Exchange Act Release No. 80060 (February 17, 2017), 82 FR 11673 (February 24, 2017) (SR–CBOE–2016–091), the Exchange moved third-Friday P.M.-settled options into the S&P 500 Index options class, and as a result, the trading symbol for P.M.-settled S&P 500 Index options that have standard third Friday-of-the-month expirations changed from ''SPXPM'' to ''SPXW.'' This change went into effect on May 1, 2017, pursuant to Cboe Options Regulatory Circular RG17–054.

[17] *See* Securities Exchange Act Release Nos. 70087 (July 31, 2013), 78 FR 47809 (August 6, 2013) (SR–CBOE–2013–055); *and* 91067 (February 5, 2021) 86 FR 9108 (February 11, 2021) (SR–CBOE–2020–116).

[18] *See supra* note 4.

[19] *See* Securities Exchange Act Release Nos. 98454 (September 20, 2023) (SR–CBOE–2023–005) (order approving proposed rule change to make permanent the operation of a program that allows the Exchange to list p.m.-settled third Friday-of-the-month SPX options series); 98455 (September 20, 2023) (SR–CBOE–2023–019) (order approving proposed rule change to make permanent the operation of a program that allows the Exchange to list p.m.-settled third Friday-of-the-month XSP and MRUT options series); and 98456 (September 20, 2023) (SR–CBOE–2023–020) (order approving proposed rule change to make the nonstandard expirations pilot program permanent).

[20] *See supra* note 4.

[21] In providing the pilot reports to the Commission, the Exchange previously requested confidential treatment of the pilot reports under the Freedom of Information Act (''FOIA''). *See* 5 U.S.C. 552.

(3) month-end open interest aggregated for all Weekly and EOM series;

(4) month-end open interest for EOM series aggregated by expiration date and week-ending open interest for Weekly series aggregated by expiration date;

(5) ratio of monthly aggregate volume in Weekly and EOM series to total monthly class volume; and

(6) ratio of month-end open interest in EOM series to total month-end class open interest and ratio of week-ending open interest in EOW series to total week-ending open interest.

The annual reports for the Pilot Programs also contained the information noted in respective Items (1) through (6) above for Expiration Friday, A.M.-settled series, if applicable, for the period covered in the pilot report. With respect to the Nonstandard Expirations Pilot Program, upon request by the Commission, the Exchange provided data files containing: (1) Weekly and EOM option volume data aggregated by series, and (2) Weekly week-ending open interest for expiring series and EOM month-end open interest for expiring series. In the annual reports, the Exchange also provided the following analyses of trading patterns in XSPPM options and index options with Weekly and EOM Expirations:

• with respect to the XSPPM Pilot Program, a time series analysis of open interest and an analysis of the distribution of trade sizes; and

• with respect to the Nonstandard Expirations Pilot Program, Weekly and EOM option volume data aggregated by series, and Weekly open interest for expiring series and EOM month-end open interest for expiring series.

Finally, for series that exceed certain minimum parameters,[22] the annual reports contained the following analysis related to index price changes and underlying share trading volume at the close on Expiration Fridays:

(1) a comparison of index price changes at the close of trading on a given Expiration Friday with comparable price changes from a control sample. The data includes a calculation of percentage price changes for various time intervals and compare that information to the respective control sample. Raw percentage price change data as well as percentage price change data normalized for prevailing market volatility, as measured by the Cboe Volatility Index (VIX), is provided; and

(2) a calculation of share volume for a sample set of the component securities representing an upper limit on share trading that could be attributable to expiring in-the-money series. The data includes a comparison of the calculated share volume for securities in the sample set to the average daily trading volumes of those securities over a sample period.

Also, during the course of the Pilot Programs, the Exchange provided the Commission with any additional data or analyses the Commission requested if it deemed such data or analyses necessary to determine whether the Nonstandard Expirations Pilot Program was consistent with the Exchange Act. The Exchange has made public on its website all data and analyses previously submitted to the Commission under the Nonstandard Expirations Pilot Program,[23] and will continue to make public any data and analyses it submits to the Commission while the Pilot Programs is still in effect.

The Exchange has concluded that the Pilot Programs do not negatively impact market quality or raise any unique or prohibitive regulatory concerns. The Exchange has not identified any evidence from the pilot data indicating that the trading of XSPPM, Weekly options, and EOM options has any adverse impact on fair and orderly markets on Expiration Fridays for the underlying indexes or the underlying securities comprising those indexes, nor have there been any observations of abnormal market movements attributable to XSPPM, Weekly and EOM options from any market participants that have come to the attention of the Exchange.

Based on a study conducted by the Commission's Division of Economic and Risk Analysis (''DERA'') staff on the pilot data from 2006 through 2018,[24] and the Exchange's review of the pilot data from 2019 through 2021, the size of the market for P.M.-settled SPX options (including quarterly, weekly, EOM and third Friday expirations) since 2007 has grown from a trivial portion of the overall market to a substantial share (from around 0.1% of open interest in 2007 to 30% in 2021).[25] Notional value of open interest in P.M.-settled SPX options increased from approximately a median of $1.5 billion in 2007 to $1.9 trillion in 2021, approximately 1260 times its value in 2007. Notional open interest in A.M.-settled SPX options was already hovering around a median of $1.4 trillion in 2007, and it has since increased to approximately $4.4 trillion in 2021. It is also important to note that open interest on expiring P.M.-settled SPX options, as compared to A.M.-settled options, is spread out across a greater number of expiration dates, which results in a smaller percentage of open interest expiring on any one date, thus mitigating concerns that SPXPM option expiration may have a disruptive effect on the market.[26] Daily trading volume in P.M.-settled SPX options has increased from a median of about 700 contracts in 2007 to nearly 1.9 million contracts in 2021,[27] and now exceeds trading volume in A.M.-settled SPX options.

Moreover, the DERA staff study of the P.M.-settled SPX options pilot data (2006 through 2018) did not identify any significant economic impact on S&P 500 futures,[28] the S&P 500, or the underlying component securities of the S&P 500 surrounding the close. For purposes of the study, volatility was by and large measured by using the standard deviation[29] of one-minute returns of S&P 500 futures values and the index value during regular hours on each day reviewed (excluding the first and last 15 minutes of trading) and then compared with the standard deviation of one-minute returns (for S&P 500 futures, the S&P 500, and the underlying component securities of the S&P 500) over the last 15 minutes of a trading

[22] The Exchange and the Commission determined the minimum open interest parameters, control sample, time intervals, method for randomly selecting the component securities, and sample periods.

[23] Available at *https://www.cboe.com/aboutcboe/legal-regulatory/national-market-system-plans/pm-settlement-spxpm-data.*

[24] *See* DERA Staff PM Pilot Memo, at 13 (''Option settlement quantity data for A.M.- and P.M.-settled options were obtained from the Cboe, including the number of contracts that settled in-the-money for each exchange-traded option series on the S&P 500 index . . . on expiration days from January 20, 2006 through December 31, 2018. Daily open interest and volume data for [SPX] option series were also obtained from Cboe, including open interest data from January 3, 2006 through December 31, 2018 and trading volume data from January 3, 2006 through December 31, 2018.'')

[25] The DERA staff study reviewed and provided statistics for market share, median notional value of open interest and median volume in 2007 and in 2018. The Exchange provides updated statistics for market share, median notional value of open interest and median volume in 2021, replacing the 2018 statistics provided in the Commission staff study.

[26] *See* DERA Staff PM Pilot Memo, at 2.

[27] The Exchange notes that the DERA staff study used two-sided volume data for the median volume in 2007 and in 2018; therefore, the Exchange provides two-sided volume data for the median volume in 2021.

[28] Futures on the S&P 500 experience high volume and liquidity both before and after the close of the underlying market. Therefore, futures are a useful measure of abnormal volatility surrounding the close and the open. *See* DERA Staff PM Pilot Memo, at 14. The Exchange agrees with this approach.

[29] Standard deviation applied to a rate of return (in this case, one-minute) of an instrument can indicate that instrument's historical volatility. The greater the standard deviation, the greater the variance between price and the mean, which indicates a larger price range, *i.e.,* higher volatility.

day.[30] Using this as a general measure,[31] the DERA staff study then reviewed whether, and to what extent, the settlement quantity of SPXPM options and the levels of open interest in SPXPM options on expiration days (as compared to non-expiration days) may be associated with general price volatility and price reversals for S&P 500 futures, the S&P 500, and the underlying component securities of the S&P 500 near the close. From its review of the study, the Exchange agrees that, although volatility before the market close is generally higher than during the rest of the trading day, there is no evidence of any significant adverse economic impact to the futures, index, or underlying index component securities markets as a result of the quantity of P.M.-settled SPX options that settle at the close or the amount of expiring open interest in P.M.-settled SPX options. For example, the largest settlement event that occurred during the time period of the study (a settlement of $100.4 billion of notional on December 29, 2017) had an estimated impact on the futures price of only approximately 0.02% (a predicted impact of $0.54 relative to a closing futures price of $2,677).

In particular, the DERA staff study found that an additional P.M.-settled SPX options settlement quantity equal to $10 billion in notional value is associated with a marginal impact on futures prices during the last 15 minutes of the trading day of only about $0.06 (where the hypothetical index level is 2,500), additional expiring open interest in P.M.-settled SPX options equal to $10 billion in notional value is associated with a marginal impact on futures prices during the last 15 minutes of the trading day of only about $0.05 (assumed index level is 2,500). Also, an additional increase in settlement quantity or in expiring open interest, each equal to $20 million in notional value, did not result in any meaningful futures price reversals near the close (neither was found to cause a price reversal of over one standard deviation[32]).

Likewise, the study identified that an additional total P.M.-settled SPX options settlement quantity equal to $10 billion in notional value corresponds to price movement in the S&P 500 of only about $0.08 (assuming an index level of 2,500) during the last 15 minutes of the trading day, and that additional expiring open interest equal to $10 billion in notional value corresponds to a price movement in the S&P 500 of only about $0.06 (assuming an index level of 2,500) during the last 15 minutes of the trading day. The study also identified that it would take an increase of $34 billion in notional value of total settlement quantity and of expiring open interest for one additional S&P 500 price reversal of greater than two standard deviations to occur in the last 15 minutes before the market close. Also, regarding potential impact to S&P 500 component securities, it would take an increase in total P.M.-settled SPX options settlement quantity equal to $20 billion to effect a price movement of only approximately $0.03 for a $200 stock, an increase in expiring open interest in P.M.-settled SPX options equal to $10 billion to effect a price movement less than half a standard deviation, and an increase in total P.M.-settled SPX settlement quantity equal to $7 billion to achieve a price reversal greater two standard deviations.

The study employed the same metrics to determine whether there is greater price volatility for S&P 500 futures, the S&P 500, and the component securities of the S&P 500 related to SPXPM option settlements during an environment of high market volatility (*i.e.,* on days in which the VIX Index was in the top 10% of closing index values) and did not identify indicators of any significant economic impact on these markets near the close as a result of the P.M.-settled SPX options settlement.[33] In addition to this, the DERA staff study, applying the same metrics and analysis as for P.M.-settled SPX options to A.M.-settled SPX options, did not identify any evidence of a statistically significant relationship between settlement quantity or expiring open interest of A.M.-settled options and volatility near the open.

Upon review of the results of the DERA staff study, the Exchange agrees that each of the above-described marginal price movements in S&P 500 futures, the S&P 500, and the S&P 500 component securities affected by increases in P.M.-settled SPX options settlement quantity and expiring open interest appear to be de minimis pricing changes from those that occur over regular trading hours (outside of the last 15 minutes of the trading day). Further, the Exchange has not observed any significant economic impact or other adverse effects on the market from similar reviews of its pilot reports and data submitted after 2018.[34] In its review of a sample of the pilot data from 2019 through 2021, the Exchange similarly measured volatility over the final fifteen minutes of each trading day by taking the standard deviation of rolling one-minute returns of the S&P 500 level (excluding the first and last fifteen minutes of trading) and comparing such with the standard deviation of one-minute returns[35] of the S&P 500 level, over the last 15 minutes of a trading day. The Exchange identified an average standard deviation ratio of 1.42 for the S&P 500 on non-expiration days and an average standard deviation ratio of 1.54 for the S&P 500 on expiration days (a ratio between expiration days and non-expiration days of 1.09). The Exchange also notes that, using the same methodology, it observed that, from 2015 through 2019,[36] the average standard deviation ratio for the S&P 500 on non-expiration days was 1.11 and the average standard deviation ratio for the S&P 500 on expiration days was 1.22 (a ratio between expiration days and non-expiration days of 1.10). While the average standard deviation ratio on both expiration and non-expiration days was higher in 2019 through 2021 due to overall market volatility, the ratios between the standard deviation ratios on expiration days and non-expirations days remained nearly identical between the 2015 through 2019 timeframe and the 2019 through 2021. This shows that, in cases where overall market volatility may increase, the normalized impact on expiration days to non-expiration days generally remains consistent.

In addition to this, the Exchange notes that the S&P 500 Index is rebalanced quarterly. The changes resulting from each rebalancing coincide with the third-Friday of the quarterly rebalancing month (*i.e.,* March, June, September, October and December)[37] and generally

[30] For example, if on a particular day the standard deviation of one-minute returns between 3:45 p.m. ET and 4:00 p.m. ET is 0.004 and the standard deviation of returns from 9:45 a.m. ET to 3:45 p.m. ET is 0.002, this metric would take on a value of 2 for that day, indicating that volatility during the last 15 minutes of the trading day was twice as high as it was during the rest of the trading day. *See* DERA Staff PM Pilot Memo, at 15; *see also* DERA Staff PM Pilot Memo, at Section V, which discusses in detail the metrics used to measure, for the purposes of the study, the extent to which the market may experience abnormal volatility surrounding SPXPM option settlement.

[31] *See* DERA Staff PM Pilot Memo, at Section V, which discusses in detail the metrics used to measure, for the purposes of the study, the extent to which the market may experience abnormal volatility surrounding SPXPM option settlement.

[32] *See supra* note 29.

[33] The Exchange also notes that the study did not identify any evidence that less liquid S&P 500 constituent securities experienced any greater impact from the settlement of P.M.-settled SPX options.

[34] Total SPX open interest volumes were examined for expiration dates over a roughly two-year period between October 2019 and November 2021.

[35] Calculated at every tick for the prior minute.

[36] November 2015 through November 2021.

[37] *See* S&P Dow Jones Indices, Equity Indices Policies & Practices, Methodology (August 2021), at 15, available at *https://www.spglobal.com/spdji/en/*

drive an increase in trading activity from investors that seek to track the S&P 500. As such, the Exchange measured volatility on quarterly rebalancing dates and found that the average standard deviation ratio was 1.62, which suggests more closing volatility on quarterly rebalance dates compared to non-quarterly expiration dates (for which the average standard deviation ratio was 1.22), thus indicating that the impact rebalancing may have on the S&P 500 is greater than any impact that P.M.-settled SPX options may have on the S&P 500.

The Exchange additionally focused its study of the post-2018 sample pilot data on reviewing for potential correlation between excess market volatility and price reversals and the hedging activity of liquidity providers. As explained in the DERA staff study, potential impact of P.M.-settled SPX options on the correlated equity markets is thought to stem from the hedging activity of liquidity providers in such options.[38] To determine any such potential correlation, the Exchange studied the expected action of liquidity providers that are the primary source of the hedging on settlement days. These liquidity providers generally delta-hedge their S&P 500 index exposure via S&P 500 futures and on settlement day unwind their futures positions that correspond with the delta of their in-the-money (ITM) expiring P.M.-settled SPX options. Assuming such behavior, the Exchange estimated the Market-On-Close (''MOC'') [39] volume for the shares of the S&P 500 component securities (*i.e.,* ''MOC share volume'') that could ultimately result from the unwinding of the liquidity providers' futures positions by equating the notional value of the futures positions that correspond to expiring ITM open interest to the number S&P 500 component security contracts (based on the weight of each S&P 500 component security). That is, the Exchange calculated (an estimate) of the amount of MOC volume in the S&P 500 component markets attributable hedging activity as a result of expiring ITM P.M.-settled SPX options (*i.e.,* ''hedging MOC''). The Exchange then: (1) compared the hedging MOC share volume to all MOC share volume on expiration days and non-expiration trading days; and (2) compared the notional value of the hedging futures positions (*i.e.,* that correspond to expiring ITM P.M.-settled SPX options open interest) to the notional value of expiring ITM P.M.-settled SPX options open interest, the notional value of all expiring P.M.-settled SPX options open interest and the notional value of all P.M.-settled SPX options open interest.

The Exchange observed that, on average, there were approximately 25% more MOC shares executed on expiration days (332 expiration days) than non-expiration days (209 non-expiration days). While, at first glance, the volume of MOC shares executed on expiration days seems much greater than the volume executed on non-expiration days, the Exchange notes that much of this difference is attributable to just eight expiration days—the quarterly index rebalancing dates captured within the scope of the post-2018 sample pilot data. The average MOC share volume on the eight quarterly rebalancing dates was approximately 4.8 times the average MOC share volume on the non-quarterly rebalancing expiration dates; again, indicating that the impact rebalancing may have on the S&P 500 Index is greater than any impact that P.M.-settled SPX options may have on the S&P 500 Index. That is, the Exchange observed that the majority of closing volume on quarterly rebalance dates is driven by rebalancing of shares in in the S&P 500, and not by P.M.-settled SPX options expiration-related hedging activity. Notwithstanding the MOC share volume on quarterly rebalancing dates, the volume of MOC shares executed on expiration days (324 expiration days) was only approximately 13% more than that on non-expiration days, substantially less than the increase in volume over non-expiration days wherein the eight index rebalancing dates are included in expiration day volume. In addition to this, the Exchange observed that the hedging MOC share volume (*i.e.,* the expected MOC share volume resulting from hedging activity in connection with expiring ITM P.M.-settled SPX options) was, on average, less than the MOC share volume on non-expiration days, and was only approximately 20% of the total MOC share volume on expiration days, indicating that other sources of MOC share volume generally exceed the volume resulting from hedging activity of expiring ITM P.M.-settled SPX options and would more likely be a source of any potential market volatility.

The Exchange also observed that, across all third-Friday expirations, the notional value of the hedging futures positions was approximately 25% of the notional value of expiring ITM P.M.-settled SPX options, approximately 3.8% of the notional value of all expiring P.M.-settled SPX options, and approximately only 0.5% of the notional value of all P.M.-settled SPX options. As such, the estimated hedging activity from liquidity providers on expiration days is a fraction of the expiring open interest in P.M.-settled SPX options, which, the Exchange notes, is only 14% of the total open interest in P.M.-settled SPX options; thus, indicating negligible capacity for hedging activity to increase volatility in the underlying markets.

While unrelated to the initial concerns of P.M.-settlement as described above, at the request of the Commission, the Exchange recently completed an analysis intended to evaluate whether the Pilot Programs impacted the quality of the A.M.-settled option market. Specifically, the Exchange compared values of key market quality indicators (specifically, the bid-ask spread [40] and effective spread) [41] in SPXW options (which trade on Cboe Options, an affiliated of the Exchange, pursuant to a nonstandard expiration program substantively similar to the Nonstandard Expiration Pilot Program) both before and after the introduction of Tuesday expirations and Thursday expirations for SPXW options on April 18 and May 11, 2022, respectively.[42] Options on the Standard & Poor's Depositary Receipts S&P 500 ETF (''SPY'') were used as a control group to account for any market factors that might influence key market quality indicators. The Exchange used data from January 3, 2022 through March 4, 2022 (the two-month period prior to the introduction of SPXW options with Tuesday expirations) and data from May 11, 2022 to July 10, 2022 (the two-month period following the introduction of SPXW options with Thursday expirations).[43]

Given the time that as passed since the implementation of the Pilot

documents/methodologies/methodology-sp-equity-indices-policies-practices.pdf.

[38] *See* DERA Staff PM Pilot Memo, at 10–12.

[39] MOC orders allow a market participant to trade at the closing price. Market participants generally utilize MOC orders to ensure they exit positions at the end of the trading day.

[40] The Exchange calculated for each of SPXW options (with Monday, Wednesday, and Friday expirations) and SPY Weekly options (with Monday, Wednesday, and Friday expirations) the daily time-weighted bid-ask spread on the Exchange during its regular trading hours session, adjusted for the difference in size between SPXW options and SPY options (SPXW options are approximately ten times the value of SPY options).

[41] The Exchange calculated the volume-weighted average daily effective spread for simple trades for each of SPXW options (with Monday, Wednesday, and Friday expirations) and SPY Weekly options (with Monday, Wednesday, and Friday expirations) as twice the amount of the absolute value of the difference between an order execution price and the midpoint of the national best bid and offer at the time of execution, adjusted for the difference in size between SPXW options and SPY options.

[42] For purposes of comparison, the Exchange paired SPXW options and SPY options with the same moneyness and same days to expiration.

[43] The Exchange observed comparable market volatility levels during the pre-intervention and post-intervention time ranges.

Programs, as well as the fact that when the Exchange began offering XSPPM, Weekly and EOM options, XSPPM, Weekly, and EOM options had already been trading on other exchanges for nearly a decade, the Exchange is unable to analyze whether the introduction of those options significantly impacted the market quality of corresponding A.M.-settled options. The Exchange believes analyzing whether the introduction of new SPXW P.M.-settled expirations (*i.e.,* SPXW options with Tuesday and Thursday expirations) impacted the market quality of then-existing SPXW P.M.-settled expirations (*i.e.,* SPXW options with Monday, Wednesday, and Friday expirations) provides a reasonable substitute to evaluate whether the introduction of XSPPM, Weekly and EOM options impacted the market quality of any corresponding A.M.-settled options when the pilot began.[44]

As a result of this analysis, the Exchange believes the introduction of SPX options with Tuesday and Thursday options had no significant impact on the market quality of SPXW options with Monday, Wednesday, and Friday expirations. With respect to the majority of series analyzed, the Exchange observed no statistically significant difference in the bid-ask spread or the effective spread of the series in the period prior to introduction of the Tuesday and Thursday expirations and the period following the introduction of the Tuesday and Thursday expirations. While statistically insignificant, the Exchange notes that in many series, particularly as they were closer to expiration, the Exchange observed that the values of these spreads decreased during the period following the introduction of the Tuesday and Thursday expirations.[45]

To further note, given the significant changes in the closing procedures of the primary markets in recent decades, including considerable advances in trading systems and technology, the Exchange believes that the risks of any potential impact of Weekly and EOM options on the underlying cash markets are also de minimis.

The Exchange proposes to make the Pilot Programs permanent as P.M.-settled index products have become a part of the Exchange's product offerings, providing investors with greater trading opportunities and flexibility. As indicated by the significant growth in the size of the market for P.M.-settled options, such options have been, and continue to be, well-received and widely used by market participants. Therefore, the Exchange wishes to be able to have the authority to continue to provide investors with the ability to trade XSPPM, Weekly, and EOM options on a permanent basis. The Exchange believes that the permanent continuation of the Pilot Programs will serve to maintain the status quo by continuing to offer a product to which investors have become accustomed and have incorporated into their business models and day-to-day trading methodologies for nearly 14 years (and for nearly 5 years on the Exchange). As such, the Exchange also believes that ceasing to have the authority to offer XSPPM, Weekly, and EOM options may result in market disruption and investor confusion. The Exchange has not identified any significant impact on market quality nor any unique or prohibitive regulatory concerns as a result of the Pilot Programs, and, as such, the Exchange believes that the continuation of the Pilot Programs as a pilot, including the use of time and resources to compile and analyze interim and annual pilot reports and pilot data, is no longer necessary and that making the Pilot Programs permanent will allow the Exchange to otherwise allocate time and resources to other industry initiatives.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[46] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [47] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that the making the Pilot Programs permanent will allow the Exchange to be able to have the authority to continue to offer XSPPM, Weekly, and EOM options—products that have become a part of the Exchange's offerings—on a continuous and permanent basis. Since their reintroduction beginning in 2006,[48] P.M.-settled options have been, and continue to be, well-received and widely used by market participants, providing investors with greater trading opportunities and flexibility. The Exchange believes that the permanent continuation of the Pilot Programs will 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 by continuing to offer a product to which investors have become accustomed and have incorporated into their business models and day-to-day trading strategies for nearly 14 years (including nearly 5 years on the Exchange). As indicated by the significant growth in the size of the market for P.M.-settled options, such options have been, and continue to be, well-received and widely used by market participants. Conversely, the Exchange believes ceasing to offer the Pilot Programs may result in market disruption and investor confusion, as P.M.-settled index products have become a part of the Exchange's product offerings, providing investors with greater trading opportunities and flexibility.

The Exchange further believes that making the Pilot Programs permanent will remove impediments to and perfect the mechanism of a free and open market and a national market system and protect investors, while maintaining a fair and orderly market, as the Exchange believes that previous concerns (arising in the 1980s) regarding options expirations potentially contributing to excess volatility and reversals around the close have been adequately diminished. As described in detail above, the Exchange has observed no significant adverse market impact or identified any meaningful regulatory concerns during the approximately 5-year operation of the Pilot Programs as pilots nor during the nearly years since P.M.-settled SPX options were reintroduced to the marketplace.[49] Notably, the Exchange did not identify any significant economic impact (including on pricing or volatility or in

[44] The full analysis is included in Exhibit 3 of this rule filing.

[45] In any series in which the Exchange observed an increase in the market quality indicators, the Exchange notes any such increase was also statistically insignificant.

[46] 15 U.S.C. 78f(b).

[47] 15 U.S.C. 78f(b)(5).

[48] *See supra* notes 24–44. As described above, the Exchange's conclusion is consistent with the analysis in the DERA Staff PM Pilot Memo.

[49] *See supra* notes 24–44.

connection with reversals) on related futures, the underlying indexes, or the underlying component securities of the underlying indexes surrounding the close as a result of the quantity of XSPPM, Weekly, and EOM options that settle at the close or the amount of expiring open interest in XSPPM, Weekly, and EOM options, nor any demonstrated capacity for options hedging activity to impact volatility in the underlying markets. While the DERA staff study and corresponding Exchange study described above specifically evaluated SPX options, because XSPPM, Weekly, and EOM options may only overly broad-based index options, the Exchange believes it is appropriate to extrapolate the data to apply to the XSPPM, Weekly, and EOM options, as SPX options also overlay a broad-based index. Additionally, with respect to XSP options, XSP options overly the same index comprised of the same securities (just one tenth the size). This is particularly true given that the reports submitted by the Exchange during the pilot period have similarly demonstrated no significant economic impact on the respective underlying indexes or other products.

The Exchange also believes the introduction of XSPPM, Weekly, and EOM options had no significant impact on the market quality of corresponding A.M.-settled options (which the Exchange does not list) or other options. The Exchange believes this as a result of its analysis conducted after the introduction of SPXW options with Tuesday and Thursday expirations, which demonstrated no statistically significant impact on the bid-ask or effective spreads of SPXW options with Monday, Wednesday, and Friday expirations after trading in the SPXW options with Tuesday and Thursday expirations began. While SPXW options are P.M.-settled and SPX options are A.M.-settled, they are otherwise nearly identical products. As noted above, XSPPM options are nearly identical to P.M.-settled and A.M.-settled SPX options, as they are based on an index comprised of the same securities, just 1/10th the size. Additionally, Weekly, and EOM options may only overly broad-based indexes, including the Mini-SPX Index. Therefore, the Exchange believes analyzing the impact of new SPXW options on then-existing SPXW options permit the Exchange to extrapolate from this data that it is unlikely the introduction of any other XSPPM, Weekly, or EOM options significantly impacted the market quality of A.M.-settled options when the pilots began.

Additionally, the significant changes in the closing procedures of the primary markets in recent decades, including considerable advances in trading systems and technology, has significantly minimized risks of any potential impact of XSPPM, Weekly, or EOM options on the underlying cash markets. As such, the Exchange believes that permanent Pilot Programs do not raise any unique or prohibitive regulatory concerns and that such trading has not, and will not, adversely impact fair and orderly markets on Expiration Fridays for the underlying indexes and their component securities. Further, as the Exchange has not identified any significant impact on market quality or any unique or prohibitive regulatory concerns as a result of offering XSPPM, Weekly, and EOM options, the Exchange believes that the continuation of the Pilot Programs as pilots, including the gathering, submission and review of the pilot reports and data, is no longer necessary and that making the Pilot Programs permanent will allow the Exchange to otherwise allocate time and resources to other industry initiatives.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that making the Pilot Programs permanent will impose any unnecessary or inappropriate burden on intramarket competition because XSPPM, Weekly, and EOM options will continue to be available to all market participants who wish to participate in the markets for those options. The Exchange believes that the growth the market of P.M.-settled options products, including XSPPM, Weekly, and EOM options, has experienced since their reintroduction through pilot programs indicates strong, continued investor interest and demand, warranting a permanent Pilot Program. The Exchange believes that, for the period that XSPPM, Weekly, and EOM options have been in operation as pilot programs, they have provided investors with a desirable product with which to trade and wishes to permanently offer this product to investors. Furthermore, during the pilot period, the Exchange has not observed any significant adverse market effects nor identified any regulatory concerns as a result of the Pilot Programs, and, as such, the continuation of the Pilot Programs as pilots, including the gathering, submission and review of the pilot reports and data, is no longer necessary. Permanent Pilot Programs will allow the Exchange to otherwise allocate time and resources to other industry initiatives.

The Exchange further does not believe that making the Pilot Programs permanent will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because other exchanges are free to and do offer competing products.[50] To the extent that the permanent offering and continued trading of XSPPM, Weekly, and EOM options may make the Exchange a more attractive marketplace to market participants at other exchanges, such market participants may elect to become Exchange market participants.

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 written comments on the proposed rule change.

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 Exchange consents, the Commission will:

A. by order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov*. Please include file number SR–CboeEDGX–2023–083 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.

[50] *See, e.g.,* Cboe Options Rule 4.13(e) and Interpretation and Policy .13.

All submissions should refer to file number SR–CboeEDGX–2023–083. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2023–083 and should be submitted on or before February 6, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[51]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–00638 Filed 1–12–24; 8:45 am]

BILLING CODE 8011–01–P

[51] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99303; File No. SR–NSCC–2023–011]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Granting Approval of a Proposed Rule Change To Refine the Margin Liquidity Adjustment ("MLA") Charge Calculation and the Description of the MLA Charge

January 9, 2024.

I. Introduction

On November 17, 2023, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] proposed rule change SR–NSCC–2023–011 ("Proposed Rule Change") to modify NSCC's Rules & Procedures ("Rules") [3] to refine the Margin Liquidity Adjustment ("MLA") charge calculation and the description of the MLA Charge, as described in greater detail below. The Proposed Rule Change was published for public comment in the **Federal Register** on December 1, 2023.[4] The Commission has received no comments on the Proposed Rule Change. For the reasons discussed below, the Commission is approving the Proposed Rule Change.

II. Background

A. Overview of NSCC's Margin Methodology

NSCC provides central counterparty ("CCP") services, including clearing, settlement, risk management, and a guarantee of completion for virtually all broker-to-broker trades involving equity securities, corporate and municipal debt securities, and certain other securities. As a CCP, NSCC interposes itself as the buyer to every seller and seller to every buyer for the financial transactions it clears. As such, NSCC is exposed to the risk that one or more of its members may fail to make a payment or to deliver securities.

A key tool that NSCC uses to manage its credit exposure to its members is determining and collecting an appropriate Required Fund Deposit (*i.e.,* margin) for each member.[5] The objective of a Member's margin is to mitigate potential losses to NSCC associated with liquidating a Member's portfolio in the event NSCC ceases to act for that Member (hereinafter referred to as a "default").[6] The aggregated amount of all members' margin constitutes the NSCC Clearing Fund. NSCC would access its Clearing Fund should a defaulting Member's own margin be insufficient to satisfy losses to NSCC caused by the liquidation of that Member's portfolio.[7] Each member's margin consists of several components, each of which is designed to address specific risks faced by NSCC arising out of its members' trading activity.

B. NSCC's MLA Charge

The MLA Charge [8] is a margin component designed to address the market impact costs of liquidating a defaulted Member's portfolio that may increase when that portfolio includes large Net Unsettled Positions in a particular group of securities with a similar risk profile or in a particular asset type (referred to as "asset groups"), thereby causing those costs to be higher than the amount collected for the Member's volatility charge.[9] A portfolio with large Net Unsettled Positions in a particular group of securities with a similar risk profile or in a particular asset type may be more difficult to liquidate in the market in the event the Member defaults because a concentration in that group of securities or in an asset type could reduce the marketability of those large positions. Therefore, such portfolios create a risk that NSCC may face increased market impact cost to liquidate that portfolio in the assumed margin period of risk of three business days at market prices.

The MLA Charge is calculated to address this increased market impact cost by determining an amount of margin to mitigate this risk. The MLA Charge is calculated for different asset groups. Essentially, the calculation is designed to compare the total market value of a Net Unsettled Position in a particular asset group, which NSCC would be required to liquidate in the event of a Member default, to the available trading volume of that asset group or equities subgroup in the market.[10]

Specifically, when calculating the MLA Charge, NSCC currently categorizes securities into separate asset groups that have similar risk profiles—(1) equities [11] (excluding equities

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Terms not defined herein are defined in the NSCC Rules, as applicable, *available at http://dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[4] *See* Securities Exchange Act Release No. 99022 (Nov. 27, 2023), 88 FR 83993 (Dec. 1, 2023) (File No. SR–NSCC–2023–011) ("Notice of Filing").

[5] *See* Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters) of the Rules, *supra* note 3.

[6] The Rules identify when NSCC may cease to act for a Member and the types of actions NSCC may take. For example, NSCC may suspend a firm's membership with NSCC or prohibit or limit a Member's access to NSCC's services in the event that Member defaults on a financial or other obligation to NSCC. *See* Rule 46 (Restrictions on Access to Services) of the Rules, *supra* note 3.

[7] *See* Rule 4 (Clearing Fund), *supra* note 3.

[8] *See* Securities Exchange Act Release Nos. 90181 (Oct. 14, 2020), 85 FR 66646 (Oct. 20, 2020) (File No. SR–NSCC–2020–016) and 90034 (Sep. 28, 2020), 85 FR 62342 (Oct. 2, 2020) (File No. SR–NSCC–2020–804) (introduced the MLA Charge).

[9] The volatility charge is designed to capture the market price risk associated with liquidating each Member's portfolio at a 99th percentile level of confidence. *See* Notice of Filing, *supra* note 4, at 83994.

[10] *See id.*

[11] NSCC excludes long positions in Family-Issued Securities, as defined in Rule 1 (Definitions) of the

defined as Illiquid Securities pursuant to the Rules),[12] (2) Illiquid Securities, (3) unit investment trusts, or UITs, (4) municipal bonds (including municipal bond ETPs), and (5) corporate bonds (including corporate bond ETPs).[13] NSCC then further segments the equities asset group into the following subgroups: (i) micro-capitalization equities, (ii) small capitalization equities, (iii) medium capitalization equities, (iv) large capitalization equities, (v) treasury ETPs, and (vi) all other ETPs.[14] NSCC then calculates a measurement of market impact cost for each asset group and equities asset subgroup for which a Member has Net Unsettled Positions in its portfolio.[15]

III. Description of the Proposed Rule Change

NSCC proposes to refine the MLA Charge calculation to more accurately calculate the impact costs of liquidating a security/portfolio by (i) moving all exchange traded products (''ETPs'') (other than those deemed to be Illiquid Securities) into the equities asset group and calculating impact cost at the security level rather than at the subgroup level for the equities asset subgroups, and (ii) improving the calculations relating to exchange traded funds (''ETFs'') by adding a calculation for latent liquidity for equity ETFs with in-kind baskets. In addition, NSCC proposes to amend the description of the MLA Charge to clarify the description of the calculation with respect to SFT Positions in connection with Securities Financing Transactions.

A. Moving Liquid ETPs Into Equities Asset Group and Providing Security Level Market Impact Cost Calculations

NSCC proposes to move all ETPs, including corporate bond ETPs and municipal bond ETPs, other than ETPs that are deemed to be Illiquid Securities, into the equities asset group. Currently, corporate bond ETPs and municipal bond ETPs are included as corporate bonds and municipal bonds, respectively, for purposes of the MLA Charge calculation. ETPs are traded on an exchange giving them equity-like properties, such as trading volume data at the security level apart from their underlying assets which may not be actively traded. Therefore, the impact costs of liquidating ETPs can be estimated in the same manner as other items in the equities asset subgroups, at the security level, as discussed below. ETPs that are deemed to be Illiquid Securities would be included in the Illiquid Securities category.[16]

NSCC also proposes to revise the market impact cost calculation for the equities asset group and subgroups to calculate the impact cost at the security level. Based on a review of its margin methodologies (and the ETF Study discussed below), NSCC has determined that equities and liquid ETPs display a wide disparity of trading volumes (as measured by average daily volumes) even within subgroups, and the market impact costs are more dependent on specific securities than the subgroup.[17] As a result, NSCC is proposing to calculate the market impact costs for securities in the equities asset group, including liquid ETPs, at the security level rather than at the subgroup level, which NSCC states has shown to be a more accurate calculation of market impact costs for these securities.[18]

Currently, the MLA Charge calculation for the equity asset subgroups includes a measurement of the concentration of the Net Unsettled Position in the subgroup.[19] Since the market impact cost would be calculated at the security level for the equities asset group, rather than the subgroup level, this measurement would no longer be necessary and would be removed.

In addition, for each asset group or subgroup, NSCC currently compares the calculated market impact cost to a portion of the volatility charge that is allocated to Net Unsettled Positions in that asset group or subgroup and compares that ratio to a threshold to determine if an MLA Charge is applicable to that asset group or subgroup.[20] Since the market impact cost would be calculated at the security level for all assets in the equity asset group, rather than the subgroup level, this comparison would be at the asset group level for all asset groups, including the equities asset group, and would no longer be made at the subgroup level for subgroups within the equities asset group.

To reflect these changes in the Rules, NSCC would amend Sections I(A)(1)(g) and I(A)(2)(f) of Procedure XV of the Rules[21] to move all ETP categories as subgroups in the equities asset group other than ETPs that are deemed to be Illiquid Securities, which would be categorized as Illiquid Securities. A footnote in each of these sections would be added to the ''all other ETPs'' category to clarify that ETPs with underlying securities separately categorized in an equities asset subgroup would be categorized by the asset types and capitalizations of their underlying securities, and that ETPs that are deemed Illiquid Securities would be categorized in the Illiquid Securities asset group.

Sections I(A)(1)(g) and I(A)(2)(f) of Procedure XV would be restructured to reflect that the market impact calculation for securities in the equities asset group would be calculated at the security level rather than the subgroup

Rules, from the MLA Charge. NSCC believes the margin charge applicable to long Net Unsettled Positions in Family-Issued Securities pursuant to Sections I(A)(1)(a)(iv) and (2)(a)(iv) of Procedure XV of the Rules provides adequate mitigation of the risks presented by those Net Unsettled Positions, such that an MLA Charge would not be triggered. *See id.* at n.14. *See also supra* note 3.

[12] *See* Rule 1 (Definitions), *supra* note 3.

[13] *See* Sections I(A)(1)(g) and I(A)(2)(f) of Procedure XV of the Rules, *supra* note 3. Additional details regarding the calculation of the MLA Charge are set forth in the NSCC's Methodology Documentation for Quantitative Margin Risk Models (''Methodology Documentation''). NSCC would revise the Methodology Documentation to incorporate the changes in the Proposed Rule Change and included copies of changes to the Methodology Documentation in Exhibit 3b to the Proposed Rule Change. Pursuant to 17 CFR 240.24b–2, NSCC requested confidential treatment of Exhibit 3b.

[14] *Id.* The market capitalization categorizations currently are as follows: (i) micro-capitalization equities have a capitalization of less than $300 million, (ii) small capitalization equities have a capitalization of equal to or greater than $300 million and less than $2 billion, (iii) medium capitalization equities have a capitalization of equal to or greater than $2 billion and less than $10 billion, and (iv) large capitalization equities have a capitalization of equal to or greater than $10 billion. NSCC reviews these categories annually, and any changes that NSCC deems appropriate are subject to NSCC's model risk management governance procedures set forth in the Clearing Agency Model Risk Management Framework (''Model Risk Management Framework''). *See* Securities Exchange Act Release Nos. 81485 (Aug. 25, 2017), 82 FR 41433 (Aug. 31, 2017) (File No. SR–NSCC–2017–008); 84458 (Oct. 19, 2018), 83 FR 53925 (Oct. 25, 2018) (File No. SR–NSCC–2018–009); 88911 (May 20, 2020), 85 FR 31828 (May 27, 2020) (File No. SR–NSCC–2020–008); 92381 (July 13, 2021), 86 FR 38163 (July 19, 2021) (SR–NSCC–2021–008); and 94272 (Feb. 17, 2022), 87 FR 10419 (Feb., 24 2022) (SR–NSCC–2022–001).

[15] *See* Sections I(A)(1)(g) and I(A)(2)(f) of Procedure XV of the Rules, *supra* note 3.

[16] *See* definition of ''Illiquid Security'' in Rule 1, *supra* note 3. For instance, if an ETP is not listed on a specified securities exchange or has a limited trading history, as defined in the definition, it would be treated as an Illiquid Security for purposes of the MLA Charge calculations.

[17] *See* Notice of Filing, *supra* note 4, at 83996.

[18] *Id.*

[19] *See id.* at 83995.

[20] *Supra* note 3. NSCC's margining methodology uses a three-day assumed period of risk. For purposes of this calculation, NSCC uses a portion of the applicable volatility charge that is based on one-day assumed period of risk and calculated by applying a simple square-root of time scaling, referred to in this proposed rule change as ''1-day volatility charge.'' Any changes that NSCC deems appropriate to this assumed period of risk would be subject to NSCC's model risk management governance procedures set forth in the Model Risk Management Framework. *See supra* note 14. *See also* Sections I(A)(1)(g) and I(A)(2)(f) of Procedure XV of the Rules, *supra* note 3.

[21] *See* Sections I(A)(1)(g) and I(A)(2)(f) of Procedure XV of the Rules, *supra* note 3.

level, as discussed above. As a result of this change, the current component that measures the concentration of each Net Unsettled Position in a subgroup would be removed from Sections I(A)(1)(g)(i)(4) and I(A)(2)(f)(i)(4) of Procedure XV. References to subgroup calculations would also be removed in applicable provisions, including the provisions relating to comparing the calculated market impact cost at the subgroup level to the volatility charge applicable to the Net Unsettled Positions and an applicable MLA Charge at the subgroup level and a sentence that states that all MLA Charges for each of the equities subgroups shall be added together to result in one MLA Charge for the equities subgroup. In addition, references to subgroups with respect to calculations relating to asset groups other than the equities asset group currently in Sections I(A)(1)(g)(ii) and I(A)(2)(f)(ii) (*i.e.,* references to the treasury ETP and other ETP subgroups) would be removed since those would be calculated as part of the equities asset group, as discussed above.

NSCC would add language to clarify that for each Member, all MLA Charges for each of the asset groups shall be added together to result in a total MLA Charge.

B. Changes to ETF Calculations

NSCC proposes to amend the impact cost calculations for ETFs to more accurately account for the market impact of these securities and in response to regulatory feedback on NSCC's margin methodologies, by incorporating ''latent'' liquidity to more accurately reflect the market liquidity of ETFs.[22] ETFs are securities that are traded on an exchange and that track underlying securities, indexes or other financial instruments, including equities, corporate and municipal bonds and treasury instruments. Unlike mutual funds, ETFs are created with the assistance of certain financial institutions called authorized participants (''APs''), often banks, that are given the ability to create and redeem ETF shares directly from the ETF issuer. To create ETF shares, an AP can either deliver a pre-specified bundle of securities underlying the ETFs (*i.e.,* an ''in-kind basket'') in exchange for ETF shares, or provide cash equal to the value of the cost of purchasing underlying securities for the ETF shares. To redeem ETF shares, an AP would do the opposite—deliver ETF shares to the ETF issuer in exchange for an in-kind basket of underlying securities or cash equal to the value of the underlying securities.

Throughout the life of an ETF, APs create and redeem shares depending on the market and arbitrage opportunities. As a result, ETFs, particularly those with in-kind creation/redemption mechanisms, tend to trade close to the value of the underlying securities. For instance, if the market price of the ETF on the secondary market (discussed below) is above the value of the securities underlying the ETF, the AP can purchase underlying securities (at the lower price) and exchange those securities to create new ETFs. Likewise, if the market price of the ETF falls below the value of the securities underlying the ETFs, an AP can buy ETF shares on the secondary market and redeem them with the ETF issuer in exchange for the underlying securities.

As a result of this structure, ETF market liquidity can be divided into two markets: the primary market and the secondary market. The primary market consists of APs creating and redeeming ETF shares directly with the ETF issuer. The secondary market consists of investors buying and selling ETFs through exchanges. Often the stocks underlying an ETF basket have much larger trading volumes than the trading volume of the ETF itself. Upon the liquidation of a portfolio with ETFs, the ability of APs to create and redeem ETF shares provides additional liquidity, also called ''latent liquidity,'' which changes the market risk profile of ETFs with in-kind basket creation/redemption processes.

The current impact cost calculation for the MLA Charge does not include calculations measuring the impact relating to latent liquidity. NSCC recently commissioned a review of ETFs (''ETF Study'') that included an ETF market review, risk characteristics, and an independent simulation of market impact costs associated with sample clearing portfolios.[23] Based on the ETF Study, it was observed that most equity ETFs with an in-kind creation/redemption process trade with very tight premium/discount to net asset value (''NAV''), or close to the value of the underlying securities.[24] Often, however, the stocks underlying the equity ETF baskets have a much larger trading volume than the equity ETF itself, which creates latent liquidity.

As a result, NSCC is proposing to include, as part of its impact calculation, a measure of the latent liquidity for equity ETFs with in-kind basket creation/redemption processes and a measure of the costs associated with primary market activity to more accurately assess the impact costs relating to liquidating portfolios containing equity ETFs. The proposed calculation would take into account liquidity in the primary and secondary market for liquid equity ETFs with in-kind creation/redemption processes, by comparing the market impact cost of such equity ETFs based on a hypothetical liquidation in the primary market and in the secondary market.

To determine the impact costs of a liquidation of equity ETFs with in-kind baskets, NSCC would run the proposed MLA Charge calculations described above in two scenarios for portfolios that contain such ETFs and compare the two calculations to determine the impact cost. NSCC would run a baseline calculation (''Baseline Calculation'') to simulate all the ETF positions being liquidated in the secondary market and the impact cost calculation would be at the security level (*i.e.,* the ETF shares) as liquid equities (as discussed above). NSCC would also run an alternative calculation (''Create/Redeem Calculation'') to simulate the ETF positions being liquidated in the primary market using the creation/redemption process.

The Create/Redeem Calculation would be calculated as follows:

- First, the liquid equity ETFs eligible for in-kind create/redeem process would be fully decomposed into (a) the corresponding underlying baskets of the liquid equity ETFs and (b) pairs of such ETFs and their corresponding underlying baskets;
- Second, the decomposed underlying baskets and the residual securities in the portfolio (*i.e.,* the securities in the original portfolio that are not ETFs eligible for in-kind create/redeem process) would be netted at the security level;
- Third, the impact cost on the portfolio from the second step would be calculated assuming all the securities would be liquidated in the secondary market, and the impact costs would be calculated as described above as if such securities are liquid equities;
- Fourth, the impact cost calculated in the third step would be adjusted by an amount to account for the portfolio

[22] *See* Notice of Filing, *supra* note 4, at 83996.

[23] NSCC included the ETF Study in Exhibit 3c to the Proposed Rule Change. Pursuant to 17 CFR 240.24b–2, NSCC requested confidential treatment of Exhibit 3c.

[24] *Id.* When an ETF's market price is higher than its NAV, it's trading at a premium, when it's lower, it's trading at a discount. The spread between the premium or discount to the NAV represents a potential cost to close out the paired ETF and its in-kind basket.

risk difference [25] from the netted securities resulting from the second step, as compared to the original portfolio;

- Fifth, the impact cost for paired ETFs and their corresponding underlying baskets would be calculated by multiplying the gross market amount of the ETFs by a haircut representing the premium/discount; [26] and
- Lastly, the impact costs from step four and step five would be added together.

NSCC would then use the smaller calculated impact costs of either the Baseline Calculation or the Create/Redeem Calculation for purposes of calculating the MLA Charge.

To reflect these changes in the Rules, NSCC would add language in Sections I(A)(1)(g) and I(A)(2)(f) of Procedure XV stating that the impact cost for ETFs with in-kind baskets would include calculations comparing impact costs in the secondary market and the primary market for such equity ETFs, as discussed above. NSCC would indicate that it would calculate impact costs in two scenarios: (1) a baseline calculation to simulate such ETFs being liquidated in the secondary market where the impact costs would be calculated at the security level (*i.e.,* the ETF shares) utilizing the equities asset subgroup security level and (2) a create/redeem calculation to simulate an authorized participant using the primary market to liquidate such ETFs using the creation/redemption process. The proposed language would include a description of the how the impact costs for the create/redeem calculation would be calculated by decomposing the ETFs into their underlying securities and calculating impact costs of such underlying securities utilizing the equity asset subgroup calculations (as discussed above). The proposed language would also state that an adjustment would be made in the create/redeem calculation to reflect the different portfolio risks of the original portfolio used in the baseline calculation and the decomposed portfolio used in the create/redeem calculation. The proposed language would provide that NSCC would then use the smaller calculated impact costs of the scenarios for purposes of the MLA Charge for such ETFs.

C. Changes Concerning SFT Positions

Rule 56 describes the SFT Clearing Service and contains a description of how the Clearing Fund formula is calculated with respect to SFT Positions, including how such positions are calculated with respect to the MLA Charge.[27] The Proposed Rule Change would update the language in Rule 56 relating to the MLA Charge to clarify how NSCC would calculate the MLA Charge with respect to SFT Positions for transparency and to reflect the proposed MLA Charge refinements, but it would not change how NSCC would calculate the MLA Charge with respect to SFT positions. NSCC would clarify how SFT Positions would be categorized for purposes of the MLA Charge by replacing language stating that SFT Positions are ''aggregated with'' Net Unsettled Positions in the same asset group or subgroup with language that clarifies that SFT Positions would be categorized in the same asset groups or subgroups as the underlying SFT Securities in such SFT Positions. NSCC would also clarify language discussing an added calculation relating to the MLA Charge in the event a Member's portfolio contains both (i) SFT Positions and (ii) Net Unsettled Positions or Net Balance Order Unsettled Positions. The language in Rule 56 relating to the added calculation for SFT positions does not reference Net Balance Order Unsettled Positions which are treated in the same manner as Net Unsettled Positions for purposes of the added calculation when a portfolio contains both (i) SFT Positions and (ii) Net Unsettled Positions or Net Balance Order Unsettled Positions. The proposed language would add a reference to Net Balance Order Unsettled Positions.

NSCC is also proposing to add a sentence in Sections I(A)(1)(g) and I(A)(2)(f) of Procedure XV of the Rules clarifying that if a Member's portfolio contains both (i) SFT Positions and (ii) Net Unsettled Positions or Net Balance Order Unsettled Positions, the MLA Charge shall be calculated as set forth in Rule 56.

IV. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act [28] 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. After carefully considering the proposed rule change, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to NSCC. In particular, the Commission finds that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) [29] of the Act and Rules 17Ad–22(e)(4)(i), and (e)(6)(i) thereunder.[30]

A. Consistency With Section 17A(b)(3)(F) of the Act

1. Prompt and Accurate Clearance and Settlement

Section 17A(b)(3)(F) of the Act [31] requires that the rules of a clearing agency, such as NSCC, be designed to, among other things, 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 the clearing agency or for which it is responsible.[32] The Commission believes that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act for the reasons stated below.

As described above in Sections III.A and B, NSCC proposes to refine the MLA Charge calculation to more accurately calculate the impact costs of liquidating a security/portfolio by moving all ETPs (except for Illiquid Securities) into the equities asset group and calculating impact cost at the security level rather than at the subgroup level for the equities asset subgroups, and by adding a calculation for latent liquidity for equity ETFs. As a result, the proposal would better align the MLA Charge with the risks arising from position concentrations in portfolios containing ETPs and ETFs. The Commission believes that a closer alignment between the MLA Charge and the risks presented by the concentration of securities Member portfolios would help facilitate NSCC's ability to set margins that more accurately reflect the risks posed by such portfolios. Setting

[25] The original portfolio used in the Baseline Calculation and the decomposed portfolio from step two would have different portfolio risks. As a result, because such portfolios would contain different positions, they would have different VaR Charges if calculated separately. The VaR Charge of the original portfolio is a component of the MLA Charge calculation for the portfolio from step two. Step four would adjust for those differences as part of the impact cost.

[26] The haircut is calculated as an estimate of the cost of closing out the ETFs and underlying pairs using the create/redeem process. The haircut is a model parameter and will be reviewed at least monthly in accordance with the model risk management governance procedures set forth in the model Risk Management Framework. *See supra* note 14.

[27] *See* Rule 56 (Securities Financing Transaction Clearing Service) of the Rules, *supra* note 3.

[28] 15 U.S.C. 78s(b)(2)(C).

[29] 15 U.S.C. 78q–1(b)(3)(F).

[30] 17 CFR 240.17Ad–22(e)(4)(i) and(e)(6)(i).

[31] 15 U.S.C. 78q–1(b)(3)(F).

[32] *Id.*

margins that accurately reflect the risks posed by its members' portfolios could reduce the likelihood that NSCC would not have collected sufficient margin to address losses arising out of a member default. Reducing the likelihood that NSCC holds insufficient margin to address default losses would, in turn, further assure that NSCC's operation of its critical clearance and settlement services would not be disrupted because of insufficient financial resources.

As part of the Proposed Rule Change, NSCC filed Exhibit 3a—Summary of Impact Study (''Impact Study''), which provided the actual MLA Charges at the member-level, account-level, and CCP-level, from January 3, 2022 through June 30, 2023, as compared to the MLA Charges that NSCC would have assessed if the proposed amendments had been in place during that time period.[33] The Commission reviewed and analyzed the Impact Study, which showed, among other things, that had the proposed amendments been in place during that period, it would have resulted in an average daily increase of $62 million in the aggregate MLA Charge. Therefore, the Commission believes that the Impact Study demonstrates that the proposed MLA Charge calculation would enable NSCC to set more precise margin coverage levels than those using the current calculation, providing further assurance that NSCC's operation of its critical clearance and settlement services would not be disrupted because of insufficient financial resources.

As described above in Section III.C, NSCC proposes to provide transparency to the Rules by updating the language relating to how the MLA Charge is calculated with respect to SFT Positions. Enhancing the clarity of the NSCC Rules would enable members to more efficiently and effectively understand and conduct their business in accordance with the NSCC Rules.

Accordingly, for the reasons above, the Commission finds that the Proposed Rule Change should help NSCC to continue providing prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.[34]

2. Safeguarding Securities and Funds

In the event that a defaulted member's own margin be insufficient to satisfy losses to NSCC caused by the liquidation of that member's portfolio, NSCC would access the mutualized Clearing Fund. As discussed above in Section IV.A.1, NSCC's proposed enhancements to the MLA Charge calculation discussed in Sections III.A and B should help facilitate NSCC's ability to promptly respond to changing risk profiles of its members' portfolios, and thereby set margins that more accurately reflect the risks posed by such portfolios. As a result, the proposal would better align the MLA Charge with the risks arising from position concentrations in portfolios containing ETPs and ETFs should help ensure that NSCC collects sufficient margin from its members. Accordingly, the Proposed Rule Change should help minimize the likelihood that NSCC would have to access the Clearing Fund, thereby limiting non-defaulting members' exposure to mutualized losses.

The Commission believes that by helping to limit the exposure of NSCC's non-defaulting members to mutualized losses, the Proposed Rule Change would help NSCC assure the safeguarding of securities and funds which are in its custody or control, consistent with Section 17A(b)(3)(F) of the Act.[35]

B. Consistency With Rule 17Ad–22(e)(4)(i) Under the Act

Rule 17Ad–22(e)(4)(i) under the Act requires that each covered clearing agency that provides central counterparty services, such as NSCC, establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.[36] The Commission believes that the proposal is consistent with Rule 17Ad–22(e)(4)(i) under the Act for the reasons stated below.

As discussed above in Section IV.A, NSCC's proposed enhancements to the MLA Charge calculation would apportion a higher MLA Charge to those members' accounts that present greater potential risk to NSCC due to large Net Unsettled Positions in a particular group of securities with a similar risk profile or asset types that may be more difficult to liquidate in the market in the event the member defaults. As a result, the proposal would better align the MLA Charge with the risks arising from position concentration in such portfolios. The Commission has reviewed and analyzed the filing materials, including the Impact Study,[37] and agrees that the proposed enhancements to the MLA Charge calculation should better enable NSCC to collect margin amounts that are sufficient to mitigate NSCC's credit exposures to its members' portfolios, as compared to the current methodology.

Accordingly, the Commission finds the Proposed Rule Change is consistent with Rule 17Ad–22(e)(4)(i) under the Act because it is designed to assist NSCC in managing its credit exposures to its members by maintaining sufficient financial resources to cover its credit exposure to the portfolios of members with ETP and equity ETF positions in their respective portfolios.[38]

C. Consistency With Rule 17Ad–22(e)(6)(i) Under the Act

Rule 17Ad–22(e)(6)(i) under the Act requires that each covered clearing agency that provides central counterparty services, such as NSCC, establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[39] The Commission believes that the proposal is consistent with Rule 17Ad–22(e)(6)(i) under the Act for the reasons stated below.

As discussed above in Section IV.A, NSCC's proposed enhancements to the MLA Charge calculation would apportion a higher MLA Charge to those member accounts that present greater potential risk to NSCC due to large Net Unsettled Positions in a particular group of securities with a similar risk profile or asset types that may be more difficult to liquidate in the market in the event the member defaults. As a result, the proposal would better align the MLA Charge with the risks arising from position concentration in such member portfolios. The Commission has reviewed and analyzed the filing materials, including the Impact Study,[40] and agrees that the proposed enhancements to the MLA Charge calculation would enable NSCC to set margins that more accurately reflect the risks posed by such portfolios than the current methodology. As a result, implementing the Proposed Rule Change would better enable NSCC to set and collect margin at levels

[33] NSCC has requested confidential treatment of Exhibit 3a, pursuant to 17 CFR 240.24b–2.

[34] 15 U.S.C. 78q–1(b)(3)(F).

[35] *Id.*

[36] 17 CFR 240.17Ad–22(e)(4)(i).

[37] *See supra* note 33.

[38] 17 CFR 240.17Ad–22(e)(4)(i).

[39] 17 CFR 240.17Ad–22(e)(6)(i).

[40] *See supra* note 33.

commensurate with the risks associated with the portfolios of its members.

Accordingly, the Commission finds the Proposed Rule Change is consistent with Rule 17Ad–22(e)(6)(i) under the Act because it is designed to assist NSCC in maintaining a risk-based margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of members' portfolios.[41]

VII. 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 of the Act[42] and the rules and regulations promulgated thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[43] that Proposed Rule Change SR–NSCC–2023–011, be, and hereby is, *approved*.[44]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[45]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–00630 Filed 1–12–24; 8:45 am]

BILLING CODE 8011–01–P

[41] 17 CFR 240.17Ad–22(e)(6)(i).

[42] 15 U.S.C. 78q–1.

[43] 15 U.S.C. 78s(b)(2).

[44] In approving the Proposed Rule Change, the Commission considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[45] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 2013–0259]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Advisory Circular: Reporting of Laser Illumination of Aircraft

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval renew information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 17, 2023. The collection involves information to be collected will be used to and/or is necessary because Advisory Circular 70–2B provides guidance to civilian air crews on the reporting of laser illumination incidents and recommended mitigation actions to be taken in order to ensure continued safe and orderly flight operations.

DATES: Written comments should be submitted by February 13, 2024.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field)

By mail: Nicholas Torgerson, Federal Aviation Administration, AJR–223, 800 Independence Ave. SW, Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Nicholas Torgerson, by email at: *Nicholas.d.torgerson@faa.gov;* phone: 202–322–4157

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0698.

Title: Advisory Circular (AC): Reporting of Laser Illumination of Aircraft.

Form Numbers: Advisory Circular 70–2B, Reporting of Laser Illumination of Aircraft.

Type of Review: Renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 17, 2023 (88 FR 58633). Advisory Circular 70–2B provides guidance to civilian air crews on the reporting of laser illumination incidents and recommended mitigation actions to be taken in order to ensure continued safe and orderly flight operations. Information is collected from pilots and aircrews that are affected by an unauthorized illumination by lasers. The requested reporting involves an immediate broadcast notification to Air Traffic Control (ATC) when the incident occurs, as well as a broadcast warning of the incident if the aircrew is flying in uncontrolled airspace. In addition, the AC requests that the aircrew supply a written report of the incident and send it by fax or email to the Washington Operations Control Complex (WOCC) as soon as possible.

Respondents: Approximately 1,100 pilots and crewmembers.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 10 minutes.

Estimated Total Annual Burden: 183 hours.

Issued in Washington, DC, on January 10, 2024.

Sandra L. Ray,

Aviation Safety Inspector, AFS–260.

[FR Doc. 2024–00687 Filed 1–12–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2023–0066]

Petition for Waivers of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on August 10, 2023, Georgia Central Railway, L.P. and Heart of Georgia Railroad, Inc. (Petitioners) submitted a request to the Federal Railroad Administration (FRA) under 49 CFR 211.51 for approval of a test program, and the temporary suspension of certain FRA safety regulations in connection with that program (Program). Petitioners explain that the proposed test program involves a system of a ''novel, self-propelled, zero-emission, battery-electric rail vehicle'' (Vehicle) and its associated computer and telemetry technology (System), manufactured by Parallel Systems, Inc. Petitioners state that the goal of the technology is to provide smaller freight railroads an opportunity to meaningfully compete in the short-haul transportation of containers, and the technology also provides ''numerous public benefits for the environment, the economy, the national highway system, and communities disproportionately impacted by highway movement of containers.'' Petitioners contend that ''safety is an overriding focus of the proposed program'' and the Pilot Test Safety Plan is included in Exhibit C of the submission. Petitioners state that the Program is ''designed to evaluate the effectiveness of the system and new operational approaches to rail vehicle technology in the short-haul movement of containers.''

FRA has conducted a preliminary review of Petitioner's application to determine whether it meets the minimum regulatory requirements and provides enough information to be actionable by FRA, and FRA has found the application complete. However, upon analyzing the request, FRA has decided to treat Petitioners' application as a request for waivers of compliance under the relevant provisions of 49 CFR part 211. FRA will also review Petitioners' request for a test program under 49 CFR 211.51.

FRA assigned the petition Docket Number FRA–2023–0066. A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov*.

Petitioners assert that suspending (waiving) certain provisions of the Federal railroad safety regulations is necessary for the conduct of the Program, and, accordingly, Petitioners request that FRA temporarily suspend certain provisions of the CFR throughout the Program. Specifically, petitioners request relief from specific regulatory requirements during each phase of testing, as listed in the table below:

SUMMARY OF REGULATORY RELIEF REQUESTED

Reference	Regulation summary	Basis for relief	Petitioner comments
Part 218, subpart D.	Operating Practices—Prohibition Against Tampering with Safety Devices: §§ 218.55–59 prohibit disabling of safety devices or knowingly operating a train with disabled safety devices.	In order to support testing of certain features of the System, some Program procedures will require installing, removing, disabling, and bypassing onboard sensors, self-diagnostic devices, and other devices of the Vehicles.	Alternative safety protections designed to mitigate the risks associated with the disabled functions will remain operative even if safety devices on the Vehicles are disabled. The petitioner's safety plan (Safety Plan) is included as Appendix A to the petition.
Part 229	Locomotive Safety Standards—multiple provisions of part 229 require suspension given the unique design of the Vehicle and the braking system.	In summary, the following design features of the System and characteristics of the Program are directly related to the part 229 temporary suspension requests: —Remotely Directed Operation. —Platooning Capability. —Alternative Braking Technology.	For those aspects of the requested part 229 temporary suspensions that are not predicated on the absence of conventional features due to remotely directed operation, the platooning capability or the alternate braking technology of the Vehicle, the procedures and the System design and operational features explained in the Safety Plan will assure safety.
	229.9, Movement of Non-Complying Locomotives: § 229.9(a)(3).	The provision requires tagging of the locomotive at certain locations. This Vehicle does not have a locomotive cab.	The Vehicle will be tagged on the low voltage isolation switch, which controls power to the Vehicle computers.
	229.13, Control of Locomotives: § 229.13	The provision includes requirements when multiple locomotives are coupled. This Vehicle does not couple.	Safety Plan sections 2.7 and 5.4 describe the safety features of the platooning technology that offer an alternative safety standard to traditional coupling, brake, and lead locomotive systems.
	229.15, Locomotives with Control Units: § 229.15(a)(10).	This provision requires locomotives with radio control units to be designed with specific self-diagnostics.	This Vehicle has designed integrity-monitoring features described in Safety Plan section 5.2 and these features are part of the test program.
	229.29, Air Brake System Calibration, Maintenance and Testing: § 229.29.	This provision defines the calibration, maintenance, and testing of locomotive braking systems.	Safety Plan section 5.6 describes the maintenance, calibration, and testing of the brake technology that the Vehicles will feature. These features are part of the test program.
	229.47, Emergency Brake Valves: § 229.47	This provision states that the brake pipe valve must be accessible to members of the crew in the cab other than the engineer and must be attached to a wall adjacent to an end exit door. This Vehicle does not have a locomotive cab.	Safety Plan section 4.2 describes the emergency-stop function of the Vehicles. These features are part of the test program.
	229.53, Brake Gauges: § 229.53	This provision requires all gauges and indicators to be located so the engineer can conveniently read them in the locomotive cab. This Vehicle does not have a cab.	Monitoring associated with movement of the Vehicle is available on the devices used to control movements. These features are part of the test program.
	229.55, Piston Travel: § 229.55(b)	This provision includes requirements of the brake cylinder. This Vehicle includes alternative braking technology.	The Program will evaluate the effectiveness of different brake technology than what is present on conventional locomotives.
	229.71, Clearance Above Top of Rail: § 229.71	This provision prohibits any part or appliance to be less than 2.5 inches above the top of rail.	The Vehicle will comply with § 229.71 except that if test data indicates that the Vehicle does not reliably activate track circuits by shunting, electrical rail contacts may be added less than 2.5 inches above the top of rail to improve shunting performance for the testing program.
	229.115(a), (c), Slip/Side Alarms: § 229.115(a) and (c).	This provision requires audible and visual alarms in the cab if wheels slip or slide. This Vehicle does not have a cab.	Monitoring associated with movement of the Vehicle is available on the devices used to control movements. These features are part of the test program.
	229.117, Speed Indicators: § 229.117	This provision requires the locomotive speed to be readable from the engineer's normal position. This Vehicle does not have a cab.	Monitoring associated with movement of the Vehicle is available on the devices used to control movements. These features are part of the test program.
	229.119, Cabs, Floors, and Passageways: §§ 229.119 and 229.127, Cab Lights: § 229.127.	This provision sets requirements for locomotive cabs, floors, passageways.	This Vehicle does not have a cab.
	229.131(a), Sanders: § 229.131(a)	This provision requires each locomotive to be equipped with operative sanders. This Vehicle includes alternative braking technology.	The Program will evaluate the effectiveness of different brake technology than what is present on conventional locomotives, including testing of wheel slip and slide.

SUMMARY OF REGULATORY RELIEF REQUESTED—Continued

Reference	Regulation summary	Basis for relief	Petitioner comments
	229.137, Sanitation, General Requirements and 229.139, Sanitation, Servicing Requirements.	These provisions are premised upon having a locomotive cab.	This Vehicle does not have a cab.
	229.141, Body Structure, MU Locomotives: § 229.141.	These provisions are premised upon the MU locomotive cars being coupled together. This Vehicle does not couple.	Safety Plan sections 2.7 and 5.4 describe the safety features of the platooning technology that offer an alternative safety standard to traditional coupling, brake, and lead locomotive systems.
	Part 229, subpart D, Locomotive Crashworthiness Design Requirements: §§ 229.201–206.	These provisions are premised upon having a locomotive cab.	This vehicle does not have a cab.
	229.311, Review of Locomotive Electronics Safety Analysis Before Use: §§ 229.301–319.	Petitioner seeks temporary suspension of the 60-day notice requirement and will provide details throughout the testing program.	Petitioner will comply with the rest of part 229, subpart E, including being subject to FRA's authority to audit the safety analysis any time after the System is placed in use under the Program.
Part 231	Railroad Safety Appliance Standards— —§ 231.6(a), Handbrakes, —§ 231.6(d), End Handholds, —§ 231.6(e), Uncoupling Levers.	These provisions that detail the placement and design of safety appliance equipment are not applicable to this alterative Vehicle design.	This temporary suspension request is predicated on the fact that the Vehicles will not have and do not need ladders, running boards or drawbars.
Part 232	Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices —232.103(f), (g), (j), (k), (l), (m), (n), (o), General Requirements for All Train Brake Systems. —232.205–212, Brake Tests. —232.215, Transfer Train Brake Tests. —232.303, General Requirements (for periodic maintenance). —232.305, Single Car Air Brake Tests. —232, subpart E, End-of-Train Devices. —232.503, Process to Introduce New Brake System Technology. —232.505, Pre-Revenue Service Acceptance Testing Plan.	Certain design features of the Vehicle, including its platooning capability and alternative braking technology, are drivers of the part 232 temporary suspension requests. The Vehicles will not be coupled, and the Program will test a novel braking technology that is different than air brakes and evaluate the effectiveness of the self-monitoring capabilities of the Vehicles. The testing program includes extensive testing of the new brake system technology and will be iterative. FRA test monitoring will review the results of testing as the testing progresses through the various stages.	The Petitioner will conduct inspections and tests that are functionally similar to the requirements of part 232. Analogous functional features of the novel braking technology will be inspected and tested, but inspections and tests will reference components and metrics that are relevant to the design of the novel brake technology.
Part 236	Rules, Standards, and Instructions Governing the Installation, Inspection, Maintenance, and Repair of Signal and Train Control Systems, Devices, and Appliances, § 236.913 Product Safety Plan for Processor-Based Signal and Train Control Systems.	This testing will be performed in dark territory under track warrant control. Special test provisions will be in place to protect the testing. The Vehicle is not equipped with a traditional train control system.	Future development of this Vehicle will likely include interface between the locomotive electronics and a signal and train control system.
Parts 240 and 242.	Qualification and Certification of Engineers and Conductors —240.103 and 242.103 Approval of Design of Individual Railroad Programs by FRA.	The remotely directed operation of the Vehicle alters the traditional role and requirements of Engineers and Conductors. This test program will be used to determine the qualification and certification requirements for Engineers and Conductors operating a Vehicle by remotely directed operation.	This testing will be performed by trained testing professionals following the test program and Safety Plan. The test program will be supported by qualified and certified Georgia Central Railway and Heart of Georgia Railroad Engineers and Conductors.

Recognizing that 49 CFR part 231 involves compliance with certain statutory requirements, Petitioners also request that FRA exercise its authority under 49 U.S.C. 20306 to exempt the rail equipment involved in the Program from the requirements of 49 U.S.C. 20302, which, in part, requires rail equipment to be equipped with certain safety appliances (*e.g.,* couplers, sill steps, hand brakes, grab irons, hand appliances, and power brakes). In accordance with 49 U.S.C. 20306, FRA may exempt Petitioners from these statutory requirements based on evidence received and findings developed at a hearing demonstrating that the statutory requirements ''preclude the development or implementation of more efficient railroad transportation equipment or other transportation innovations under existing law'' [1] or an ''agreement between national railroad labor representatives and the developer of the new equipment or technology.'' [2]

FRA views the petition as consisting of (1) a request for the temporary suspension of certain FRA regulations or waivers of compliance, and (2) a request for approval of a centralized test program that would utilize that requested relief. FRA intends to review Petitioners' requests for temporary suspension of the above-listed regulatory requirements as petitions for waivers of compliance pursuant to 49 CFR part 211, subpart C. FRA will also review the proposed test program under 49 CFR 211.51 and will address its evaluation of the test program in a separate decision after it completes its review of the requested waivers.

[1] 49 U.S.C. 20306(a).

[2] *Id.* at (b)(2).

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments relating to the Program, the temporary waiver of regulations, or both. If any interested party desires an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request. In addition, absent an agreement under 49 U.S.C. 20306(b)(2), FRA will hold a hearing on Petitioners' application and notice of such hearing will be published at a later date.

All communications concerning these proceedings should identify Docket Number FRA–2023–0066 and may be submitted at *www.regulations.gov,* and follow the online instructions for submitting comments.

Communications received by March 18, 2024 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), the U.S. Department of Transportation (DOT) solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacy-notice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2024–00664 Filed 1–12–24; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2023–0002–N–44]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, this notice announces that FRA is forwarding the Information Collection Request (ICR) summarized below to the Office of Management and Budget (OMB) for review and comment. The ICR describes the information collection and its expected burden. On November 2, 2023, FRA published a notice providing a 60-day period for public comment on the ICR. FRA received no comments related to the proposed collection of information.

DATES: Interested persons are invited to submit comments on or before February 15, 2024.

ADDRESSES: Written comments and recommendations for the proposed ICR should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the particular ICR by selecting ‘‘Currently under Review—Open for Public Comments’’ or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ms. Joanne Swafford, Information Collection Clearance Officer, at email: *joanne.swafford@dot.gov* or telephone: (757) 897–9908 or *arlette.mussington@dot.gov* or telephone: (571) 609–1285.

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On November 2, 2023, FRA published a 60-day notice in the **Federal Register** soliciting comment on the ICR for which it is now seeking OMB approval. *See* 88 FR 75368. FRA received no comments related to the proposed collection of information.

Before OMB decides whether to approve the proposed collection of information, it must provide 30 days for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.12(d); see also 60 FR 44978, 44983 Aug. 29, 1995. OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICR regarding: (1) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Workforce Development Survey.

OMB Control Number: 2130–0621.

Abstract: FRA has statutory responsibility to ensure the safety of railroad operations under 49 U.S.C. 20103. To conduct safe railroad operations, the workforce must have the requisite knowledge and skills to operate equipment and utilize technologies. FRA therefore seeks to promote workforce development policies and standards to ensure that the workforce has the necessary knowledge and skills to conduct safe railroad operations. Due to an increasingly dynamic and maturing workforce, combined with continual changes in knowledge and skills required to use new technologies, there is an increasing risk of not having the necessary talent pools to fill critical railroad operational positions. FRA uses this information collection to survey a select group of railroad industry personnel to gain insight into the current workforce development strategies.

Type of Request: Extension without change (with changes in estimates) of a currently approved collection.

Affected Public: Class I freight and passenger railroads, short line and regional railroads, labor unions, railroad associations, academia, and specialty experts.

Form(s): FRA F240.

Respondent Universe: 818.[1]

Frequency of Submission: One-time.

Total Estimated Annual Responses: 258.

Total Estimated Annual Burden: 107 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $4,924.

FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information that does not display a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Christopher S. Van Nostrand,

Acting Deputy Chief Counsel.

[FR Doc. 2024–00620 Filed 1–12–24; 8:45 am]

BILLING CODE 4910–06–P

[1] The respondent universe in the published 60-day FR notice reflected 967. In this 30-day notice the respondent universe is 818. The change reflects the current number of short-line and regional railroads.

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW]

Agency Information Collection Activity Under OMB Review: Monthly Progress Report-Veteran Readiness and Employment

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by clicking on the following link *www.reginfo.gov/public/do/PRAMain*, select ''Currently under Review—Open for Public Comments'', then search the list for the information collection by Title or ''OMB Control No. 2900–NEW.''

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–NEW'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 38 U.S.C 3116 and 3117.

Title: Monthly Progress Report-Veteran Readiness and Employment.

OMB Control Number: 2900–NEW.

Type of Review: New collection.

Abstract: VA Form 28–10289 is primarily used to gather information to determine the Veteran's monthly employment progress as outlined in his or her Individualized Employment Assistance Plan. Without this information, VR&E service is unable to ensure that program participants are receiving the necessary employment services to ensure the successful completion of their rehabilitation program.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at insert citation date: 88 FR 77673 on November 13, 2023, pages 77673.

Affected Public: Individuals or Households.

Estimated Annual Burden: 3,896.50.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: Monthly.

Estimated Number of Respondents: 15,586.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2024–00681 Filed 1–12–24; 8:45 am]

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Part II

Securities and Exchange Commission

17 CFR Part 240

Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule With Respect to U.S. Treasury Securities; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240

[Release No. 34–99149; File No. S7–23–22]

RIN 3235–AN09

Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule With Respect to U.S. Treasury Securities

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting rules under the Securities Exchange Act of 1934 (''Exchange Act'') to amend the standards applicable to covered clearing agencies for U.S. Treasury securities to require that such covered clearing agencies have written policies and procedures reasonably designed to require that every direct participant of the covered clearing agency submit for clearance and settlement all eligible secondary market transactions in U.S. Treasury securities to which it is a counterparty. In addition, the Commission is adopting additional amendments to the Covered Clearing Agency Standards with respect to risk management. These requirements are designed to protect investors, reduce risk, and increase operational efficiency. Finally, the Commission is amending the broker-dealer customer protection rule to permit margin required and on deposit with covered clearing agencies for U.S. Treasury securities to be included as a debit in the reserve formulas for accounts of customers and proprietary accounts of broker-dealers (''PAB''), subject to certain conditions.

DATES:

Effective date: March 18, 2024.

Compliance date: The applicable compliance dates are discussed in Part III of this release.

FOR FURTHER INFORMATION CONTACT: Elizabeth L. Fitzgerald, Assistant Director, and Robert Zak, Special Counsel, Office of Clearance and Settlement at (202) 551–5710, Division of Trading and Markets; Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Associate Director, at (202) 551–5521; Randall W. Roy, Deputy Associate Director, at (202) 551–5522; Raymond Lombardo, Assistant Director, at 202–551–5755; Sheila Dombal Swartz, Senior Special Counsel, at (202) 551–5545; or Nina Kostyukovsky, Special Counsel, at (202) 551–8833, Office of Broker-Dealer Finances, Division of Trading and Markets; U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: First, the Commission is amending 17 CFR 240.17ad–22(e)(18) (''Rule 17ad–22(e)(18)'') to require covered clearing agencies that provide central counterparty (''CCP'') services for U.S. Treasury securities to establish, implement, maintain and enforce written policies and procedures reasonably designed, as applicable, to establish objective, risk-based and publicly disclosed criteria for participation, which require that any direct participant of such a covered clearing agency submit for clearance and settlement all the eligible secondary market transactions in U.S. Treasury securities to which such direct participant is a counterparty. In addition, these policies and procedures must be reasonably designed, as applicable, to identify and monitor the covered clearing agency's direct participants' submission of transactions for clearing as required above, including how the covered clearing agency would address a failure to submit transactions. These policies and procedures must also be reasonably designed, as applicable, to ensure that the covered clearing agency has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants, which policies and procedures the board of directors of such U.S. Treasury securities covered clearing agency (''CCA'') must review annually. The Commission is defining an eligible secondary market transaction as a secondary market transaction in U.S. Treasury securities of a type accepted for clearing by a registered covered clearing agency that is either a repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities, in which one of the counterparties is a direct participant, or certain specified categories of cash purchase or sale transactions, including certain exclusions for transactions with sovereign entities, international financial institutions, natural persons, inter-affiliate repo transactions, state/local governments, and other clearing organizations. Second, the Commission is amending 17 CFR 240.17ad–22(e)(6)(i) (''Rule 17ad–22(e)(6)(i)'') to require that a covered clearing agency providing central counterparty services for U.S. Treasury securities establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, calculate, collect, and hold margin for transactions in U.S. Treasury securities submitted on behalf of an indirect participant separately from those submitted on behalf of the direct participant. Third, the Commission is amending Rule 17ad–22(e)(18) to require that a covered clearing agency providing central counterparty services for U.S. Treasury securities establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, ensure that it has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants, which policies and procedures the board of directors of such covered clearing agency reviews annually. In connection with these proposed amendments, the Commission is including as part of 17 CFR 240.17ad–22(a) (''Rule 17ad–22(a)'') definitions of ''U.S. Treasury security,'' ''central bank,'' ''eligible secondary market transaction,'' ''international financial institution,'' ''sovereign entity,'' ''state and local government,'' and ''affiliated counterparty.'' As part of this rulemaking, the Commission is also amending the CFR designation of Rule 17Ad–22 to Rule 17ad–22.[1] Fourth, the Commission is amending 17 CFR 240.15c3–3a (''Rule 15c3–3a'') to permit margin required and on deposit at covered clearing agencies providing central counterparty services for U.S. Treasury securities to be included by broker-dealers as a debit in the customer and PAB reserve formulas, subject to certain conditions.

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[1] *See* note 71 *infra* for further discussion of this amendment. The Commission refers to the redesignated Rule 17ad–22 throughout this release.

I. Introduction

The Commission is responsible for facilitating the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions.[2] This responsibility includes the authority to regulate clearing agencies engaged in the clearance and settlement of government securities transactions, including U.S. Treasury securities.[3] This inclusion of government securities, including U.S. Treasury securities, within the Commission's authority for the national system of clearance and settlement underscores the importance of, among other things, the U.S. Treasury market.

U.S. Treasury securities play a critical and unique role in the U.S. and global economy, serving as a significant investment instrument and hedging vehicle for investors, a risk-free benchmark for other financial instruments, and an important mechanism for the Federal Reserve's

[2] *See* 15 U.S.C. 78q–1.

[3] Government Securities Act of 1986, section 102(a); 15 U.S.C. 78c(a)(12)(B)(i).

implementation of monetary policy.[4] Consequently, confidence in the U.S. Treasury market, and in its ability to function efficiently, even in times of stress, is critical to the stability of the global financial system.[5]

CCPs provide an important role for securities markets, interposing themselves between the counterparties to securities transactions, acting functionally as the buyer to every seller and the seller to every buyer. The Commission regulates CCPs as covered clearing agencies (''CCA'').[6] The Commission historically has acknowledged the benefits that a CCP brings to the markets it serves. By novating transactions (that is, becoming the counterparty to both sides of a transaction), a CCP addresses concerns about counterparty risk by substituting its own creditworthiness and liquidity for the creditworthiness and liquidity of the counterparties.[7] Further, the Commission has recognized that ''the centralization of clearance and settlement activities at covered clearing agencies allows market participants to reduce costs, increase operational efficiency, and manage risks more effectively.'' [8] A CCP also provides a centralized system of default management that can mitigate the potential for a single market participant's failure to destabilize other market participants or the financial system more broadly.[9] However, the Commission has also recognized that this centralization of activity at clearing agencies makes risk management at such entities a critical function.

Because of the importance of risk management at CCPs and to further the establishment of linked and coordinated facilities for clearance and settlement of securities transactions, in 2016, the Commission adopted the Covered Clearing Agency Standards.[10] These standards address all aspects of a CCP's operations, including financial risk management, operational risk, default management, governance, and participation requirements.[11] The Commission has had the opportunity to administer this new regulatory framework, considering many rule filings with respect to proposed rule changes filed by CCAs pursuant to their rule filing obligations as self-regulatory organizations (''SROs'') under Section 19(b) of the Exchange Act that address how the proposed rule changes are consistent with the Exchange Act and the Covered Clearing Agency Standards thereunder.

The Commission also has had the opportunity to observe the U.S. Treasury market, including with respect to the clearance and settlement of U.S. Treasury security transactions in both the cash and repo market. In particular, the Commission understands that the proportion of transactions that are centrally cleared has declined over the past years. One recent analysis by the Treasury Market Practice Group [12] estimates that only 13 percent of the overall volume in U.S. dollars of U.S. Treasury cash transactions were centrally cleared as of the first half of 2017, and that an additional 19 percent were what the TMPG refers to as ''hybrid'' clearing, that is, executed on an interdealer broker platform (as discussed in parts II.A.1 and II.A.2.b.ii *infra*) in which one counterparty is a member of a CCA and submits its transaction with the interdealer broker for central clearing, while the other counterparty is not a member of a CCA and bilaterally clears its transaction with the interdealer broker.[13] This use of both centrally cleared and not centrally cleared transactions introduces risk into the market, because bilateral clearing involves varying risk management practices that are less uniform and less transparent to the broader market and may be less efficient with regard to netting exposures and use of collateral as compared to central clearing.

Therefore, the Commission proposed amendments to Rule 17ad–22(e)(18) to help reduce contagion risk to the CCA and bring the benefits of central clearing to more transactions involving U.S. Treasury securities, thereby lowering overall systemic risk in the market.[14] Specifically, the Commission proposed amendments that would require CCAs for the U.S. Treasury market to establish, implement, maintain and enforce written policies and procedures reasonably designed to require that their direct participants submit for clearance and settlement certain eligible secondary market transactions, both for repos and certain categories of cash transactions. In addition, the Commission proposed amendments to address certain other issues that could help facilitate increased central clearing in the U.S. These proposed changes included amending Rule 17ad–22(e)(6)(i) to require that a CCA establish, implement, maintain and

[4] *See, e.g.,* Staffs of the U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Reserve Bank of New York, U.S. Securities and Exchange Commission, and U.S. Commodity Futures Trading Commission, *Recent Disruptions and Potential Reforms in the U.S. Treasury Market: A Staff Progress Report,* at 1 (Nov. 2021), *available at https://home.treasury.gov/system/files/136/IAWG-Treasury-Report.pdf* (''Inter-Agency Working Group for Treasury Market Surveillance (''2021 IAWG Report''); Staffs of the U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Reserve Bank of New York, U.S. Securities and Exchange Commission, and U.S. Commodity Futures Trading Commission, *Joint Staff Report: The U.S. Treasury Market on October 15, 2014,* at 1, 8 (2015), *available at https://home.treasury.gov/system/files/276/joint-staff-report-the-us-treasury-market-on-10-15-2014.pdf* (''Joint Staff Report''). These reports represent the views of Commission and other Federal regulatory staff. The reports are not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content in the reports. These reports, like all staff reports, have no legal force or effect: they do not alter or amend applicable law, and they create no new or additional obligations for any person.

[5] Group of Thirty Working Group on Treasury Market Liquidity, *U.S. Treasury Markets: Steps Toward Increased Resilience,* at 1 (2021), *available at https://group30.org/publications/detail/4950* (''G–30 Report'').

[6] *See* Rule 17ad–22(a) (defining covered clearing agency and central counterparty) and Exchange Act Section 3(a)(23) (defining clearing agency).

[7] *See, e.g.,* Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection with Request of Liffe Administration and Management and Lch.Clearnet Ltd. Related to Central Clearing of Credit Default Swaps, and Request for Comments, Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139, 140 (Jan. 2, 2009) (''Liffe Order'').

[8] Covered Clearing Agency Standards Proposing Release, Exchange Act Release No. 71699 (Mar. 12, 2014), 79 FR 29507, 29587 (May 27, 2014) (''CCA Standards Proposing Release'').

[9] *See, e.g.,* Liffe Order, supra note 7, 74 FR 140.

[10] *See* Covered Clearing Agency Standards Adopting Release, Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786 (Oct. 13, 2016) (''CCA Standards Adopting Release'').

[11] *See generally id.*

[12] The Treasury Market Practices Group (''TMPG'') is a group of ''market professionals committed to supporting the integrity and efficiency of the Treasury, agency debt, and agency mortgage-backed securities markets.'' *See* Treasury Mark Practice Group, *About the TMPG, available at https://www.newyorkfed.org/TMPG/index.html.* The TMPG is sponsored by the Federal Reserve Bank of New York. *Id.*

[13] TMPG, *White Paper on Clearing and Settlement in the Secondary Market for U.S. Treasury Securities,* at 12 (July 2019), *available at https://www.newyorkfed.org/medialibrary/Microsites/tmpg/files/CS_FinalPaper_071119.pdf* (''TMPG White Paper''). These estimates use FR2004 data, which are reports provided to the Federal Reserve Bank of New York regarding primary dealer market activity in U.S. Government securities, covering the first half of 2017 and are based on various assumptions specified in the TMPG White Paper. *See also* FR2004, Government Securities Dealer Reports, *available at https://www.federalreserve.gov/apps/reportforms/reportdetail.aspx?sOoYJ+5BzDZq2f74T6b1cw.*

[14] Proposing Release, Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule With Respect to U.S. Treasury Securities, Exchange Act Release No. 95763 (Sept. 14, 2022), 87 FR 64610 (Oct. 25, 2022) (''Proposing Release''). *See also Report of the Joint Treasury-Federal Reserve Study of the U.S. Government Securities Market* (Apr. 1969), *available at https://fraser.stlouisfed.org/title/joint-treasury-federal-reserve-study-us-government-securities-market-318/report-joint-treasury-federal-reserve-study-us-government-securities-market-6282.*

enforce written policies and procedures reasonably designed to calculate, collect, and hold proprietary margin separate from customer margin, amending Rule 17ad–22(e)(18) to require that CCAs establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure that they have appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants, and amending Rule 15c3–3 to permit margin required and on deposit at covered clearing agencies providing central counterparty services for U.S. Treasury securities to be included by broker-dealers as a debit in the customer and PAB reserve formulas.

The Commission received many comments on the proposal.[15] Having considered the comments received, the Commission is adopting the proposed new rules and rule amendments with modifications, as discussed further below.

II. Discussion of Comments Received and Final Rules

A. U.S. Treasury Securities CCA Membership Requirements

1. Requirement To Clear Eligible Secondary Market Transactions

Proposed Rule 17ad–22(e)(18)(iv)(A) would require that U.S. Treasury securities CCAs establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, establish objective, risk-based, and publicly disclosed criteria for participation, which require that the direct participants of such covered clearing agency submit for clearance and settlement all of the eligible secondary market transactions to which they are a counterparty. The proposed amendment would apply to ''direct participants'' in a U.S. Treasury securities CCA, which distinguishes entities that access a CCA directly (*i.e.,* members of the CCA) from indirect participants who ''rely on the services provided by direct participants to access the covered clearing agency's payment, clearing or settlement facilities.''[16] For purposes of the Covered Clearing Agency Standards, ''participants'' of a CCA are referred to as ''members'' or ''direct participants'' to differentiate these entities from ''direct participants' customers'' or ''indirect participants.''[17] Consequently, for purposes of this amendment and consistent with the terminology already used in the Covered Clearing Agency Standards,[18] the term ''direct participants'' refers to the entities that directly access a U.S. Treasury securities CCA (generally banks and broker-dealers), and the term ''indirect participants'' would refer to those entities which rely on a direct participant to clear and settle their U.S. Treasury securities transactions with the U.S. Treasury securities CCA (generally their customers or clients, which typically include market participants such as money market funds, hedge funds, other asset managers, and smaller banks or broker-dealers).[19]

Moreover, persons who provide services in connection with clearance and settlement, such as settlement agent, settlement bank, or clearing bank services, and do not submit trades for clearing to a U.S. Treasury securities CCA would not be ''direct participants'' or ''indirect participants'' within the meaning of this amendment and the terminology used in the Covered Clearing Agency Standards.[20]

In the Proposing Release, the Commission stated that it believes that the requirement to clear eligible secondary market transactions would promote the prompt and accurate clearance and settlement of U.S. Treasury securities transactions, providing several benefits to the market for U.S. Treasury securities as a whole,[21] which are summarized briefly here.

First, the Commission stated that it believes that the requirement to clear eligible secondary market transactions would decrease the overall amount of counterparty credit risk in the secondary market for U.S. Treasury securities. Because a U.S. Treasury securities CCA would novate and guarantee each transaction submitted for central clearing, it would become a counterparty to each transaction, as the buyer to every seller and the seller to every buyer. The U.S. Treasury securities CCA would be able to risk manage these transactions centrally, pursuant to risk management procedures that the Commission has reviewed and approved,[22] and would guarantee settlement of the trade in the event of a direct participant default.

In particular, the requirement to clear eligible secondary market transactions is designed to reduce the amount of ''contagion risk'' to a U.S. Treasury securities CCA arising from what has been described as ''hybrid clearing,'' as discussed in more detail in part II.A.2.b.iii. With this type of clearing, a direct participant's transactions that are not submitted for central clearing pose an indirect risk to the covered clearing agency, as any default on a bilaterally settled transaction could impact the direct participant's financial resources and ability to meet its obligations to the covered clearing agency. The Commission stated that it believes that requiring U.S. Treasury securities CCAs to impose, as a condition of membership, an obligation on their direct participants to submit all eligible secondary market transactions for central clearing should address the transactions most likely to cause contagion risk to the CCA.

Second, the Commission stated that it believes that the requirement to clear eligible secondary market transactions would also help any U.S. Treasury securities CCA to avoid a potential disorderly member default. Defaults in bilaterally settled transactions are likely

[15] Copies of all comment letters received by the Commission are available at *https://www.sec.gov/comments/s7-23-22/s72322.htm.*

[16] 17 CFR 240.17ad–22(e)(19). *See also* CCA Standards Proposing Release, *supra* note 8, at 29553 (noting that some market participants would not meet a covered clearing agency's direct participation requirements and proposing risk management requirements for indirect and tiered participants).

[17] *See, e.g.,* 17 CFR 240.17ad–22(e)(6) (referring to participants) and (e)(2)(vi) (referring to direct participants' customers). In addition, the Exchange Act defines a participant of a clearing agency as ''any person who uses a clearing agency to clear or settle securities transactions or to transfer, pledge, lend, or hypothecate securities.'' 15 U.S.C. 78c(a)(24). Indirect participants are expressly excluded from the Exchange Act definition of a ''participant'' of a clearing agency because the Exchange Act provides that a person whose only use of a clearing agency is through another person who is a participant or as a pledgee of securities is not a ''participant'' of the clearing agency. *Id.*

[18] *See* 17 CFR 240.17ad–22(e)(19) (referring to firms that are indirect participants in a covered clearing agency as those that ''rely on the services provided by direct participants to access the covered clearing agency's payment, clearing, or settlement facilities'').

[19] For example, FICC maintains the Sponsored Service. *See* Fixed Income Clearing Corporation, Government Securities Division Rulebook, Rule 3A, *available at https://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_gov_rules.pdf* (''FICC Rule''). Because sponsored members cannot clear or settle government securities transactions without a sponsoring member, the Commission believes that these sponsored members are not ''direct participants.'' As noted above, such persons are referred to in this release as ''indirect participants'' or ''customers.''

[20] The Commission recognizes that some entities may access more limited services of a U.S. Treasury securities CCA without use of its CCP services. For example, FICC provides ''comparison only'' services for a certain membership type. *See* FICC Rule 8, supra note 19. Consistent with the definition of a ''participant'' under the Exchange Act, such entities would not be considered participants of a CCA and therefore would not be subject to any rules with respect to the clearing of eligible secondary market transactions that a CCA may adopt for its direct participants.

[21] *See generally* Proposing Release, *supra* note 14, 87 FR 64626–29; *see also* part IV.C.1 *infra.*

[22] *See* Section 19(b) of the Exchange Act and Rule 19b–4 thereunder.

to be less orderly and subject to variable default management techniques because bilaterally settled transactions are not subject to the default management processes that are required to be in place and publicly disclosed at a CCP.[23] Centralized default management is a key feature of central clearing.[24] Because the CCP has novated and guaranteed the transactions, it is uniquely positioned to coordinate the default of a member for trades that it has centrally cleared, and the non-defaulting members can rely on the CCP to complete the transactions of the defaulting member and cover any resulting losses using the defaulting member's resources and/or its default management tools. Even in a situation where two CCPs have to coordinate the default of a joint member, that coordination should result in more efficiency and market confidence than multiple bilateral settlements.

Third, the Commission stated that it believes that the requirement to clear eligible secondary market transactions will further the prompt and accurate clearance and settlement of U.S. Treasury securities by increasing the multilateral netting of transactions in these instruments, thereby reducing operational and liquidity risks, among others. Central clearing of transactions nets down gross exposures across participants, which reduces firms' exposures while positions are open and reduces the magnitude of cash and securities flows required at settlement.[25] As the Commission stated in the Proposing Release, FICC's failure to receive all eligible trading activity of an active market participant reduces the value of its vital multilateral netting process and causes FICC to be less well-situated to prevent future market crises.[26]

The benefits of multilateral netting flowing from central clearing can improve market safety by lowering exposure to settlement failures, which would also tend to promote the prompt and accurate clearance and settlement of U.S. Treasury securities transactions.[27] Multilateral netting can also reduce the amount of balance sheet required for intermediation and could also enhance dealer capacity to make markets during normal times and stress events because existing bank capital and leverage requirements recognize the risk-reducing effects of multilateral netting of trades that CCP clearing accomplishes.[28]

Fourth, the Commission stated that the potential benefits associated with the multilateral netting of transactions at a CCP that the requirement to clear eligible secondary market transactions is designed to bring about could, in turn, help to unlock further improvements in U.S. Treasury market structure. For example, the increase in clearing and consequent reduction in counterparty credit risk could ''enhance the ability of smaller bank and independent dealers to compete with the incumbent bank dealers.'' [29] Similarly, decreased counterparty credit risk—and potentially lower costs for intermediation—could result in narrower spreads, thereby enhancing market quality.[30] The Commission also stated that increased accessibility of central clearing in U.S. Treasury markets could support movement toward all-to-all trading, even potentially in the repo market, which would further improve market structure and resiliency, although a movement in that direction is not assured.[31] This potential movement would stem from the fact that increased central clearing of U.S. Treasury securities transactions would, in turn, result in decreased counterparty risk, making all-to-all trading more attractive, that is, a market participant would be more willing to trade with any counterparty if a CCP were to serve as its ultimate counterparty.

Finally, the Commission stated that increased central clearing should enhance regulatory visibility in the critically important U.S. Treasury market. Specifically, central clearing increases the transparency of settlement risk to regulators and market participants, and in particular allows a CCP to identify concentrated positions and crowded trades, adjusting margin requirements accordingly, which should help reduce significant risk to the CCP and to the system as a whole.[32] In light of the role of U.S. Treasury securities in financing the Federal Government, it is important that regulators improve their visibility into this market. Increased central clearing would also allow for a more aggregated view of market activity in one place.

a. Comments Regarding the Requirement To Clear Eligible Secondary Market Transactions

Some commenters generally supported the proposal and its approach to requiring additional central clearing of transactions in U.S. Treasury securities.[33] However, other commenters generally opposed the proposed requirement to clear eligible

[23] A covered clearing agency, including a U.S. Treasury securities CCA, is required to establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, ensure the CCA has the authority and operational capacity to contain losses and liquidity demands and continue to meet its obligations, which must be tested annually, and publicly disclose all relevant rules and material procedures, including key aspects of its default rules and procedures. *See* Rule 17ad–22(e)(13) and (e)(23)(i).

[24] CCA Standards Proposing Release, *supra* note 8, 79 FR 29545 (a CCP's default management procedures would provide certainty and predictability about the measures available to a covered clearing agency in the event of a default which would, in turn facilitate the orderly handling of member defaults and would enable members to understand their obligations to the covered clearing agency in extreme circumstances).

[25] 2021 IAWG Report, *supra* note 4, at 30.

[26] Proposing Release, *supra* note 14, 87 FR 64628 & n. 182 (citing Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Granting Approval of a Proposed Rule Change Relating to Trade Submission Requirements and Pre-Netting, Exchange Act Release No. 51908 (June 22, 2005), 70 FR 37450 (June 29, 2005) (describing a rule designed to bring additional transactions into FICC's netting system as ''clearly designed to promote the prompt and accurate clearance and settlement of those transactions and to preserve the safety and soundness of the national clearance and settlement system.'')).

[27] Darrell Duffie, *Still the World's Safe Haven Redesigning the U.S. Treasury Market After the COVID–19 Crisis,* Hutchins Center Working Paper # 62 (Brookings Inst.) at 15 (June 2020), *available at https://www.brookings.edu/wp-content/uploads/2020/05/WP62_Duffie_v2.pdf* (''Duffie'').

[28] 2021 IAWG Report, *supra* note 4, at 30; Nellie Liang & Patrick Parkinson, *Enhancing Liquidity of the U.S. Treasury Market Under Stress,* at 9 (Dec. 16, 2020), *available at https://www.brookings.edu/wp-content/uploads/2020/12/WP72_Liang-Parkinson.pdf* (''Liang & Parkinson''); Duffie, *supra* note 27, at 16–17.

[29] Liang & Parkinson, *supra* note 28, at 9.

[30] G–30 Report, *supra* note 5, at 13.

[31] 2021 IAWG Report, *supra* note 4, at 30; Duffie, *supra* note 27, at 16; G–30 Report, *supra* note 5, at 13. All-to-all trading would be characterized by the ability for a bid or offer submitted by one market participant to be accepted by any other market participant, with trades executed at the best bid or offer. *See, e.g.,* Liang & Parkinson, *supra* note 28, at 9. All-to-all trading could improve the quality of trade execution in normal market conditions and broaden and stabilize the supply of market liquidity under stress. *See, e.g.,* G–30 Report, *supra* note 5, at 10.

[32] Duffie, *supra* note 27, at 15;2021 IAWG Report, *supra* note 4, at 30 (centralization of transactions at a CCP ''can simplify data collection and improve visibility into market conditions for the authorities and, to some degree, for market participants'').

[33] *See generally* Letter from Americans for Financial Reform Education Fund (Dec. 27, 2022) (''AFREF Letter''); Letter from Stephen W. Hall, Legal Director and Securities Specialist, and Scott Farnin, Legal Counsel, Better Markets, Inc. (Dec. 23, 2022) (''Better Markets Letter''); Letter from Murray Pozmanter, Managing Director, President of DTCC Clearing Agency Services, Head of Global Business Operations, and Laura Klimpel, General Manager of FICC, Head of SIFMU Business Development, Depository Trust and Clearing Corporation and Fixed Income Clearing Corporation (Dec. 27, 2022) (''DTCC/FICC Letter''); Letter from Robin Vince, President and Chief Executive Officer, The Bank of New York Mellon Corporation (Dec. 22, 2022) (''BNY Mellon Letter''); Letter from Rachel Goldberg, Head of Government Relations and Regulatory Strategy, Americas, London Stock Exchange Group (Dec. 27, 2022) (''LSEG Letter''); Letter from Chris Edmonds, Chief Development Officer, Intercontinental Exchange, Inc. (Jan. 12, 2023) (''ICE Letter'').

secondary market transactions, arguing that there was not sufficient information on the costs and benefits of such a requirement, that the Commission should do further study, and/or that the Commission should incentivize additional clearing instead of requiring it.[34]

One commenter also referenced the need to assess the potential impact of an increased volume of cleared repo transactions on the Secured Overnight Financing Rate (''SOFR''), given its importance as a reference rate replacing LIBOR and because SOFR is calculated largely based on implied financing rates of repo transactions cleared at FICC.[35] SOFR is calculated as a volume-weighted median, which is the rate associated with transactions at the 50th percentile of transaction volume.[36] Specifically, the volume-weighted median rate is calculated by ordering the transactions from lowest to highest rate, taking the cumulative sum of volumes of these transactions, and identifying the rate associated with the trades at the 50th percentile of dollar volume. Such volume weighting should allow preparation of the rate to take into account any increased transaction volume arising from additional central clearing in response to a requirement to clear eligible secondary market transactions, thereby making further study unnecessary.

With respect to costs and benefits, one commenter stated that the increased costs of centrally clearing U.S. Treasury security transactions may reduce liquidity and diversity in the Treasury market if firms reduce activity, leave the market, or if barriers to entry are too high, given the significant costs of clearing for market participants.[37] The commenter identified several types of costs, including initial margin requirements, clearing fees, obligations with respect to FICC's Capped Contingent Liquidity Facility (''CCLF''), the operational build necessary to access central clearing either as a direct or indirect participant, and legal costs and time associated with onboarding customers for indirect central clearing, including, *e.g.,* the need for Sponsoring Members to file UCC financing statements with respect to Sponsored Members under the Sponsored Member program. The commenter stated that the impact of these costs would be disproportionately felt by small and mid-sized participants in the U.S. Treasury market, and that these costs would reduce diversity in the market and further increase concentration among market participants (which may increase systemic risk) if such participants leave the market.[38]

As discussed in more detail in part IV.C.2, increased transaction costs will generally reduce the expected return of a particular investment. If the amendments regarding eligible secondary market transactions resulted only in such increased costs, then the potential risk/return tradeoff would worsen, resulting in decreased transaction volumes and decreased liquidity. However, central clearing provides other benefits, including those described in part IV.C.1, many of which could accrue to small and mid-sized market participants. Moreover, increased cost does not necessarily mean that firms will reduce activity or leave the market.

The commenter also stated that these costs may incentivize non-direct participants of a U.S. Treasury securities CCA to look for ways to trade away from direct participants in order to not have to centrally clear U.S. Treasury transactions, undermining the policy goals of the proposal.[39] The Commission acknowledges that the proposed requirement for U.S. Treasury securities CCAs to require their members to submit eligible secondary market transactions for clearing and settlement does not limit the ability of market participants to transact in U.S. Treasury securities transactions away from CCAs. This requirement is not a mandate to clear all transactions in U.S. Treasury securities, regardless of who executes the transaction, and differs from the swaps mandate imposed by Congress in the Dodd-Frank Act in 2010.[40] However, given current market structure and requirements applicable to certain market participants, it would be challenging for market participants to simply shift all their activity to transact away from CCAs. For example, primary dealers, which serve as trading counterparties of the New York Fed in its implementation of monetary policy, are required to maintain a substantial presence as a market maker that provides two-way liquidity in U.S. government securities, particularly Treasury cash and repo operations.[41] These primary dealers must be participants in FICC, as the CCP for the government securities market, to support clearing of primary market transactions.[42] Therefore, if a market participant wants to transact with a primary dealer which is required to be a direct participant of FICC, it would have to determine an appropriate way to submit such transactions for clearing and settlement. Primary dealers are responsible for a significant portion of market activity in the U.S. Treasury market (*see* part IV.B *infra*), and therefore, market participants likely would continue to transact with such primary dealers.

In addition, the commenter stated that central clearing can have procyclical effects in times of market stress due to the margin requirements of clearing agencies, further reducing liquidity when it is most needed.[43] The commenter stated that, depending on the applicable margin models, clearing can be procyclical in times of market turmoil, as increased margin requirements (including intraday and ad hoc calls) drive demand for liquid assets, which, in turn, increases the scarcity of those assets and further drives market stress. The commenter described FICC's rules as allowing FICC to demand, at any time in its discretion, additional margin from its members in times of market volatility, including through intraday calls, to safeguard the clearing infrastructure.[44] The commenter suggested that the Commission should engage in additional study on the procyclical effects of central clearing before implementing a central clearing requirement, focusing on the appropriate balance from a systemic risk perspective of rigorously managing the risk of positions cleared through a CCP as compared to minimizing liquidity strains on the U.S. Treasury market.[45]

The Commission acknowledges that, in times of market stress, margin calls

[34] The Commission discusses the comments on incentives in its discussion of alternative approaches to a clearing requirement in part II.A.5 *infra.*

[35] Letter from William C. Thum, Managing Director and Assistant General Counsel, Securities Industry and Financial Markets Association (''SIFMA'') Asset Management Group, at 7 (Dec. 23, 2022) (''SIFMA AMG Letter'').

[36] Additional Information about Reference Rates Administered by the New York Fed, *available at https://www.newyorkfed.org/markets/reference-rates/additional-information-about-reference-rates#tgcr_bgcr_sofr_calculation_methodology.*

[37] Letter from Robert Toomey, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, and Michelle Meertens, Deputy General Counsel, Institute of International Bankers, at 8 (Dec. 22, 2022) (''SIFMA/IIB Letter'').

[38] SIFMA/IIB Letter, *supra* note 37, at 8.

[39] SIFMA/IIB Letter, *supra* note 37, at 8.

[40] Dodd-Frank Act section 723; 15 U.S.C. 3C(a).

[41] *See* Primary Dealers, *available at https://www.newyorkfed.org/markets/primarydealers* (''In order to be eligible as a primary dealer, a firm must . . . Be a participant in the central counterparty service for the government securities market—DTCC's FICC–GSD—to support clearing of primary market transactions.'').

[42] *Id.*

[43] SIFMA/IIB Letter, *supra* note 37, at 9.

[44] SIFMA/IIB Letter, *supra* note 37, at 9.

[45] SIFMA/IIB Letter, *supra* note 37, at 9.

may increase to address the ongoing market volatility. This is by design, as margin models are built to be responsive to current market conditions. The Commission has specifically required that CCAs have the authority and operational capacity to make intraday margin calls in defined circumstances.[46] This ability is important to the CCA's ability to manage the risk and cover the credit exposures that its participants may bring to the CCA. When considering a CCA's authority with respect to intraday margin, the Commission may consider its potential procyclicality.[47] In addition, the Commission may consider the transparency of the margin model, such that market participants can understand when the CCA may make margin calls.[48] In addition to the FICC rules cited by the commenter, FICC has provided additional transparency regarding how it determines the need for intraday margin calls, including the specific criteria that it uses to assess the need.[49] FICC is also subject to Rule 17ad–22(e)(23), which requires certain levels of public disclosure regarding FICC's margin methodology and the costs of participating in FICC, as discussed further in part II.B.2 *infra.* The Commission's ongoing consideration of the role and function of intraday margin calls, as well as market participants' ability to understand such calls, obviates the need for separate study in connection with this proposal.[50]

b. Comments Regarding the Concentration of Risk in One Covered Clearing Agency

Commenters also mentioned the potential concentration risk that would arise as a result of the requirement to clear eligible secondary market transactions, specifically because only one covered clearing agency currently provides such services. One commenter stated that concentrating such significant levels of settlement, operational, liquidity and credit risk in one institution means that were there operational or liquidity stress at FICC, widespread dysfunction in the Treasury markets could result.[51] Another commenter which analyzed market views of the proposal identified increased concentration risk as a primary concern for market participants, who cited potential technical issues at FICC that would result in a ''pause [of] counterparty trade transactions and lead to substantial losses for market participants.'' However, the commenter also acknowledged that a smaller group of market participants explained that they were not opposed to a single clearinghouse model through FICC, stating that FICC has adequate risk models and that the concentration in one CCP is not of concern in the futures or derivatives markets, which, like FICC, also only have one CCP to serve their respective markets.[52]

In addition, one commenter stated that the Commission should only impose a clearing mandate once FICC and at least a second covered clearing agency are able to offer access to clearing solutions that will fulfill the enhanced rule requirements and meet the needs of market participants.[53] The commenter noted that the existence of one covered clearing agency serving the U.S. Treasury market is highly problematic as it creates enormous concentration risk for market participants, and highlighted that, given the importance of the U.S. Treasury market to the overall global economy, there needs to be a compelling reason for increasing the concentration of cleared trading activity in a single clearing house that is member owned and operated on a for-profit basis, particularly when there is no alternative or fallback venue should the clearing house experience a disruption to its operations or more significantly were it to fail.[54]

The Commission acknowledges that, currently, there is only one U.S. Treasury securities CCA, FICC, and that this does create concentration risk for the clearing of U.S. Treasury securities transactions. However, this concentration risk is mitigated by the existence of a supervisory framework for the existing U.S. Treasury securities CCA, and it is not uncommon for one CCA to serve a particular market.[55] The Commission therefore disagrees with the commenter that the existence of two CCAs is necessary for this requirement to be implemented. Moreover, the Commission is not requiring that the additional central clearing of U.S. Treasury securities transactions be concentrated in one clearing house. But, if that remains the case going forward, the benefits expected to arise from this additional clearing, as discussed further in part IV.C.1 *infra,* constitute a sufficient compelling reason to adopt the final rule, even if such concentration is present, which, as discussed, is subject to the appropriate mitigation of risk arising from the regulatory framework applicable to CCAs as discussed in this section.

FICC has been designated by the Financial Stability Oversight Council as systemically important under Title VIII of the Dodd-Frank Act. This designation means that FICC is subject to heightened supervision and examination by the Commission, in consultation with the Board of Governors of the Federal Reserve System (''Board of Governors''.

[46] 17 CFR 240.17ad–22(e)(6)(ii).

[47] *See, e.g.,* Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving a Proposed Rule Change to Modify the Calculation of the MBSD VaR Floor to Incorporate a Minimum Margin Amount, Exchange Act Release No. 92303, at 32 (June 30, 2021) (discussing commenter's concern regarding potential procyclical nature of a margin methodology change); Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of Proposed Rule Change Concerning The Options Clearing Corporation's Margin Methodology for Incorporating Variations in Implied Volatility, Exchange Act Release No. 95319, at 3 (July 19, 2022) (referencing the impact of a change to margin methodology on procyclicality of margin).

[48] *See, e.g.,* Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving a Proposed Rule Change to Enhance National Securities Clearing Corporation's Haircut-Based Volatility Charge Applicable to Illiquid Securities and UITs and Make Certain Other Changes to Procedure XV, Exchange Act Release No. 34–90502, at 56–59 (Nov. 24, 2020) (discussing commenter's concerns regarding transparency of change to margin methodology).

[49] *See* Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Changes to the Required Fund Deposit Calculation in the Government Securities Division Rulebook, Exchange Act Release No. 82588 (Jan. 26, 2018) (identifying the following specific parameter breaks: (i) a dollar threshold that evaluates whether a Netting Member's Intraday VaR Charge equals or exceeds a set dollar amount (then set at $1,000,000) when compared to the VaR Charge that was included in the most recently collected Required Fund Deposit including, any subsequently collected Intraday Supplemental Fund Deposit; (ii) a percentage threshold, that evaluates whether the Intraday VaR Charge equals or exceeds a percentage increase (then set at 100%) of the VaR Charge that was included in the most recently collected Required Fund Deposit including, if applicable, any subsequently collected Intraday Supplemental Fund Deposit; (iii) the coverage target, that evaluates whether a Netting Member is experiencing backtesting results below the 99% confidence level). FICC has updated this information via Important Notices to its participants. *See, e.g.,* Important Notice GOV1244–22, GSD Intraday Supplemental Fund Deposit Parameter Change (Apr. 11, 2022), *available at https://www.dtcc.com/-/media/Files/pdf/2022/4/11/GOV1244-22.pdf* (raising the coverage target).

[50] *See also* Proposed Rule, Covered Clearing Agency Resilience and Recovery and Wind-Down Plans, Exchange Act Release No. 97516 (May 17, 2023), 88 FR 34708 (May 30, 2023) (proposing additional requirements with respect to intraday margin that CCAs require intraday monitoring of their exposures and specifying particular circumstances in which the CCA should make intraday margin calls).

[51] SIFMA/IIB Letter, *supra* note 37, at 10.

[52] Comment Submission from SIA Partners, entitled CENTRAL CLEARING OF U.S. TREASURIES & REPO, A Study on the Impact to the Market and Market Participants, at 79–80 (Mar. 2023) (''SIA Partners Comment''); *see also id.* at 8.

[53] SIFMA/AMG Letter, *supra* note 37, at 3, 9.

[54] SIFMA/AMG Letter, *supra* note 37, at 9.

[55] For example, there is only one CCA in the U.S. equities market and in the U.S. listed derivatives market.

FICC is subject to the Covered Clearing Agency Standards, which address the various types of risk that FICC faces as a CCP, including settlement, operational, liquidity, and credit risk.

A CCA must be able to meet the requirements of the Covered Clearing Agency Standards regardless of the presence or absence of other CCAs. The Covered Clearing Agency Standards specifically address a CCA's obligations in 23 specific areas, many of which directly relate to the CCA's ability to manage the risks presented to it as a CCA. For example, a CCA must have policies and procedures in place to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by, among other things, maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence and maintain additional financial resources to enable it to cover a wide range of foreseeable stress scenarios, including the default of the largest or two largest participant families (depending on the nature of the CCA's activities). A CCA also must have policies and procedures in place to effectively measure, monitor, and manage the liquidity risk that arises in or is borne by the CCA, including measuring, monitoring, and managing its settlement and funding flows on an ongoing and timely basis, and its use of intraday liquidity, by, among other things, holding qualifying liquid resources in an amount sufficient to effect same-day and, where appropriate, intraday and multiday settlement of payment obligations with a high degree of confidence under a wide range of foreseeable stress scenarios that includes, but is not limited to, the default of the largest participant family in extreme but plausible market conditions. With respect to both its credit and liquidity resources, the CCA is required to, among other things, test the sufficiency of such resources at least once each day using standard and predetermined parameters and assumptions, conduct a comprehensive analysis on at least a monthly basis of the existing scenarios, models, and underlying parameters and assumptions used to ensure that they are appropriate for determining the CCA's needs and resources in light of current and evolving market conditions, and to perform a model validation of the models used for such testing at least annually.[56]

In addition, a CCA is required to establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum and among other things, calculates margin sufficient to cover its potential future exposure to participants in the interval between the last margin collection and the close out of positions following a participant default, and is monitored by management on an ongoing basis and is regularly reviewed, tested, and verified by conducting backtests of its margin model at least once each day using standard predetermined parameters and assumptions and conducting a sensitivity analysis of its margin model and a review of its parameters and assumptions for backtesting on at least a monthly basis, among other things.[57] A CCA also is required to have policies and procedures reasonably designed to establish objective, risk-based, and publicly disclosed criteria for participation, which permit fair and open access by direct and, where relevant, indirect participants and other financial market utilities, require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the clearing agency, and monitor compliance with such participation requirements on an ongoing basis; and identify, monitor, and manage the material risks to the CCA arising from arrangements in which firms that are indirect participants in the CCA rely on the services provided by direct participants to access the CCA's payment, clearing, or settlement facilities.[58]

These requirements should ensure that a CCA is able to accommodate the market needs for its clearance and settlement activity and that a CCA can appropriately risk manage the activity that its participants submit for clearing and settlement, which should, in turn, mitigate the potential concentration risk arising from the existence of only one CCA for a particular asset class.

Further, regarding the comments raising concerns about potential operational or technical issues at a single CCA, the Covered Clearing Agency Standards include Rule 17ad–22(e)(17), which requires written policies and procedures reasonably designed to manage the covered clearing agency's operational risks by (i) identifying the plausible sources of operational risk, both internal and external, and mitigating their impact through the use of appropriate systems, policies, procedures, and controls; (ii) ensuring that systems have a high degree of security, resiliency, operational reliability, and adequate, scalable capacity; and (iii) establishing and maintaining a business continuity plan that addresses events posing a significant risk of disrupting operations.[59] In addition, CCAs, as registered clearing agencies, are subject to the requirements of Regulation Systems Compliance Integrity (''Regulation SCI''). Regulation SCI is designed to strengthen the infrastructure of the U.S. securities markets, reduce the occurrence of systems issues in those markets, improve their resiliency when technological issues arise, and implement an updated and formalized regulatory framework, thereby helping to ensure more effective Commission oversight of such systems.[60] As entities subject to Regulation SCI, CCAs are required to have written policies and procedures reasonably designed to ensure that their key automated systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and that such systems operate in accordance with the Exchange Act and the rules and regulations thereunder and the entities' rules and governing documents, as applicable.[61] These requirements should work to mitigate the possibility that a CCA would experience an interruption to its operations. In the event that a CCA were to fail, it is required to have policies and procedures to establish a recovery and wind-down plan to address that situation.[62]

FICC also must meet its obligations under both Section 19(b) of the Exchange Act, as a self-regulatory organization, and Title VIII of the Dodd-Frank Act. This means that the Commission has the opportunity to review any proposed rule changes and imposes specific additional filing obligations for an entity designated as systemically important under Title VIII

[56] 17 CFR 240.17ad–22(e)(4)(vi) and (vii) and (e)(7)(vi) and (vii).

[57] 17 CFR 240.17ad–22(e)(6).

[58] 17 CFR 240.17ad–22(e)(18) and (19).

[59] 17 CFR 240.17ad–22(e)(17).

[60] Securities Exchange Act Release No. 73639 (Nov. 19, 2014), 79 FR 72252, 72253, 72256 (Dec. 5, 2014).

[61] *See* 17 CFR 242.1001.

[62] 17 CFR 240.17ad–22(e)(3)(ii). In the event of a wind-down in which the result is that the U.S. Treasury securities CCA no longer exists, Rule 17ad–22(e)(18)(iv) would not apply, as there would be no CCA to impose such membership requirements. The requirement to clear eligible secondary market transactions arises under the CCA's rules and is not a mandate to clear based on the nature of the security.

of the Dodd-Frank Act to provide advance notice to the Commission, which must consult with the Board of Governors, of any change to the entity's procedures that may materially alter the nature or level of risk presented.[63] This overall supervisory framework, including the Covered Clearing Agency Standards, should help ensure that FICC continues to be subject to robust supervision and oversight and to be able to manage the risks presented to it, even those arising from increased Treasury clearing. In light of the robust regulatory framework applicable to CCAs, the fact that only one CCA serves the market should not preclude the imposition of a requirement to clear eligible secondary market transactions.

Further, the Commission is not persuaded that the ownership or organizational structure of the present U.S. Treasury securities CCA has an effect on its ability to serve the market. The Commission has not imposed particular requirements for the ownership or corporate structure of CCAs, and CCAs currently exhibit a variety of ownership and corporate structures. For example, FICC is wholly owned by the Depository Trust & Clearing Corporation (''DTCC''), which is, in turn, owned by the members of the clearing agencies owned by the DTCC.[64] FICC operates on a cost plus low-margin model, meaning that its fees are cost-based plus a markup as approved by the Board or management and that this markup or ''low margin'' is applied to recover development costs and operating expenses and to accumulate capital sufficient to meet regulatory and economic requirements.[65] Nevertheless, a CCA's status as a for-profit organization does not preclude its ability to meet its requirements under the Covered Clearing Agency Standards.

An additional commenter stated its belief that relinquishing control of credit approval to a single entity poses a significant problem, particularly, with all transactions going through FICC and where margin requirements can be changed at any time. The commenter stated that every firm has a different risk appetite and quantitative and qualitative perspectives as it relates to credit analysis, which are part of the professional services and expertise that well-run firms offer, and that by inserting FICC into the center of the credit approval process, firms lose their ability to apply their deeply informed market views and differentiate themselves from competitors.[66]

The Commission disagrees that the requirement to clear eligible secondary market transactions, which currently can be done only at FICC, will remove firms' ability to differentiate themselves from their competitors. FICC has no role in the relationship between a direct participant and the direct participant's customers, and, indeed, the Exchange Act provides that its rules cannot impose any schedule of prices, or fix rates or other fees, for its participants' services.[67] FICC's direct participants will remain free to determine what services they will offer to their customers, and at what price, thereby providing the ability for the direct participants to differentiate themselves from their competitors.

The Commission also disagrees that margin requirements at FICC can change at any time. FICC's margin methodology is part of its rules that have been approved by the Commission, and changes to that methodology must be filed with and reviewed by the Commission because of FICC's status as a self-regulatory organization. The margin methodology, which is part of FICC's approved rules, does provide some flexibility to FICC to manage risk, and potentially increase margin requirements, in times of market volatility and to guard against exposure to the CCP, but this flexibility is not equivalent to FICC being able to alter its margin requirements at any time. Pursuant to the Commission's rules, FICC would be obligated to file for Commission review any proposed change to its margin methodology and to file an advance notice of any proposed change to its rules in the event that the change would materially alter the nature or level of risk presented by the CCA, with both of these processes involving notice and the opportunity for public comment.[68]

Finally, one commenter also stated that any final rule should expressly acknowledge the potential for multiple U.S. Treasury securities CCAs and prohibit a clearing agency's rules from restricting or impeding in any way their members' ability to clear U.S. Treasury securities cash or repo transactions at another CCA.[69] Such clarification is unnecessary. The requirements being adopted apply to any U.S. Treasury securities CCA and do not rely on the existence of only one U.S. Treasury securities CCA. The Commission acknowledges that there is the potential for multiple clearing agencies serving the U.S. Treasury market under its regulatory framework, and that the existence of additional U.S. Treasury securities CCAs would lower the concentration risk that currently exists due to having a single CCA for that market. Moreover, a rule prohibiting a clearing agency from restricting or impeding in any way its member's ability to clear at another CCA is also unnecessary because to be registered under Section 17A of the Exchange Act, a clearing agency's rules must not impose any burden on competition not necessary or appropriate in furtherance of the purposes of Section 17A.[70]

c. Final Rule

For the reasons discussed in parts II.A.1.a and b *supra,* the Commission is adopting Rule 17ad–22(e)(18)(iv) as proposed.[71] This requirement applies to all types of transactions that are of a type currently accepted for clearing at a U.S. Treasury securities CCA; it does not impose a requirement on a U.S. Treasury securities CCA to offer additional products for clearing.

2. Definition of Eligible Secondary Market Transactions

As part of Rule 17ad–22(a), the Proposing Release set forth a definition of an eligible secondary market

[63] 12 U.S.C. 5465(e); 17 CFR 240.19b–4.

[64] The members of such clearing agencies are required to purchase common shares under DTCC's Shareholders Agreement as a condition to use the clearing agencies' services and facilities. *See, e.g.,* FICC Rule 49, section 2, *supra* note 19. This differs from other clearing agencies or clearing organizations in which the shareholders are not limited to the participants of the clearing agency and the clearing agency may be owned by a publicly traded company.

[65] *See, e.g.,* Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Certain MBSD Fees, Exchange Act Release No. 96575 (Dec. 22, 2022). In addition, because FICC is member-owned, members may receive rebates when FICC collects excess net income, which is defined as either income of FICC or one business line of FICC after application of expenses, capitalization costs, and applicable regulatory requirements. *See* FICC Rules, Fee Structure, Section XII, *supra* note 19.

[66] Letter from the Independent Dealer & Trader Association, at 9 (Dec. 27, 2022) (''IDTA Letter'').

[67] 15 U.S.C. 78q–1(b)(3)(E).

[68] 15 U.S.C. 78s(b); Dodd-Frank Act Section 806(e); 17 CFR 240.19b–4.

[69] ICE Letter, *supra* note 33, at 2–3.

[70] 15 U.S.C. 78q–1(b)(3)(I).

[71] The Commission also amends the CFR designation of Rule 17Ad–22 in order to ensure the regulatory text conforms more consistently with section 2.13 of the Document Drafting Handbook. *See* Office of the Federal Register, Document Drafting Handbook (Aug. 2018 Edition, Revision 2.1, dated Oct. 2023), *available at https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf.* In particular, the Commission amends the CFR section designation for 17 CFR 240.17Ad–22 (Rule 17Ad–22) to replace the uppercase letter with the corresponding lowercase letter, such that the rule is redesignated as 17 CFR 240.17ad–22 (Rule 17ad–22).

transaction in U.S. Treasury securities [72] subject to the requirement to submit for clearance and settlement discussed in part II.A.1 above. Specifically, the definition of an eligible secondary market transaction [73] would include:

- Repurchase agreements and reverse repurchase agreements in which one of the counterparties is a direct participant;
- Any purchases and sales entered into by a direct participant if the direct participant (A) brings together multiple buyers and sellers using a trading facility (such as a limit order book) and (B) is a counterparty to both the buyer and seller in two separate transactions; and
- Any purchases and sales of U.S. Treasury securities between a direct participant and a counterparty that is a registered broker-dealer, government securities dealer, or government securities broker, a hedge fund, or an account at a registered broker-dealer, government securities dealer, or government securities broker where such account may borrow an amount in excess of one-half of the value of the account or may have gross notional exposure of the transactions in the account that is more than twice the value of the account.

The Commission is adopting this rule, with modifications related to repos by other clearing organizations (*see* part II.A.2.a.iii), inter-affiliate repo transactions (*see* part II.A.2.a.vi), and state and local government repo transactions (*see* part II.A.2.a.vii) and related to cash transactions by hedge funds and leveraged accounts (*see* part II.A.2.b.iii). The Commission discusses the proposed definitions and the comments received thereupon in the following sections.

a. Repo Transactions

The proposed definition of an eligible secondary market transaction would include, among other things, all U.S. Treasury repurchase and reverse repurchase agreements entered into by a direct participant of a U.S. Treasury securities CCA, subject to the exclusions discussed in part XX *infra*. As explained in the Proposing Release, in a U.S. Treasury repo transaction, one party sells a U.S. Treasury security to another party (often referred to as the ''start leg'') and commits to repurchase the security at a specified price on a specified later date (often referred to as the ''end leg''), and a reverse repo transaction is the same transaction from the buyer's perspective.[74]

In the Proposing Release, the Commission stated that the available data indicates that the volume of repo transactions that are bilaterally cleared and settled remains substantial.[75] Because of this, FICC lacks visibility into its members' non-centrally cleared repo trades, and the default of one counterparty can have cascading effects on multiple other market participants, including members of FICC, thereby risking contagion to the CCP.

The Commission also stated its belief that, particularly with respect to banks and dealers, an important potential benefit of repo central clearing stems from mitigating the constraints on intermediaries' balance sheets under the existing accounting and regulatory capital rules.[76] The Commission further stated that it believes that the benefit of this resulting additional balance sheet capacity could be shared by all market participants through improved market liquidity and smooth market functioning.[77]

The Commission also referenced that, as with cash markets, risk management practices in the bilateral clearance and settlement of repos are not uniform across market participants and are not transparent.[78] Indeed, a recent publication stated that competitive pressures in the bilaterally settled market for repo transactions have exerted downward pressure on haircuts, sometimes to zero.[79] The reduction of haircuts, which serve as a counterparty credit risk mitigant in bilateral repos, could result in greater exposure to potential counterparty default risk in non-centrally cleared repos. The Commission stated that by contrast, a U.S. Treasury securities CCA is subject to the Commission's risk management requirements addressing financial, operational, and legal risk management, which include, among other things, margin requirements commensurate with the risks and particular attributes of each relevant product, portfolio, and market.[80] Therefore, repos cleared at a U.S. Treasury securities CCA would be subject to transparent risk management standards that are publicly available and

[72] The Commission did not receive any comments on its proposed definition of ''U.S. Treasury security'' and is adopting that definition as proposed.

[73] As the Commission stated in the Proposing Release, the amendment does not apply to the primary market, *i.e.,* the issuance and sale of a U.S. Treasury security to a primary dealer or other bidder in a U.S. Treasury auction. Proposing Release, *supra* note 14, 87 FR 64621. Further, as the Commission also stated in the Proposing Release, because trading in when-issued securities occurring the day after the auction shares similar characteristics to secondary market transactions and because such trading is already reported as a secondary market transaction, the definition of an eligible secondary market transaction would apply to when-issued trades that occur the day after the auction and are considered on-the-run on some IDBs, to the extent that such when-issued trades otherwise meet the definition of an eligible secondary market transaction, as discussed further in part II.A.2.ii *infra. Id.* However, because when-issued trading occurring before and on the day of the auction does not share these characteristics and is primarily used as a tool for price discovery leading to the auction, such transactions would not be encompassed by the definition. *Id.*

[74] Proposing Release, *supra* note 14, 87 FR 64616. The effect of a repo transaction is similar to a cash loan, using U.S. Treasury securities as collateral. *Id.* However, standard industry documentation classifies the start and end legs of the repo transaction as purchases and sales of securities. *See, e.g.,* SIFMA, *Master Repurchase Agreement (September 1996 Version), available at https://www.sifma.org/wp-content/uploads/2017/08/MRA_Agreement.pdf.* In this release, the term ''seller'' refers to the party selling U.S. Treasury securities on the start leg of the transaction and repurchasing them on the end leg of the transaction. The term ''buyer'' refers to the party purchasing the U.S. Treasury securities on the start leg of the transaction and selling them on the end leg of the transaction.

[75] Proposing Release, *supra* note 14, 87 FR 64616 (citing 2021 IAWG Report, *supra* note 4, at 29 (stating that non-centrally cleared bilateral repo represents a significant portion of the market, roughly equal in size to centrally cleared repo) (citing a 2015 pilot program by the Treasury Department); TMPG, *Clearing and Settlement Practices for Treasury Secured Financing Transactions Working Group Update* (''TMPG Repo White Paper''), at 1 (Nov. 5, 2021), *available at https://www.newyorkfed.org/medialibrary/Microsites/tmpg/files/CSP_SFT_Note.pdf;* Katy Burne, ''Future Proofing the Treasury Market,'' BNY Mellon Aerial View, at 7 (Nov. 2021), *available at https://www.bnymellon.com/content/dam/bnymellon/documents/pdf/aerial-view/future-proofing-the-us-treasury-market.pdf.coredownload.pdf* (noting that 63% of repo transactions remain non-centrally cleared according to Office of Financial Research data as of Sept. 10, 2021); Sebastian Infante *et al., Insights from revised Form FR2004 into primary dealer securities financing and MBS activity* (Aug. 5, 2022), *available at https://www.federalreserve.gov/econres/notes/feds-notes/insights-from-revised-form-fr2004-into-primary-dealer-securities-financing-and-mbs-activity-20220805.htm* (recent research with respect to primary dealers indicates that 38% of their repo and 60% of their reverse repo activity is not centrally cleared, and, overall, that 20% of all their repo and 30% of their reverse repo activity is centrally cleared through FICC)).

[76] In effect, accounting rules allow purchases and sales of the same security to be netted but do not allow repos of the same security to be netted, unless the repos are with the same counterparty and the trades have been documented under a master netting agreement. *See, e.g.,* Proposing Release, *supra* note 14, 87 FR 64621 (citing G–30 Report, *supra* note 5, at 13; Program on International Financial Systems, *Mandatory Central Clearing for U.S. Treasuries and U.S. Treasury Repos,* at 25–27 (Nov. 2021), *available at https://www.pifsinternational.org/wp-content/uploads/2021/11/PIFS-Mandatory-Central-Clearing-for-U.S.-Treasury-Markets-11.11.2021.pdf* (''PIFS Paper'')). Thus, if a dealer's repos are all with a U.S. Treasury securities CCA, greater netting is allowed.

[77] *See* Committee on the Global Financial System, *Repo Market Functioning,* at 24 (Apr. 2017), *available at https://www.bis.org/publ/cgfs59.pdf.*

[78] TMPG Repo White Paper, *supra* note 75, at 1.

[79] G–30 Report, *supra* note 5, at 13.

[80] 17 CFR 240.17ad–22(e)(6).

applied uniformly and objectively to all participants in the CCA.

Many commenters supported the definition of an eligible secondary market transaction as it relates to repo and reverse repo transactions.[81] These commenters encouraged a broad and comprehensive definition to limit market fragmentation and avoidance of central clearing. Several other commenters that did not support a requirement to clear eligible secondary market transactions still acknowledged that repos were the most appropriate scope for such a requirement if one were to be adopted. For example, one commenter agreed that a clearing mandate applied to bilateral repo transactions would be beneficial, pointing to the balance sheet efficiency resulting from repo clearing, but stressing that this requirement be put in place only after the Commission has strengthened the ability for market participants to access central clearing.[82] Another commenter stated that while the case for clearing repos is ''marginally stronger'' than the case for clearing cash transactions, it is ''far from convincing.''[83]

Other commenters questioned the need for a requirement with respect to repo, noting that the balance sheet netting efficiencies already exist, providing a natural incentive to centrally clear such transactions.[84] The Commission agrees that centrally cleared repo already benefits from favorable treatment on balance sheet, but also recognizes that, by definition, a requirement to clear repo transactions should result in more transactions being centrally cleared. Thus, there would still be benefits from the requirement, despite the currently existing balance sheet treatment, as discussed further in part IV.C.1.a.ii.

In addition, some commenters supported excluding particular types of repos from the definition, and other commenters supported excluding particular types of market participants engaging in repos from the definition. The Commission discusses these comments in the following parts.

i. Triparty Repo

Several commenters supported excluding triparty repos from the definition of an eligible secondary market transaction.[85] One commenter suggested that the cost of including triparty repos would outweigh the benefits, and other commenters raised similar concerns.[86] The discussion of additional costs and benefits arising from the inclusion of triparty repos within the definition of an eligible secondary market transaction is provided in part IV.C.2 *infra.* Several commenters argued that including triparty repos would not significantly reduce the risks that the proposal seeks to address because the current triparty market infrastructure inherently mitigates the associated risks.[87] Specifically, these commenters argue that credit risk in the triparty market is mitigated by the triparty agent's provision of custodial, collateral management, and settlement services.[88]

Moreover, one commenter stated that the infrastructure underlying the triparty repo market is robust and provides credit protections, operational safeguards, and strict internal controls akin to central clearing.[89] One commenter stated that the triparty agent's ability to handle the settlement of triparty repos through its collateral allocation system has resulted in a well-functioning process that operates under severe time constraints.[90] One commenter added that the triparty market is relatively safe from credit risk because the triparty agent is subject to prudential regulation.[91] One commenter added that settlement risk in the triparty market is nearly eliminated because collateral posted to the triparty platform cannot generally be repledged outside the platform.[92] The commenter stated, therefore, that the only significant source of settlement risk is the rare occurrence of a counterparty's nonpayment of the repurchase price, which is generally attributable to operational risk as opposed to credit risk.[93] Another commenter stated that these types of triparty repos, described as secured funding transactions where the funding counterparty has no rehypothecation rights, do not appear to raise concerns discussed in the proposal regarding the use of transactions to generate leverage that would warrant imposition of the requirement to clear eligible secondary market transactions.[94]

Despite supporting the exclusion of triparty repos from the definition of an eligible secondary market transaction, one commenter acknowledged that the triparty agent ''does not fulfill a CCP role—it does not guarantee either counterparty's performance through novation or otherwise and does not assume counterparty risk.''[95] For this reason, triparty repos will not be excluded from the definition of an eligible secondary market transaction.

The Commission recognizes that the current triparty market infrastructure incorporates credit protections, operational safeguards, and strict internal controls. The Commission also recognizes that the triparty agent's current processes for handling the settlement of triparty repos generally

[81] *See* Letter from Jirí Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association, at 6–7 (Dec. 22, 2022) (''AIMA Letter''); AFREF Letter, *supra* note 33, at 3; *see generally* Better Markets Letter, *supra* note 33; DTCC/FICC Letter, note 33; Letter from Ryan Sheftel, Global Head of Fixed Income, GTS Securities, LLC (Jan. 6, 2023) (''GTS Securities Letter''); LSEG Letter, *supra* note 33; Letter from ARB Trading Group LP, Citadel Securities, DRW Holdings, LLC, Eagle Seven LLC, Geneva Trading USA, LLC, Hard Eight Futures, LLC, Hudson River Trading LLC, IMC Trading, Jump Trading Group, Kore Trading LLC, Optiver, Quantlab Financial, LLC, WH Trading LLC, and XR Trading LLC, at 4 (Dec. 27, 2022) (''ARB et al. Letter''); Letter from Manfred E. Will, Founder & CEO, MEW Consul (Oct. 24, 2022); Letter from Shiv Rao, Chairman, Sunthay Holdings LLC, at 2 (Dec. 27, 2022); and Letter from Elisabeth Kirby, Head of U.S. Market Structure, Tradeweb Markets Inc. (Dec. 27, 2022). One commenter, while broadly supporting the definition of an eligible secondary market repo and reverse repo transaction, recommended excluding Derivatives Clearing Organizations (''DCO'') registered with the CFTC. *See* Letter from Jonathan Marcus, Senior Managing Director and General Counsel, CME Group Inc., at 6–7 (Dec. 27, 2022) (''CME Letter'') and part II.A.2.iii *infra.* Other commenters, while broadly supporting the definition, recommended excluding transactions executed on the triparty repo platform. *See* Letter from Stephen John Berger, Managing Director, Global Head of Government & Regulatory Policy, Citadel and Citadel Securities (Dec. 27, 2022) (''Citadel Letter''), Letter from Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, Managed Funds Association at 6, 14 (Dec. 21, 2022) (''MFA Letter''), and part II.A.2.i *infra.*

[82] MFA Letter, *supra* note 81, at 13 (supporting inclusion of bilateral repo and reverse repo).

[83] SIFMA AMG Letter, *supra* note 35, at 11.

[84] *See, e.g.,* SIFMA AMG Letter, *supra* note 35, at 4; SIFMA–IIB Letter, *supra* note 37, at 4.

[85] *See* MFA Letter, *supra* note 81, at 6, 14; SIFMA–IIB Letter, *supra* note 37, at 20–21; SIFMA AMG Letter, *supra* note 35, at 6, 11; Letter from Sarah A. Bessin, Deputy General Counsel, and Nhan Nguyen, Assistant General Counsel, Investment Company Institute at 22–23 (Dec. 23, 2022) (''ICI Letter''); Citadel Letter, *supra* note 81, at 6; Letter from Deborah A. Cunningham, Executive Vice President, Chief Investment Officer of Global Liquidity Markets, and Senior Portfolio Manager, Susan R. Hill, Senior Vice President, Senior Portfolio Manager and Head of Government Liquidity, and David R. McCandless, Corporate Counsel, Federated Hermes at 5 (Dec. 28, 2022) (''Federated Letter''); Letter from Sebastian Crapanzano, Managing Director, Morgan Stanley, at 2 (Nov. 15, 2023) (''Morgan Stanley Letter'').

[86] *See* MFA Letter, *supra* note 81, at 6, 14; *see also* SIFMA/IIB Letter, *supra* note 37, at 20; ICI Letter, *supra* note 85, at 11; Federated Letter, *supra* note 85, at 5.

[87] *See* MFA Letter, *supra* note 81, at 14; SIFMA/AMG Letter, *supra* note 35, at 11; ICI Letter, *supra* note 85, at 12, 22; Citadel Letter, *supra* note 81, at 6; Federated Letter, *supra* note 85, at 5.

[88] *See id.*

[89] *See* ICI Letter, *supra* note 85, at 22.

[90] *See* Federated Letter, *supra* note 85, at 3.

[91] *See* MFA Letter, *supra* note 81, at 14.

[92] *See* Federated Letter, *supra* note 85, at 5.

[93] *See* Federated Letter, *supra* note 85, at 5.

[94] Morgan Stanley Letter, *supra* note 85, at 2.

[95] ICI Letter, *supra* note 85, at 33.

function well. However, the triparty agent does not serve as a central counterparty, meaning that it does not guarantee either counterparty's performance through novation or assume counterparty risk, and therefore, the Commission disagrees with the contention that the current market infrastructure incorporates controls equivalent to those available through central clearing. The Commission recognizes that the triparty agent is subject to heightened prudential regulation.[96] However, the triparty agent is not subject to regulatory supervision as a CCP, which entails additional protections against the risk of many market participants acting to liquidate similar collateral in the event of a default in a non-centrally cleared environment. A U.S. Treasury securities CCA is subject to the Commission's risk management requirements addressing financial, operational, and legal risk management, which include, among other things, margin requirements commensurate with the risks and particular attributes of each relevant product, portfolio, and market and also include certain requirements applicable only to covered clearing agencies that are serving as central counterparties.[97] In contrast, a triparty agent is not equipped with a mechanism to manage the risk of collateral fire-sale in the aftermath of a counterparty default.[98] As a result, a U.S. Treasury securities CCA is better positioned to handle a large, unexpected default than a triparty agent. The possibility that a direct participant in a U.S. Treasury securities CCA with large, unsettled trading volumes (bilateral or triparty) could fail creates contagion risk to the CCA, as well as to the market as a whole. This rulemaking is designed to ameliorate that contagion risk, at least in part. Accordingly, the Commission does not believe that the current triparty market infrastructure alone mitigates the aforementioned contagion risk sufficiently to warrant excluding triparty repos from the definition of an eligible secondary market transaction. In response to the commenter who stated that most risks are eliminated because collateral cannot be posted outside the triparty platform, the Commission disagrees. Significant risks exist if concerns emerge regarding the financial condition of sellers in the triparty market.[99] In such scenarios, even though collateral stays within the triparty platform, the buyer could still experience distress following a sudden default of a triparty repo counterparty.[100] For example, a triparty repo default may leave a money market fund holding long-dated Treasury securities collateral, which may cause the money market fund to no longer meet requirements under rule 2a–7 relating to the weighted average life to maturity of the fund's portfolio.[101] A spike in market volatility accompanying an event of default and potential collateral liquidation activity by buyers could cause liquidity stress for the financial system leading to decline in collateral value even for the most creditworthy assets such as U.S. Treasury securities. A U.S. Treasury securities CCA is better positioned to manage a repo counterparty default by employing a range of available pre-funded resources without reliance on repo collateral liquidation.[102] In contrast, the triparty platform is not designed to manage risks associated with a repo counterparty default and a potential collateral liquidation following the default. In a triparty repo transaction, the triparty custodian bank holds the collateral on behalf of the buyer. However, the buyer is responsible for initiating and managing the collateral liquidation process, including Treasury securities, if the liquidation is necessary.[103]

One commenter argued that including triparty repos in the definition of an eligible secondary market transaction would likely impair the cash and collateral management processes of hedge funds and alternative asset managers.[104] Specifically, the commenter suggested that such firms currently conduct same-day bilateral transactions that they would not be able to conduct with a direct participant of a U.S. Treasury securities CCA required to centrally clear its repo transactions.[105] Similarly, another commenter argued that including triparty repos would prevent participants, such as money market funds, from conducting transactions on a short term (*i.e.,* overnight) basis when U.S. Treasury securities CCAs are at full capacity.[106]

The Commission disagrees with these commenters. In its supervisory capacity, the Commission is aware that registered funds, hedge funds, and alternative asset managers currently conduct centrally cleared triparty repo transactions. For example, the Commission is aware that numerous hedge funds conduct such same-day transactions as sponsored members of FICC. Therefore, the existing operational infrastructure supports centrally cleared triparty repo transactions. The FICC novation window for all delivery-versus-payment trades, including the sponsored repo service, remains open until 8 p.m. (ET) and therefore is available for a later-day trading.[107] Additionally, the Commission disagrees that there is a finite ''full capacity'' at a U.S. Treasury securities CCA. The Commission understands that increased demand for a CCA service may lead to a higher volume of trading activity by existing members and, in certain circumstances, reduce members' ability or willingness to facilitate their clients' access to central clearing, if such members do not wish to grow this line of business. However, higher demand for access to central clearing could also present an opportunity for dealers that

[96] The triparty agent is supervised and/or regulated by, among others, New York State Department of Financial Services, and the Federal Reserve Bank of New York. *See https://www.bnymellon.com/us/en/disclaimers/business-disclaimers.* Additionally, the triparty agent is designated as a Global Systemically Important Bank by the Financial Stability Board. *See https://www.fsb.org/wp-content/uploads/P211122.pdf.*

[97] 17 CFR 240.17ad-22(e)(6).

[98] *See, e.g,* Brian Begalle et al., The Risk of Fire Sales in the Tri-Party Repo Market, N.Y. Fed Staff Report No. 616 (''Begalle et al.''), at 9–14, *available at, https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr616.pdf.*

[99] *See* 2013 Annual Report of the Financial Stability Oversight Council, at 4, 12–13, 133–134, *available at https://home.treasury.gov/system/files/261/FSOC-2013-Annual-Report.pdf* (''FSOC 2013 Annual Report''); Begalle et al., *supra* note 98 (discussing concern that stress caused by a potential default of a triparty repo counterparty can lead to either pre-default fire sales of assets by the counterparty or post-default fire sales of collateral by the triparty repo investor and the related financial stability concerns). *See also* 2019 Annual Report of the Financial Stability Oversight Council, at 11, *available at https://home.treasury.gov/system/files/261/FSOC2019AnnualReport.pdf* (highlighting that the possibility of fire sales of collateral by creditors of a defaulted counterparty in the triparty repo market remains a financial system vulnerability despite the triparty repo infrastructure reform).

[100] *See* FSOC 2013 Annual Report, *supra* note 99, at 12–13 (recognizing that a major broker-dealer's default could threaten financial stability as the broker-dealers' creditors liquidate the collateral pledged against their tri-party repo lending, with the fire sales of this collateral potentially destabilizing financial markets and amplifying the negative consequences of such a default).

[101] *See* 17 CFR 270.2a–7(d)(1). In addition, the money market fund holding the collateral may cause liquidity concerns under rule 2a–7. *See* 17 CFR 270.2a–7(d)(4).

[102] 17 CFR 240.17ad–22(e)(13).

[103] Baklanova, *et al.,* Reference Guide to U.S. Repo and Securities Lending Markets, OFR Working Paper No15–17 (Sept. 2015), available at: *https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17_Reference-Guide-to-U.S.-Repo-and-Securities-Lending-Markets.pdf.*

[104] *See* MFA Letter, *supra* note 81, at 17.

[105] *See id.*

[106] *See* ICI Letter, *supra* note 85, at 12, 22.

[107] *See* DTCC, Looking to the Horizon: Assessing a Potential Expansion of U.S. Treasury Central Clearing, Sept. 2023 (''DTCC 2023 White Paper''), *available at https://www.dtcc.com/-/media/Files/Downloads/WhitePapers/Accessing-Potential-Expansion-US-Treasury-Clearing-White-Paper.pdf.*

do not currently offer such services to enter the market, resulting in growing CCA capacity, more competition among its members, and a wider range of available repo counterparties. The Commission also understands that the existing U.S. Treasury securities CCA may consider, as appropriate, additional changes to their operational infrastructure and trading capacity, including revisions to the eligibility criteria for sponsored membership and an extension of the trade submission and novation windows later in the day,[108] to enhance their ability to accommodate any increase in the volume of centrally cleared triparty repo transactions resulting from this rulemaking.

One commenter expressed concern that the centrally cleared triparty repo market has only been available since 2021 and is therefore, relatively untested.[109] Therefore, the commenter suggested that the Commission should delay its decision whether to include triparty repos in the definition of an eligible secondary market transaction until after the Commission has had an opportunity to evaluate the effectiveness of the centrally cleared triparty repo infrastructure.[110] The Commission disagrees. While FICC expanded its Sponsored Service in 2021 to enable sponsored members (*e.g.,* registered funds) to conduct centrally cleared triparty repo transactions,[111] FICC has been facilitating such transactions for its direct participants via the General Collateral Finance (''GCF'') Repo Service since 1998.[112] Additionally, although the expanded Sponsored Service is relatively new, the infrastructure is operational, and its usage appears to be increasing. Data provided by the Federal Reserve show a significant increase in the gross value of Treasury securities traded in GCF Repo since March 2020.[113] Additionally, as stated above, the Commission understands that the U.S. Treasury securities CCA is consulting with market participants and is considering steps to further enhance its operational infrastructure to support any increase in the volume of centrally cleared triparty repo transactions resulting from this rulemaking.[114]

Finally, commenters argued for the exclusion from the definition of an eligible secondary market transaction of triparty repos involving purchased securities that include both Treasury CUSIPs and securities with other CUSIPs or where permitted substitution may be made in CUSIPs other than Treasury CUSIPs. According to the commenters, the fact that some CUSIPs in a mixed triparty repo are U.S. Treasury security CUSIPs should not bring that transaction into the definition of an eligible secondary market transaction if it were of a type that is entered into in the ordinary course of business or otherwise in connection with a legitimate business purpose. The commenters stated that without such an exemption, the definition of an eligible secondary market transaction could scope in transactions of which U.S. Treasury securities only represent a small component, which would exceed the regulatory objective behind the proposal, and stated that such transactions do have margin collected.[115]

The Commission understands that market participants may use U.S. Treasury securities as permissible substitutions for other types of collateral and generally should not consider mixed CUSIP triparty repos resulting from such a permissible substitution as within the scope of part (i) of the definition of an eligible secondary market transaction. Collateral substitution allows a repo seller to complete trade settlement even if the type of collateral securities agreed upon at the time of trade initiation is no longer available. Typically, Treasury securities or cash can be permissible substitution.[116] However, to the extent that a mixed CUSIP triparty repo contains U.S. Treasury CUSIPs from the outset of the transaction, such a transaction would be included in the scope of part (i) of the definition of an eligible secondary market transaction. An exclusion for such transactions is not necessary because the counterparties specifically structured the transaction to include U.S. Treasury securities; therefore, such a transaction is within the scope of the definition. Data submitted by money market funds on Form N–MFP shows that the holdings reported as U.S. Government Agency Repurchase Agreements are typically collateralized by U.S. government agency securities and are also partially collateralized by Treasury securities.[117] Collateral management practices may evolve to better delineate collateral types in light of the definition of an eligible secondary market transaction.

ii. Repos by Registered Funds

Registered investment companies, or registered funds, that is, those entities that are registered under the Investment Company Act of 1940 (''1940 Act''), including money market funds and exchange-traded funds, are important participants in the U.S. Treasury repo market. Filings of Form N–MFP by money market funds show that, as of September 30, 2023, these funds invested approximately $2.2 trillion in Treasury repos.[118] In addition, mutual funds invested $37 billion in repurchase agreements, including those backed by Treasury securities.[119] Generally, commenters acknowledged that central clearing of Treasury repos and reverse repos through the FICC Sponsored Service, which has been available to registered funds since 2005, provides additional collateral supply.[120] FICC data shows that at the end of November 2023, the daily volume of sponsored ''delivery-versus-payment'' Treasury repo activity was approximately $820 billion, while the daily volume of sponsored activity in the triparty GCF repo was close to $130 billion.[121]

[108] *Id.*

[109] *See* MFA Letter, *supra* note 81, at 12, 14.

[110] *See id.*

[111] Securities Exchange Act Release No. 92799 (Aug. 27, 2021), 86 FR 49387 (Sept. 2, 2021) (SR–FICC–2021–801); Securities Exchange Act Release No. 92014 (May 25, 2021), 86 FR 29334 (June 1, 2021) (SR–FICC–2021–003).

[112] Securities Exchange Act Release No. 40623 (Oct. 30, 1998), 63 FR 59831 (Nov. 5, 1998) (SR–GSCC–98–02).

[113] Federal Reserve, GCF Repo (showing that the daily snapshot of the Treasury securities value traded in the GCF repo segment was under $120 billion on Mar. 10, 2020. The value reported on June 9, 2023 was over $320 billion, which includes sponsored activity), *available at https://www.newyorkfed.org/data-and-statistics/data-visualization/tri-party-repo#interactive/tripartygcf.*

[114] *See* DTCC 2023 White Paper, *supra* note 107.

[115] *See* SIFMA/IIB Letter, *supra* note 37, at 20–21; Letter from Jiri Krol, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association (Oct. 20, 2023) at 3 (''AIMA Letter II''); *see also* Citadel Letter, *supra* note 81, at 6 (supporting that the Commission exclude triparty repos at this stage, noting that they may include both Treasury and non-Treasury securities as collateral).

[116] For example, money market fund filings of portfolio data show that, on average, Treasury securities account for around 3% of collateral backing investments in non-government repos.

[117] Money market fund filings of portfolio data show that, on average, Treasury securities account for around 20% of collateral backing investments in U.S. government agency repos.

[118] Of this amount, approximately $1.5 trillion was invested in the Federal Reserve's overnight reverse repo facility. *See* U.S. Securities and Exchange Commission, Money Market Fund Statistics (Sept. 2023), *available at https://www.sec.gov/divisions/investment/mmf-statistics.* Repo transactions with the central bank are excluded from the scope of Eligible Secondary Market Transactions.

[119] Federal Reserve, Financial Accounts of the United States, Table L.207 Federal Funds and Security Repurchase Agreements (2023 Q2).

[120] ICI Letter, *supra* note 85, at 13; Federated Letter, *supra* note 85, at 2; DTCC/FICC Letter, *supra* note 33, at 17.

[121] *See* DTCC, Sponsored DVP and Sponsored GC Activity, *available at https://www.dtcc.com/charts/membership,* which also shows data over a longer timeframe for reference.

Several commenters stated that they did not support including repo transactions with registered funds as a counterparty in the definition of an eligible secondary market transaction, which, as proposed, would include repo transactions with all counterparties.[122] One commenter stated that the Commission should not, at this time, require that repos between a fund and a direct participant of a U.S. Treasury securities CCA be subject to a clearing requirement because the current clearing framework is not sufficiently developed to support such a mandate.[123] The commenter identified several issues to be addressed prior to adopting such a requirement, which are discussed in the following paragraphs.

First, the commenter stated that the Commission should encourage FICC to enhance its Sponsored Service in several ways, to address regulatory, structural, and operational issues raised by the proposal. The commenter stated that the Commission should encourage FICC to further develop a ''give up'' structure to facilitate best execution. The commenter described this as a ''critically important step'' to incentivize voluntary clearing, because it would generate increased competition among market participants, which may result in more efficient pricing. The commenter also stated that a ''give up'' structure would be essential under a requirement to centrally clear eligible secondary market transactions because the Sponsored Service may not be able to meet the increased capacity requirements due to the limited number of sponsoring members and the increased demand for sponsored clearing under such a requirement. The commenter suggested that the infrastructure currently used by FICC for prime brokerage clearing could be leveraged to develop a give up model, stating that any such model will need to provide for standardized documentation that facilitates additions and deletions of approved brokers, agreed-upon terms for rejection of trades by a sponsoring member, and centralized storage of delegation.[124]

The commenter requested that the SEC encourage FICC to establish a feature allowing (but not requiring) registered fund sponsored members to support their obligations by having margin posted with FICC (''FICC registered fund margin arrangement'') rather than by paying fees to the sponsoring member.[125] FICC's rules currently provide that each sponsoring member must make a deposit to FICC's Clearing Fund based on the activity of its sponsored members.[126] The contributions of all Netting Members, including those that are sponsoring members, are commingled in the Clearing Fund and are available to FICC for, among other things, securing members' obligations and providing liquidity to meet its settlement obligations.[127] While the commenter stated that the Sponsored Service under current FICC rules does not raise custody issues for registered funds under the 1940 Act because registered funds are not required to post margin to FICC, if a fund's margin were permitted to be posted with FICC, that could raise custody issues for funds unless such funds receive relief from certain provisions of the 1940 Act.[128] The commenter stated that permitting registered funds' margin to be posted with FICC could reduce costs for registered funds and facilitate their use of cleared reverse repos and term repos.[129] The commenter also stated that the final rule should require FICC to establish margin rules that ensure that margin is held in a segregated manner, not commingled with any direct participant's house margin, and not be subject to loss mutualization associated with other direct participants.[130] Finally, the commenter stated that in order to address concerns regarding the security of registered fund assets under a Treasury repo clearing mandate, FICC rules addressing margin posting would need to be amended to provide for enhanced recordkeeping, internal controls, and transparency around the positions and related margin.[131]

In order to support a clearing requirement for eligible secondary market transactions, the Commission is taking the position that, for a period of five years, registered funds utilizing such an arrangement in a manner consistent with the circumstances described below would not provide a basis for enforcement action under Section 17(f) of the 1940 Act. The Commission takes this position to recognize the unique circumstances facing registered funds in the context of entering into eligible secondary market transactions using FICC's Sponsored Program.

Our staff has previously stated that it would not recommend enforcement action under the custody provisions of the 1940 Act in the context of certain registered fund trading activities.[132] For example, the staff issued the Delta Letter in connection with Delta's options clearing service, which provided assurances that the staff would not recommend enforcement action under

[122] ICI Letter, *supra* note 85, at 12–28; Federated Letter, *supra* note 85, at 2–6.

[123] ICI Letter, *supra* note 85, at 12.

[124] ICI Letter, *supra* note 85, at 13–14.

[125] ICI Letter, *supra* note 85, at 14; Letter from Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, Managed Funds Association (Dec. 4, 2023), at 4 (''MFA Letter II''). *See also* MFA Letter, *supra* note 81, at 7 (noting that ''an indirect participant should have the ability (although not the obligation) to fund the margin obligations of the direct participant clearing on its behalf which are attributable to the indirect participant. In such case, the margin posted by the indirect participant should be segregated from the direct participant's house margin, and it should not be subject to loss mutualization vis-à-vis other direct participants. Given that many indirect participants have fiduciary obligations to their own clients, it is crucial that indirect participants are able to post margin on a segregated basis such that their clients are not subject to the credit risk of others (and, likewise, that their funds are not subject to loss mutualization).''); SIFMA/IIB Letter, *supra* note 37, at 12–13 (noting that ''it will be difficult to support expanding cleared trading in U.S. Treasury securities until we have a framework which ensures customers can access clearing solutions where their margin and collateral will be adequately protected, including from loss mutualization by the clearing agency'').

[126] FICC Rule 3A, section 10, *supra* note 19.

[127] FICC Rule 4, *supra* note 19.

[128] Section 17(f) of the 1940 Act (providing that ''[e]very registered management company shall place and maintain its securities and similar investments in the custody of (A) a bank or banks having the qualifications prescribed in paragraph (1) of section 26(a) of this title for the trustees of unit investment trusts; or (B) a company which is a member of a national securities exchange as defined in the Securities Exchange Act of 1934, subject to such rules and regulations as the Commission may from time to time prescribe for the protection of investors; or (C) such registered company, but only in accordance with such rules and regulations or orders as the Commission may from time to time prescribe for the protection of investors.''). *See also* rule 17f–1 under the 1940 Act (permitting registered funds to custody assets with a member of a national securities exchange as defined in the 1934 Act pursuant to certain conditions).

[129] ICI Letter, *supra* note 85, at 14.

[130] *Id.*

[131] *See id.* (''Enhanced recordkeeping and related controls are critical to appropriately identifying ownership of assets during a Treasury repo or reverse repo transaction particularly since, unlike a typical derivates or cash transaction, ownership of the Treasury securities underlying a repo or reverse repo change owners during the transaction.'').

[132] *See e.g.,* Delta Government Options Corp. No-Action Letter (pub. avail. Sept. 27, 1990) (''Delta Letter''); *cf.* CME Group, Inc. No-Action Letter (pub. avail. Dec. 19, 2017); FICC No-Action Letter (pub. avail. Mar. 13, 2003) (''FICC 2003 Letter''). In the FICC Letter, the staff observed certain operational features of FICC's Mortgage-Backed Securities Division (''MBSD''), which differ from the current circumstances of FICC's Government Securities Division, such as registered funds being direct participants in MBSD's clearing scheme and participant trades not being novated to MBSD. Any staff statements cited represent the views of the staff. They are not a rule, regulation, or statement of the Commission. Furthermore, the Commission has neither approved nor disapproved their content. These staff statements, like all staff statements, have no legal force or effect: they do not alter or amend applicable law; and they create no new or additional obligations for any person.

Section 17(f) of the 1940 Act if registered investment companies deposited margin with Delta.[133] One representation in the Delta Letter was that Delta was permitted to withdraw the margin provided ''only upon the investment company's default on the option contract.'' [134] Other previous staff no-action positions have been provided in different contexts. In one such no-action position, FICC represented that a registered fund's margin would not be used to cover another client's default and segregating fund assets from the custodian's proprietary assets and other customers' assets.[135] These types of features would help protect fund client assets consistent with the 1940 Act under the FICC registered fund margin arrangement, and we have included similar types of features for purposes of our position that follows below.

While the final rules do not require registered funds' margin to be posted with FICC, and no current U.S. Treasury securities CCA has rules imposing such a requirement, as discussed above, a commenter requested that the Commission encourage FICC to establish a FICC registered fund margin arrangement.[136] The Commission agrees that facilitating the ability for a registered fund's margin to be posted at FICC as an alternative to the sponsoring member posting the margin and passing the cost of doing so through to the registered fund may lower the cost of trading for the fund, and the Commission position below will help facilitate the posting of registered fund margin [137] to satisfy a U.S. Treasury securities CCA's margin deposit requirements.

Specifically, the Commission takes the position that, for a period of five years beginning on the effective date of this adopting release, if a registered investment fund's cash and/or securities are placed and maintained in the custody of FICC for purposes of meeting FICC's margin deposit requirements that may be imposed for eligible secondary market transactions in connection with the fund's participation in the Sponsored Program, it would not provide a basis for enforcement action under Section 17(f) of the 1940 Act *so long as:* [138]

- FICC withdraws the margin provided by a sponsored member registered fund only upon that registered fund's default; [139]
- The margin provided by a registered fund is not commingled with, and is kept separate from, FICC's assets; [140]
- FICC segregates on its books and records the margin provided by a registered fund (or series thereof, as applicable), and identifies a value of margin in its books and records as being attributable to the registered fund;
- The entity that FICC uses to custody such margin is an eligible fund custodian under the 1940 Act and the applicable rules thereunder; [141]
- The margin provided by a registered fund is not subject to loss mutualization [142] or allocation; [143]
- The margin provided by a registered fund is not used by FICC for any purpose other than in connection with that registered fund's default as a sponsored member; [144]
- Registered funds receive quarterly statements of accounts concerning the margin provided in connection with eligible secondary market transactions showing, at a minimum, the name of the account, asset movements during the quarter, and quarter-end positions; and
- The account into which a registered fund's margin is deposited is governed by a contract by and among the registered fund, its sponsoring member, and FICC providing for an arrangement consistent with this Commission position, (together, the ''FICC registered fund margin framework'').[145]

In general, Section 17(f) of the 1940 Act and the rules thereunder govern the safekeeping of investment company assets.[146] The FICC registered fund margin framework is designed to protect fund investor assets, consistent with the principles of the 1940 Act.[147] The framework would seek to adequately protect registered fund assets by isolating them from FICC's proprietary assets and segregating them on FICC's books and records from the sponsoring member's other customers, preventing registered fund assets from being used to cover any obligation other than an obligation of that registered fund, limiting FICC's ability to use registered fund margin for any purpose other than an obligation of the registered fund as a sponsored member, and prohibiting registered fund assets from being subject to loss mutualization or allocation.[148] Five years is intended to provide sufficient time for FICC to develop and file any proposed rule changes under Section 19(b) of the Exchange Act that may be relevant to facilitate a registered fund's ability to have its margin posted at FICC consistent with the FICC registered fund margin framework. The Commission will consider any proposed rule changes consistent with its obligations under Section 19(b) of the Exchange Act in the event that FICC submits any proposal to facilitate a registered fund's ability to have its margin posted at FICC consistent with the FICC registered fund margin framework in the future, and providing this position for five years will also provide sufficient time for the Commission to determine if extending or revising this position is appropriate. Five years is intended to provide sufficient time for market participants to consider other potential frameworks for the posting of registered fund margin to satisfy FICC's margin deposit requirements and to gain insight into the merits of such frameworks.[149]

[133] Delta Letter.

[134] *Id.*

[135] *See* FICC 2003 Letter.

[136] *See* ICI Letter, *supra* note 85, at 14.

[137] The Commission position is intended to address certain considerations under the 1940 Act specific to registered funds. Other types of buy-side participants may have different considerations to address in connection with their participation in the Sponsored Program beyond the scope of the 1940 Act.

[138] To the extent a registered fund becomes aware that its custodial arrangement is no longer consistent with the FICC registered fund margin framework, the registered fund may not utilize the FICC registered fund margin framework to enter into eligible secondary market transactions.

[139] For the avoidance of doubt, FICC may only withdraw margin provided by a registered fund in the event that the registered fund defaults on a transaction that has been novated to FICC.

[140] *See* FICC Letter; *see also* Institutional Equity Fund No-Action Letter (pub. avail. Feb. 27, 1984) (stating that the staff would not recommend enforcement action under Section 17(f) of the 1940 Act if, among other things, the assets of a registered fund participating in the Options Clearing Corporation's program were held in a ''non-proprietary account at OCC which does not include any assets held by the Clearing Member agent other than as a fiduciary, custodian or otherwise for customers'').

[141] *See* Section 17(f) of the 1940 Act and the rules thereunder.

[142] *See* FICC 2003 Letter at n. 18.

[143] *See e.g.,* FICC Rule 4, *supra* note 19.

[144] For purposes of this Commission position, FICC is not permitted to use registered fund margin for default liquidity purposes.

[145] The Commission notes that this position only applies with respect to the custody of registered fund margin, and does not apply to cash or collateral received under a sponsored repo or reverse repo trade. Further, this position does not impact any other obligation that a registered fund has in connection with its participation in the Sponsored Program or under the 1940 Act and rules thereunder.

[146] The legislative history of section 17(f) indicates that Congress intended the assets of investment companies to be kept by a financially secure entity that has sufficient safeguards against misappropriation. *See* Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 264 (1940).

[147] *See e.g.,* ICI Letter, *supra* note 85, at 14.

[148] *Cf. infra* part II.C.2.

[149] We note that a U.S. Treasury securities CCA could develop a different mechanism for a registered fund to post margin. For example, the Options Clearing Corporation has a ''deposits in lieu of margin'' framework whereby a customer of

A registered fund may wish to use a member of a national securities exchange as a sponsoring member. Such a sponsoring member that receives and posts margin to a U.S. Treasury securities CCA on behalf of registered funds may be deemed to have custody of fund assets and implicate Rule 17f–1 under the 1940 Act. Therefore, the Commission takes the position, for a period of five years from the effective date of this adopting release, that if a registered fund's cash and/or securities are placed and maintained with a sponsoring member that is a member of a national securities exchange, solely in connection with facilitating the posting of margin to FICC on behalf of a registered fund in connection with the registered fund's participation in the Sponsored Program, it would not provide the basis for an enforcement action against a registered fund under Section 17(f) of the 1940 Act *so long as:* (i) the fund complies with Rule 17f–1(a), (b)(5), and (d), and (ii) the contract between the registered fund and the member of the national securities exchange provides for the following:

- The margin provided by a registered fund is not commingled with, and is kept separate from, the sponsoring member's assets; [150]
- The sponsoring member segregates on its books and records the margin provided by a registered fund (or series thereof, as applicable), and identifies a value of margin in its books and records as being attributable to the registered fund;
- The registered fund's provision of margin is consistent with the FICC registered fund margin framework; and
- The sponsoring member does not hold registered fund assets that exceed the amount that is required to be deposited as margin to FICC with respect to the registered fund's outstanding eligible secondary market transactions.[151]

As above, such an approach is intended to accomplish a similar purpose as the FICC registered fund margin framework and additionally limit the amount of assets held in custody at a sponsoring member that is a member of a national securities exchange to an amount of margin that is required by FICC.

More generally, the Commission understands that the commenter which raised issues regarding the ability of registered funds to post margin to the CCA is referring to clearing models whereby an indirect participant in a U.S. Treasury securities CCA executes a transaction with a counterparty and then ''gives up'' the transaction to another party to submit for clearance and settlement. The Commission agrees with the commenter that the use of a ''give up'' model could be helpful in further facilitating the increased demand for central clearing under a potential clearing requirement. The Commission understands that FICC currently has certain models that facilitate ''give up'' style clearing, and, consistent with the requirement discussed in part II.B.2 *infra,* encourages U.S. Treasury securities CCAs to consider how best to facilitate ''give up'' clearing.

The Commission's ability to ''encourage'' FICC, a covered clearing agency, must be considered in context of the relevant regulatory framework. Covered clearing agencies are SROs for purposes of the Exchange Act,[152] meaning that, as an SRO, a covered clearing agency is required to file with the Commission any proposed rule or proposed change in its rules, including additions or deletions from its rules.[153] The Commission publishes all proposed rule changes for comment.[154] When considering whether to approve or disapprove a proposed rule change, the Commission shall approve the proposed rule change if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the particular type of SRO.[155]

In addition, clearing agencies registered with the Commission are financial market utilities, as defined in section 803(6) of the Dodd-Frank Act.[156] A clearing agency that has been designated by the Financial Stability Oversight Council as systemically important or likely to become systemically important, and for which the Commission is the Supervisory Authority (''designated clearing agency''), is required to file 60-days advance notice with the Commission of changes to rules, procedures, and operations that could materially affect the nature or level of risk presented by the designated clearing agency (''advance notice'').[157] Such an advance notice also requires consultation with the Board of Governors.[158] The Clearing Supervision Act authorizes the Commission to object to changes proposed in such an advance notice, which would prevent the clearing agency from implementing its proposed change(s).[159]

These statutory requirements applicable to covered clearing agencies mean that the Commission must consider proposed rule changes as they are filed. The Commission does not dictate particular proposed rule changes that a CCA should adopt, although a CCA may determine that it should propose certain rule changes in response to a new or amended Commission rule. In response to this

a clearing member makes a deposit in lieu of margin through OCC's escrow deposit program, and the relevant positions are excluded from the clearing member's margin requirement to OCC. *See OCC Rules* 610, 610A, 610B, and 610C; *see also* Self-Regulatory Organization: The Options Clearing Corporation: Notice of Filing of Advance Notice Concerning the Options Clearing Corporation's Escrow Deposit Program, Securities Exchange Act Rel. No. 34–78334 (Sept. 14, 2016), 81 FR 64537–38 (Sept. 20, 2016). Although there are fundamental differences in the purpose and use of margin in the OCC's deposit in lieu of margin framework, a U.S. Treasury securities CCA could use the principles underlying the OCC's program by analogy in developing its own margin posting framework.

[150] *See* note 140 *supra.*

[151] This Commission position would not apply to the extent that the sponsoring member holds an amount of registered fund assets that exceeds the registered fund's margin obligations. If a sponsoring member were to hold registered fund assets in an amount that exceeds the registered fund's margin obligations, then the sponsoring member would need to return such excess to the registered fund as promptly as possible or promptly comply with all requirements of Rule 17f–1 under the 1940 Act.

[152] 17 CFR 240.17ad–22(a)(5) (defining a covered clearing agency); 15 U.S.C. 78c(a)(26) (defining an SRO to include a registered clearing agency).

[153] An SRO must submit proposed rule changes to the Commission for review and approval pursuant to Rule 19b–4 under the Exchange Act. A stated policy, practice, or interpretation of an SRO, such as its written policies and procedures, would generally be deemed to be a proposed rule change. *See* 15 U.S.C. 78s(b)(1); 17 CFR 240.19b–4. *See* 15 U.S.C. 78s(b)(3)(A) (setting forth the types of proposed rule changes that take effect upon filing with the Commission). The Commission may temporarily suspend those rule changes within 60 days of filing and institute proceedings to determine whether to approve or disapprove the rule changes. 15 U.S.C. 78s(b)(3)(C).

[154] *See* 15 U.S.C. 78s(b)(1). Proposed rule changes are generally required to be approved by the Commission prior to going into effect; however, certain types of proposed rule changes take effect upon filing with the Commission.

[155] 15 U.S.C. 78s(b)(1)(C)(i). On the other hand, the Commission shall disapprove a proposed rule change if it cannot make such a finding. 15 U.S.C. 78s(b)(1)(C)(ii).

[156] *See* 12 U.S.C. 5462(6).

[157] The Dodd-Frank Act defines a ''designated clearing entity'' as a designated financial market utility that is either a derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) or a clearing agency registered with the Securities and Exchange Commission under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1). *See* 12 U.S.C. 5462(3). The Commission is the Supervisory Agency, as defined in 12 U.S.C. 5462(8), for four designated clearing agencies (the Depository Trust Company, the National Securities Clearing Corporation, the Fixed Income Clearing Corporation, and the Options Clearing Corporation). *See* 12 U.S.C. 5465(e)(1)(A). The Commission published a final rule concerning the filing of advance notices for designated clearing agencies in 2012. *See* 17 CFR 240.19b–4(n); Exchange Act Release No. 34–67286 (June 28, 2012), 77 FR 41602 (July 13, 2012).

[158] *See* 12 U.S.C. 5465(e)(1)(B).

[159] *See* 12 U.S.C. 5465(e)(1)(E) and (F).

commenter, and as discussed in part II.B.2 *infra,* the Commission will consider any proposed rule changes filed by FICC, or any other U.S. Treasury securities CCA, in due course, consistent with its obligations under Section 19(b) of the Exchange Act. The Commission does not have the ability to revise particular aspects of the rules of an SRO that is a registered clearing agency, like a CCA.[160]

Second, the commenter discussed potential custody issues for registered funds under Section 17(f) of the 1940 Act and Rule 17f–4 thereunder. Section 17(f) requires that a registered fund maintain its securities and similar investments in a bank, a company which is a member of a national securities exchange, or its own custody.[161] The commenter stated that substantially all funds use a bank custodian, and that a bank custodian is particularly beneficial to funds in the context of repo and reverse repo transactions with respect to custodying both securities and cash.[162]

The Commission has adopted rules that specify required qualifications for entities other than those named in Section 17(f) to act as custodians of fund assets, including Rule 17f–4 which permits a registered fund to deposit the securities it owns in a securities depository, under certain conditions.[163] A ''securities depository'' is defined to include a clearing corporation that is registered with the Commission under Section 17A of the Exchange Act.[164] The commenter observed that FICC is registered as a clearing agency, but that FICC has stated that it is not a securities depository and does not provide securities depository services.[165] The commenter asserted that, because FICC is not deemed to be a securities depository eligible to custody fund assets, expanding the Sponsored Service for funds would require addressing Section 17(f) ''if the offering would require margin posting by funds,'' and stated that one way to do this would be for FICC to obtain Commission relief to hold fund margin as an eligible securities depository within the meaning of Rule 17f–4.[166]

The Commission is not opining on whether FICC's Government Securities Division could currently be considered a ''securities depository'' for purposes of Rule 17f–4.[167] However, the amendments to Rule 17ad–22(e) do not require that registered funds post margin directly to a U.S. Treasury securities CCA, meaning that this issue is not implicated at this time. Therefore, the Commission does not believe that such concerns are ripe for consideration, as no U.S. Treasury securities CCA has proposed particular rules that would require the posting of registered funds' securities at the CCA and such an arrangement is not specifically required by the requirement to clear eligible secondary market transactions. Moreover, as discussed in this part above, the Commission has taken the position regarding the FICC registered fund margin framework in light of the commenter's concern.

The Commission's definition of an eligible secondary market transaction and the requirement to clear such transactions does not, on its own, mandate particular changes to FICC's membership models, including the Sponsored Service. FICC has not proposed any rule changes with respect to the Sponsored Service in this regard at this time. The Commission will consider any proposed rule changes consistent with its obligations under Section 19(b) of the Exchange Act in the event that FICC submits any such proposal in the future.

Third, the commenter stated that FICC's rules addressing margin posting will need to be amended to provide for enhanced recordkeeping, internal controls, and transparency around the positions and related margin, to address fund concerns regarding the security of fund assets under a requirement to clear certain transactions. The commenter stated that enhanced recordkeeping and related controls are critical to appropriately identifying ownership of assets during a repo transaction particularly since, unlike a typical derivatives or cash transaction, ownership of the U.S. Treasury securities underlying a repo transaction changes during the transaction. The commenter asserted that FICC currently relies on its broker-dealer members and, in certain cases, designated agency banks to maintain records regarding margin positions, and that FICC has indicated that it is not able to identify positions or possess the assets of its members' customers. The commenter states that notwithstanding FICC's current lack of infrastructure, ''the Proposal relies heavily on FICC to intermediate transactions under a clearing mandate and contemplates that this approach will provide a higher level of safety to the market than the current bilateral market, which relies on a well-diversified group of credit-worthy banks to hold collateral, including through robust tri-party arrangements, and utilizes an industry standard agreement that is well understood by market participants.'' [168]

However, no U.S. Treasury securities CCA has proposed particular rules that would require the posting of registered funds' securities at the CCA. The Commission's definition of an eligible secondary market transaction and the requirement to clear such transactions does not, on its own, mandate particular changes to FICC's membership models, including the Sponsored Service. The Commission will consider any proposed rule changes consistent with its obligations under Section 19(b) of the Exchange Act in the event that FICC submits any such proposal in the future.

The Commission disagrees with the commenter's assertion that FICC has indicated that it is not able to identify positions or possess the assets of its members' customers. FICC currently is able to maintain position data for customer positions in all its indirect access models.[169] In addition, under the amendments being adopted in this release, FICC will, as discussed in section II.B.1 *infra,* be required to separately calculate and hold customer margin (which it currently does for the Sponsored Service), which addresses

[160] 15 U.S.C. 78s(c) (establishing the Commission's authority to, by rule, abrogate, add to, and delete from the rules of an SRO other than a registered clearing agency).

[161] 15 U.S.C. 80a–17(f)(1).

[162] ICI Letter, *supra* note 85, at 15.

[163] 17 CFR 270.17f–4.

[164] 17 CFR 270.17f–4.

[165] ICI Letter, *supra* note 85, at 15.

[166] ICI Letter, *supra* note 85, at 15–16.

[167] The commenter's assertion that FICC has stated that it is not a securities depository and does not provide securities depository services comes from a statement in FICC's Disclosure Framework concerning a different regulatory regime. Specifically, the statement concerns whether FICC is a ''central securities depository'' or provides ''central securities depository'' services, for purposes of discussing FICC's obligation to comply with Rule 17ad–22(e)(10), which applies to CCAs that provide central securities depository services. ''Central securities depository'' is a defined term in the Covered Clearing Agency Standards, meaning a clearing agency that is a securities depository as described in Section 3(a)(23)(A) of the Act (15 U.S.C. 78c(a)(23)(A). Section 3(a)(23)(A) defines a securities depository, in turn, as who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.

[168] ICI Letter, *supra* note 85, at 16–17.

[169] FICC Buyside FAQ at 4, *available at https://www.dtcc.com/ustclearing/-/media/Files/Downloads/Microsites/Treasury-Clearing/FICC-GSD-FAQ.pdf* (''FICC records positions of Sponsored Members and positions of Executing Firms of a Prime Broker as long as the Prime Broker submits the trades to FICC using a unique client identifier called the ''Executing Firm symbol.'') (''FICC Buyside FAQ'').

the commenter's concern that FICC calculate and hold customer margin separately.

Fourth, the commenter highlighted its support for strong protections for fund assets, including ''legally segregated, operationally commingled'' (''LSOC'') protections. In addition, another commenter asserted that, without an exclusion from the definition of an eligible secondary market transaction for repos with registered funds, such funds could be subject to greater counterparty credit risk because the existing Sponsored Member clearing model at FICC has no requirement to segregate customer assets, while at present most registered funds use third-party custodians to hold securities and cash.[170] The Commission addresses these comments in more detail in part II.B.1 below.

Fifth, the commenter stated that the Commission and FICC must address the bankruptcy treatment of certain fund assets. Specifically, the commenter stated that FICC's rules should confirm that agreements entered into by repo counterparties will be enforceable against both parties, notwithstanding that the transactions are cleared, and provide a clear process for closeout of transactions by FICC, including both the start and end legs of the transaction. The commenter also stated that FICC's rules need to address what happens upon the insolvency of a sponsoring member in a variety of factual circumstances, including providing for prompt replacement of the sponsoring member by its sponsored members and handling of other functions typically performed by the sponsoring member to ensure that transactions by the sponsored member are maintained and allowing the sponsored member the authority to receive certain reports directly and to post to the clearing fund to preserve pending trades. The commenter also stated that FICC's rules should provide clarity regarding how non-defaulting parties, such as funds, can exercise closeout rights, including those available under Sections 555, 559, 561, and similar sections of the U.S. Bankruptcy Code. The commenter stated that if, in the future, FICC decides to expand the Sponsored Service to permit (but not require) sponsored members to post margin, then the Commission and FICC should clarify that the margin posted by a sponsored member with its sponsoring member for on-posting with FICC would be eligible for customer treatment under the Securities Investor Protection Act (''SIPA''). The commenter also argues that clarification of FICC's rules regarding closeout rights—particularly in respect to ''done away'' trades—is important to clarify a repo counterparty's rights under different insolvency regimes applicable to cleared transactions.[171]

Regarding these bankruptcy-related comments, FICC's rules already address the issues raised by the commenter. For example, with respect to the enforceability of the agreements entered into by repo counterparties, FICC requires applicants for membership to execute a Membership Agreement, in which the applicant agrees to be bound by FICC's Rules, and FICC further requires applicants for membership to provide a legal opinion regarding the membership agreement, which incorporates FICC's Rules.[172] Novation consists of the termination of the deliver, receive, and related payment obligations between the parties to a trade, and their replacement with identical obligations to and from FICC in accordance with the Rules. Once it novates a transaction, FICC contractually replaces the original counterparties' obligations to each other with two sets of obligations, both of which include FICC and one of the original counterparties.[173] FICC is not a party to the pre-novation bilateral agreements between a Sponsoring Member and its Sponsored Members, and therefore, it cannot guarantee performance of those contracts.

In addition, with respect to FICC's need to establish a process for closeout, FICC's Rules contain these processes. Upon ceasing to act for an insolvent member, FICC may promptly close out and manage the member's positions, including with respect to the member's pending transactions with non-defaulting members.[174] Specifically, FICC would terminate and net all of the insolvent member's positions, after which FICC would liquidate the net positions through market action and determine a single net amount owed to or from the insolvent member from or to FICC.[175] After closing out the insolvent member's final net positions, FICC's Rules provide for the timely settlement of all deliver, receive, and related payment obligations that would have arisen had FICC not ceased to act for the insolvent member (*i.e.,* FICC would seek to fulfill its settlement obligations with respect to the insolvent member's pending transactions with non-defaulting members.)[176] Similarly, in the event that FICC determines to treat a Sponsoring Member as insolvent, FICC would cease to act for the Sponsoring Member.[177] FICC would determine whether to close-out the affected Sponsored Member Trades and/or permit the Sponsored Members to complete their settlement.[178] In the event that it closes out the Sponsored Member's transactions, it would follow the same closeout process.[179]

Moreover, these comments generally relate to particular features of FICC's Sponsored Service, including how the sponsored member is able to interact with FICC, FICC's ability to settle the transactions in the event of a Sponsoring Member default, and the operation of certain bankruptcy provisions. For the reasons discussed in more detail in part II.B.2 *infra,* the Commission cannot change the rules governing the Sponsored Service.

Sixth, the commenter identified issues for registered funds that would arise if additional clearing were to require funds to contribute to FICC's CCLF. The commenter explained that contribution by a registered fund to the CCLF could result in a prohibited joint transaction in violation of: Section 17(d) of the 1940 Act if affiliates of the fund (*e.g.,* other funds managed by the same investment adviser) also contribute to the fund; Section 18 of the 1940 Act, which prohibits a registered fund from issuing ''senior securities;'' Section 17(f) of the 1940 Act; the fund's investment purpose, policies, and organization documents; or the fiduciary duties of the fund's board and its investment adviser. The commenter asserts that the Commission would need to carefully evaluate the ability of a registered fund to become a FICC netting member and contribute to the CCLF, as well as amending its rules to confirm that view, or that, in the alternative, FICC could create a special category of netting member that would not require a fund to contribute to the CCLF.[180]

In response to this commenter, any requirement for a U.S. Treasury securities CCA to have policies and procedures requiring its direct participants to clear eligible secondary market transactions does not, on its

[170] SIFMA AMG Letter, *supra* note 35, at 5.

[171] ICI Letter, *supra* note 85, at 20–21.

[172] FICC Rule 2A, Section 7, *supra* note 19; FICC Disclosure Framework, Principle 1, *available at https://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/FICC_Disclosure_Framework.pdf.*

[173] FICC Rule 5, section 8 (regarding novation generally) and Rule 3A, section 7(a) (regarding novation in the Sponsored Service), *supra* note 19.

[174] FICC Rule 22A, Section 2, *supra* note 19.

[175] *See id.*

[176] *See id.*

[177] FICC Rule 3A, Section 16(b), *supra* note 19.

[178] *Id.*

[179] *Id.*

[180] ICI Letter, *supra* note 85, at 22.

own, require any particular market participant to become a direct participant of a U.S. Treasury securities CCA, thereby taking on the membership obligations of such participation, including contribution to the CCLF. The Commission acknowledges the commenter's view that certain regulatory provisions applicable to registered funds could effect a registered fund's ability to join a U.S. Treasury securities CCA directly, but the Commission does not believe that these concerns should impact its consideration of the proposal as the proposal would not impose such requirements. Consistent with its obligations under Section 19 of the Exchange Act, in its review of any rule filings, the Commission would consider issues related to the ability of market participants, including registered funds, to participate in FICC.

Seventh, the commenter stated that bilateral tri-party repo should be exempted from the definition of an eligible secondary market transaction. The Commission has considered this comment in part II.A.2.a.i *supra.*

In addition, certain commenters also provided specific arguments regarding money market funds subject to Rule 2a–7 under the 1940 Act.[181] One commenter stated that the Commission should not include repos with money market funds subject to Rule 2a–7 within the definition of an eligible secondary market transaction, noting that the current ability to transact in Treasury repurchase agreements across a variety of clearance and settlement platforms allows these funds to be invested in a manner that is in the best interest of their shareholders. The commenter also referred to the planning and tools that have been developed that seek to avoid a disorderly default in repurchase agreement markets. The commenter also stated that the likely insolvency regimes for the major repurchase agreement participants that would be facilitated by a receiver (either the Federal Deposit Insurance Corporation or the Securities Investor Protection Corporation) allow the receiver to transfer or wind down repurchase agreements in an orderly manner.[182]

Two commenters raised questions with respect to regulatory diversification requirements, that is, whether registered funds, including money market funds, will continue to meet the definition of a ''collateralized fully'' repurchase agreement under Rule 5b–3 under the Investment Company Act of 1940 if Treasury repo investments through the Sponsored Service grow significantly.[183] Commenters explained that meeting the definition of a ''collateralized fully'' repurchase agreement under Rule 5b–3 is necessary for Treasury repurchase agreements to remain permissible investments for a government money market fund and for achieving ''look through'' treatment for certain diversification requirements imposed under the 1940 Act and Internal Revenue Code.[184] One commenter asked that the Commission confirm through rulemaking or guidance that repo clearing offerings made available by FICC to registered funds ''would continue to satisfy'' the ''collateralized fully'' standard set forth in Rules 5b–3 and 2a–7 under the 1940 Act and would allow funds to achieve ''look through treatment'' for diversification purposes.[185]

One commenter also referenced the need for relief for reverse repo transactions. The commenter stated that, unlike Treasury repo agreements that are ''collateralized fully,'' Treasury reverse repo transactions entered into by funds (*i.e.,* where a fund is the seller) currently are not eligible for look-through treatment. The commenter concludes that this means that, under the proposal, absent additional rulemaking or relief, most money market funds would be limited to investing no more than 5% of their total assets in reverse repo agreements because funds would face FICC as the counterparty, and that diversified non-money market funds would be limited to investing either no more than 25% of their total assets in reverse repo agreements or no more than 5%, with respect to 75% of their total assets, in reverse repo agreements. The commenter stated that registered funds may use Treasury reverse repo agreements as a form of short-term financing to facilitate shareholder redemption requests.[186]

The Commission acknowledges that the final rule could limit the extent to which some registered funds enter into Treasury reverse repo agreements. However, the Commission believes that this effect will be limited because a relatively small number of funds report Treasury reverse repo agreements on Form N–PORT, and funds generally have other available means to generate cash to meet shareholder redemption requests, such as lines of credit, securities lending, interfund lending, or selling portfolio investments, as applicable. The combined effect of the final rule and the diversification requirements in section 5(b) of the 1940 Act could practically limit the amount some funds may invest in Treasury reverse repo.[187]

The commenter separately suggested that the final rule would affect money market funds' use of Treasury reverse repo agreements, in light of additional diversification requirements for those funds. However, money market funds are not permitted to rely on rule 18f–4 under the 1940 Act to enter into reverse repo transactions.[188] Moreover, money market funds historically have not reported holdings of reverse repo agreements in their portfolio reports filed with the Commission.

The Commission's definition of an eligible secondary market transaction and the requirement to clear such transactions does not mandate particular changes to FICC's membership models, including the Sponsored Service. FICC has not proposed any rule changes with respect to the Sponsored Service in this regard at this time. The Commission will consider any proposed rule changes consistent with its obligations under Section 19(b) of the Exchange Act in the event that FICC submits any such proposal in the future. In the event that any U.S. Treasury securities CCA proposes a clearing model in which

[181] Federated Letter, *supra* note 85, at 3; ICI Letter, *supra* note 85, at 5–8.

[182] Federated Letter, *supra* note 85, at 3 (citing SEC. & EXCH. COMM'N, DIV. OF INV. MGMT GUIDANCE UPDATE: COUNTERPARTY RISK MANAGEMENT PRACTICES WITH RESPECT TO TRI-PARTY REPURCHASE AGREEMENTS (July 2013), available at *https://www.sec.gov/divisions/investment/guidance/im-guidance-2013-03.pdf*).

[183] 17 CFR 270.5b–3(c)(1). Federated Letter, *supra* note 85, at 6; ICI Letter, *supra* note 85, at 23–24.

[184] Federated Letter, *supra* note 85, at 6; ICI Letter, *supra* note 85, at 23–24.

[185] ICI Letter, *supra* note 85, at 23–24.

[186] ICI Letter, *supra* note 85, at 25.

[187] Section 5(b) divides management investment companies into ''diversified companies'' and ''non-diversified companies.'' Under this section, (i) a ''diversified company'' means a management company which meets the following requirements: At least 75 per centum of the value of its total assets is represented by cash and cash items (including receivables), Government securities, securities of other investment companies, and other securities for the purposes of this calculation limited in respect of any one issuer to an amount not greater in value than 5 per centum of the value of the total assets of such management company and to not more than 10 per centum of the outstanding voting securities of such issuer and (ii) a ''non-diversified company'' means any management company other than a diversified company. *See* section 5 of the 1940 Act.

[188] *See* Use of Derivatives by Registered Investment Companies and Business Development Companies, Investment Company Act Release No. 34084 (Nov. 2, 2020), 85 FR 83162 (Dec. 21, 2020); 17 CFR 270.18f–4. Rule 18f–4 establishes a framework for funds' use of derivatives and certain other transactions, including reverse repurchase agreements. Money market funds are not permitted to rely on rule 18f–4 for these transactions.

registered funds would be required to place and maintain assets to effect eligible secondary market transactions at the CCA, the Commission would consider the applicability of Section 17(f) of the 1940 Act.

One commenter explained that registered funds' access to the Treasury repo market could be restricted by the number or willingness of the FICC netting members to provide sponsoring services with attending negative effect on the market liquidity.[189] Although increases in demand for the Sponsored Service may put pressure on existing sponsoring members and reduce their ability or willingness to onboard additional clients, this could also present an opportunity for dealers that currently do not offer the Sponsored Service to enter the market, resulting in more competition and a wider range of counterparties. This is supported by an observation of a growing number of dealers offering the Sponsored Service and the growing volume of sponsored repo indicating increased adoption of this service by a wider range of market participants.[190]

Several commenters raised concerns about the potential effect of the proposal and a potential resultant high level of exposure to the U.S. Treasury securities CCA on ratings assigned to certain money market funds by Nationally Recognized Statistical Rating Organizations (NRSROs).[191] The commentators explained that NRSROs typically establish exposure limits that a rated money market fund may have to any particular CCA and, if these limits are breached, a fund may not be able to maintain the currently assigned rating.[192] The Commission does not have the authority to adjust the NRSROs' rating criteria and methodologies, and it cannot anticipate how NRSROs may adjust their rating criteria and methodologies in response to the U.S. Treasury market infrastructure changes resulting from the adoption of the Membership Definition.

iii. Repos by Other Clearing Organizations

Several commenters supported a limited exclusion from the definition of an eligible secondary market transaction for U.S. securities transactions entered into by a derivatives clearing organization (''DCO''). A DCO is an entity that is regulated by the CFTC and is defined as a clearinghouse, clearing association, clearing corporation, or similar entity, facility, system, or organization that, with respect to an agreement, contract, or transaction (i) enables each party to the agreement, contract, or transaction to substitute, through novation or otherwise, the DCO's credit for the credit of the parties; (ii) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by the DCO's participants; or (iii) otherwise provides clearing services or arrangements that mutualize or transfer among the DCO's participants the credit risk arising from such agreements, contracts, or transactions executed by the participants.[193] Generally, DCOs perform similar functions as CCAs, but for commodities as opposed to securities.

One commenter recognized that DCOs are not specifically enumerated as an entity type subject to the expanded clearing requirement, but stated that, in practice, it would be impractical for DCOs to avoid entering into repos with direct participants of U.S. Treasury CCAs, which would therefore be included in the definition of an eligible secondary market transaction.[194] First, the commenter stated that an exclusion for DCOs was necessary to allow DCOs to retain the flexibility necessary to effectively manage risk when managing the default of a participant of the DCO, with respect both to access to the appropriate counterparties and to pressing time considerations. The commenter stated that requiring the central clearing of repos entered into for default management by a DCO could undermine the effectiveness of the DCO's default management practices. Second, the commenter asserted that including transactions with a DCO within the definition of an eligible secondary market transaction would threaten DCOs' effective cash management. The commenter stated that DCOs regularly receive U.S. dollar cash as margin from their clearing members and then enter into reverse repos, as permitted under the applicable CFTC regulations. However, the commenter expressed concern that the permissible counterparties and counterparty concentration limits included in CFTC Rule 1.25 would appear to be in tension with the requirement to clear eligible secondary market transactions because a clearing agency, which would become the counterparty to any transaction that is centrally cleared, is not a permissible counterparty. Finally, the commenter stated that allowing transactions with DCOs to be scoped into the definition of an eligible secondary market transaction would be inconsistent with the spirit, and the letter, of Section 5b(f)(1) of the Commodity Exchange Act, which states that ''under no circumstances shall a [DCO] be compelled to accept the counterparty credit risk of another clearing organization.''[195]

An additional commenter made similar arguments. This commenter stated that the rule as proposed could create contagion risk by increasing linkages between CCPs, stating that this risk would crystallize if a CCP clearing its investment trades contributed to the mutualized financial resources of another CCP via its default fund or was otherwise exposed to loss in the event of a member default of the other CCP. The commenter further stated that existing regulations under both U.S. and European regulatory frameworks recognize the potential financial stability risks of inter-CCP linkages and prohibit them from accepting the counterparty credit risk of another CCP. According to the commenter, one such conflict arises under the Commodity Exchange Act where, to minimize systemic risk, there is a requirement that ''[. . .] under no circumstances shall a derivatives clearing organization be compelled to accept the counterparty credit risk of another clearing organization.'' Finally, the commenter states that a clearing model tailored to meet CCPs' bespoke collateral management requirements would need to be developed before they could operationally clear investment trades.[196]

The Commission understands that reverse repos are used heavily by central counterparties as a means of investing their cash.[197] The Commission also agrees that entities that provide central counterparty services, like DCOs and clearing agencies, must be able to effectively manage the default of a participant.[198] In the event of a participant default, the need for such entities to be able to react within potentially compressed timeframes, including by engaging in repos of U.S.

[189] ICI Letter, *supra* note 85, at 30–31.

[190] *See* Sponsored DVP and GC Repo Activity, *available at https://www.dtcc.com/charts/membership.*

[191] Federated Letter, *supra* note 85, at 6–7; ICI Letter, *supra* note 85, at 25–26; SIFMA AMG Letter, *supra* note 35, at 14.

[192] *Id.*

[193] 7 U.S.C. 1a(15) (defining DCO) and 7a–1(a) (establishing DCO registration requirement).

[194] CME Letter, *supra* note 81, at 6.

[195] CME Letter, *supra* note 81, at 6–7.

[196] Letter from Rachel Goldberg, Head of Government Relations and Regulatory Strategy, Americas, London Stock Exchange Group, at 2–3 (June 15, 2023).

[197] *See* BIS, Committee on the Global Financial System, Repo Market Functioning, Apr. 2017.

[198] Proposing Release, *supra* note 14, 87 FR at 64627.

Treasury securities held as margin to create liquidity, may be essential to their default management processes. The Commission agrees that including such transactions within the scope of an eligible secondary market transaction might have systemic risk implications and counteract the goals of effective and efficient default management by CCPs in such scenarios. Accordingly, it is appropriate to exclude repos entered into by an entity acting as a central counterparty from the definition of an eligible secondary market transaction.[199]

To do so, the Commission is modifying the definition of an eligible secondary market transaction in Rule 17ad–22(a) to exclude any repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities in which one counterparty is a covered clearing agency providing central counterparty services, a derivatives clearing organization (*see* 7 U.S.C. 7a–1 and 17 CFR 39.3), or is regulated as a central counterparty in its home jurisdiction. With respect to a counterparty that is regulated as a central counterparty in its home jurisdiction, this portion of the exclusion encompasses entities that may serve as central counterparties in their home jurisdiction and may transact in repos with direct participants of a U.S. Treasury securities CCA. Although commenters did not specifically suggest this exclusion for a counterparty that is regulated as a CCP in its home jurisdiction, this aspect of the exclusion is appropriate to ensure that entities serving as central counterparties in other jurisdictions are similarly excepted from the definition of an eligible secondary market transaction as repo counterparties.

iv. Repos by FCMs

Two commenters asked the Commission to adopt an exemption that would allow Futures Commission Merchants (''FCMs'') to continue to engage in eligible secondary market transactions in U.S. Treasury securities outside of central clearing, and another commenter acknowledged the potential interaction between the proposal and the regulatory framework governing FCMs.[200] An FCM is an entity engaged in soliciting or accepting orders for the purchase or sale of commodities, futures, swaps, or other instruments regulated by the CFTC.[201] FCMs can also be registered with the Commission as broker-dealers.[202] In their role as market intermediaries, FCMs hold customer funds and securities. The commenter explained that as of October 31, 2022, FCMs held an aggregate amount of more than $500 billion in segregated customer accounts, a substantial percentage of which is held in the form of U.S. Treasury securities.[203]

As the commenter noted, FCMs are required under the Commodity Exchange Act[204] and the regulations promulgated thereunder[205] to assure the protection of customer funds. Specifically, as the commenter explained, FCMs are required to hold customer funds and securities in segregated accounts with a bank or other permitted depository that acknowledges such customer assets ''will be separately accounted for and segregated'' from the FCM's own funds and ''must otherwise be treated in accordance with the provisions of the [CEA]'' and CFTC rules.[206] The commenter highlighted that neither the bank/depository nor the FCM may use the FCM's customer funds to ''secure or guarantee any obligations'' that the FCM might owe to the bank/depository or make the funds ''subject to any right of offset or lien for or on account of any indebtedness, obligations, or liabilities'' the FCM may owe the bank/depository.[207] The commenter expressed concern as to whether the account structure provided by FICC would be consistent with these rules.

As an initial matter, the requirement for direct participants of a U.S. Treasury securities CCA to clear eligible secondary market transactions does not require that an FCM post customer assets directly to the U.S. Treasury securities CCA. An FCM could access central clearing through a customer model, such as the Sponsored Service or the Prime Broker/Correspondent clearing models, that allows the customer/FCM to hold customer assets elsewhere (such as at the Sponsoring Member) and does not require that the FCM post customer assets to the U.S. Treasury securities CCA. Therefore, the ability of the CCA to provide an account structure consistent with the CFTC Rules should not prevent an FCM's transactions from being submitted to central clearing.

Moreover, in light of the requirements regarding the segregation of house and customer margin, as discussed in part II.B.1 *infra,* and the amendments to Rule 15c3–3, as discussed in part II.C *infra,* U.S. Treasury securities CCAs will have to ensure that they have adopted policies and procedures to separate house and customer margin and to establish certain types of segregated accounts. The Commission encourages FCMs seeking the ability to post customer funds directly to the CCP to engage with the CCAs to consider whether such new account structures may be sufficient to comply with the provisions of the CFTC regulations that the commenter has identified or whether such structures could be leveraged to meet the commenter's needs. For example, the Commission understands that the existing U.S. Treasury securities CCA recently has indicated that it would develop customer clearing account structures in which each customer's margin would be calculated on a gross basis and held physically segregated from all other FICC margin and would also be legally segregated from FICC member as well as fellow customer exposures.[208]

One of the commenters also explained that FCMs are permitted to invest customer funds in certain securities determined by the CFTC to be ''consistent with the objectives of preserving capital and maintaining liquidity.''[209] The commenter stated that permitted investments include, among other things, U.S. Treasury securities, and investments with U.S. Treasury securities may be made by either direct purchase or sale or by entering into repo transactions.[210] The commenter further explained that, for repo transactions, an FCM's ''permitted

[199] The Commission is not opining on the proposal's consistency with the Commodity Exchange Act or other regulatory regimes, but the commenter's concern is moot in light of the modification to the definition of an eligible secondary market transaction that the Commission is adopting.

[200] *See* comments from Walt L. Lukken, President and Chief Executive Officer, Futures Industry Association, at 2–7 (Dec. 23, 2022) (''FIA Letter''). *See also* SIFMA/IIB Letter, *supra* note 37, at 30–31 (recognizing that the absent an exemption for FCMs from the central clearing requirement, FCMs engaging in repo transactions would be placed in the untenable position of violating either the SEC's proposal or existing CFTC regulations). *See also* DTCC/FICC Letter, *supra* note 33, at 25 (recognizing that CFTC regulations currently limit FCM access to central clearing by preventing FCMs from entering into FICC-cleared repo transactions using customer property).

[201] *See* 7 U.S.C. 1a(28)(A).

[202] One commenter states that the majority of FCMs are dually registered as FCMs and broker-dealers. *See* FIA Letter, *supra* note 200, at 2.

[203] *See* FIA Letter, *supra* note 200, at 4.

[204] 7 U.S.C. 1–26.

[205] 17 CFR 1.1–190.19.

[206] *See* FIA Letter, *supra* note 200, at 3 (discussing 17 CFR 1.20 (regarding futures traded on U.S. futures exchanges) and 17 CFR 22.4 (regarding cleared swaps)).

[207] FIA Letter, *supra* note 200, at 3–4 (discussing 17 CFR 1.20, 22.2, and 30.7).

[208] DTCC 2023 White Paper, *supra* note 107, at 22–23.

[209] FIA Letter, *supra* note 200, at 4–5 (discussing 17 CFR 1.25(b)).

[210] FIA Letter, *supra* note 200, at 4–5 (discussing 17 CFR 1.25(a)).

counterparties are limited to a bank . . . , securities broker-dealer, or government securities dealer registered with the [Commission],'' and a clearing agency is not a permitted counterparty.[211]

The commenter stated that, absent relief, conflict between the CFTC rules and the proposal would effectively prohibit FCMs from entering into U.S. Treasury security transactions pursuant to CFTC Rule 1.25.[212] The commenter explained that a U.S. Treasury securities CCA interposes itself between the counterparties to a securities transaction through novation, acting functionally as the buyer to every seller and seller to every buyer.[213] Therefore, according to the commenter, if an FCM were to conduct a cleared transaction, the CCA would become the FCM's counterparty. Since a CCA is not a permitted FCM counterparty under the CFTC rules, the commenter states that FCMs are prohibited from conducting such cleared transactions.[214] The commenter contended that if the Commission adopts the requirement to clear eligible secondary transactions as proposed, an FCM would lose its current ability to conduct transactions in U.S. Treasury securities with a direct participant of a U.S. Treasury securities CCA in compliance with CFTC rules.[215]

The Commission recognizes that if the FCM were to access a U.S. Treasury securities CCA through a model like FICC's Sponsored Service, the CCA would novate the transaction and become the counterparty to the FCM, which, as the commenter has described it, would not be consistent with Rule 1.25(d)(2) with respect to permitted counterparties. However, the requirement to clear eligible secondary market transactions does not require that the FCM use a particular type of model that would make the FCM a counterparty to a CCA. The FCM could access central clearing through an agent clearing model like FICC's Prime Broker or Correspondent Clearing models, in which it would essentially ''give up'' its transaction to a direct participant for submission without becoming a counterparty to the CCA, which should be consistent with the FCM's obligations under Rule 1.25(d)(2). Therefore, this requirement to clear eligible secondary market transactions does not obligate the FCM to use a model that would necessarily result in a transaction with a clearing agency as the counterparty to the FCM.

The Commission recognizes this apparent tension between the application of Rule 1.25(d)(2), as described by the commenter, and the requirement to clear repos as part of the definition of eligible secondary market transactions.[216] However, as discussed in the Proposing Release, when Congress added section 17A to the Exchange Act as part of the Securities Acts Amendments of 1975, it directed the Commission to facilitate the establishment of (i) a national system for the prompt and accurate clearance and settlement of securities transactions (other than exempt securities) and (ii) linked or coordinated facilities for clearance and settlement of securities transactions, and the Government Securities Act of 1986 specifically included government securities within the scope of section 17A.[217] The Commission therefore has the ability to make rules governing central clearing in the U.S. Treasury market, which may affect a diverse group of market participants, including FCMs. The Commission encourages interested parties to work with the CCA to identify any modifications to its client clearing models to better allow FCMs to access central clearing in the U.S. Treasury market. In addition, FCMs could enter into repos with market participants that are not direct participants of a U.S. Treasury securities CCA.[218]

The commenter also notes that CFTC rules require that securities transferred to an FCM's customer segregated custodial account must be ''made on a delivery versus payment [(DVP)] basis in immediately available funds.''[219] Even if a U.S. Treasury securities CCA would be a permitted FCM counterparty under the CFTC rules, the commenter expressed concern that upon the sale or resale of securities in a repo transaction, the FCM's customer segregated cash account may not receive same-day funds credited simultaneously with the delivery or transfer of securities.[220] The Commission does not believe that such concerns are warranted. FICC clears all transactions DVP meaning that payment of cash is made at the same time as delivery of securities.

Finally, the commenter also explained that CFTC rules require that the agreement between an FCM and a repo counterparty must ''make[ ] clear that, in the event of the [FCM's] . . . bankruptcy, any securities purchased with customer funds that are subject to an agreement may be immediately transferred. The agreement [must] also make[ ] clear that, in the event of an [FCM's] . . . bankruptcy, the counterparty has no right to compel liquidation of securities subject to an agreement or to make a priority claim for the difference between current market value of the securities and the price agreed upon for resale of the securities to the counterparty, if the former exceeds the latter.''[221] The commenter also expressed concern that there is no assurance that a U.S. Treasury securities CCA would agree to the bankruptcy provisions in the CFTC rules applicable to FCMs described above.[222] However, as stated in the discussion above, the requirement to clear eligible secondary market transactions does not require that the FCM enter into a repo agreement with the CCA.

For the reasons discussed above, the Commission does not believe that an exclusion for FCMs is necessary to accommodate the relevant provisions of the CFTC Rules. Moreover, an exclusion for FCMs would be inconsistent with the purpose of the rule which is to help reduce contagion risk to the CCA and bring the benefits of central clearing to more transactions involving U.S. Treasury securities, particularly in light of their significance to the Treasury market.

[211] FIA Letter, *supra* note 200, at 5 (discussing 17 CFR 1.25(d)(2)).

[212] FIA Letter, *supra* note 200, at 6.

[213] FIA Letter, *supra* note 200, at 6; *see also* Proposing Release, *supra* note 14, 87 FR at 64612.

[214] FIA Letter, *supra* note 200, at 6 (citing 17 CFR 1.25(d)(2)).

[215] *See* FIA Letter, *supra* note 200, at 6.

[216] *See* CFTC Global Market Advisory Committee (''GMAC''), Global Market Structure Subcommittee, CFTC Rule1.25(d)(2) Recommendation (discussing the impact of Rule 1.25(d)(2) on FCMs' ability to participate in cleared repo), *available at https://www.cftc.gov/PressRoom/Events/opaeventgmac110623.* The CFTC's GMAC voted in favor of this recommendation to amend Rule 1.25(d)(2) to include CCAs as permitted counterparties.

[217] Proposing Release, *supra* note 14, 88 FR at 64617.

[218] CFTC Rule 1.25(a)(1) also identifies additional types of permitted investments available to an FCM for its customer funds, including municipal bonds, corporate bonds, and interests in money market mutual funds.

[219] FIA Letter, *supra* note 200, at 5 (discussing 17 CFR 1.25(d)(9)).

[220] *See id.*

[221] FIA Letter, *supra* note 200, at 5 (discussing 17 CFR 1.25(d)(13)).

[222] *See id.* The commenter also noted that the CFTC has advised that ''in-house transactions'' in which an FCM receiving customer collateral that is not acceptable at a Derivatives Clearing Organization (''DCO'') or foreign board of trade may, independent of CFTC Rule 1.25 requirements, exchange that collateral for acceptable collateral to the extent necessary to meet margin requirements. The commenter requested confirmation from the Commission that such ''in-house transactions'' would similarly not be subject to the proposed clearing requirement were an FCM to conduct transactions with a participant of a U.S. Treasury securities CCA. If such transactions are with a participant of a U.S. Treasury securities CCA and otherwise meet the definition of an eligible secondary market transaction, then they would be subject to the requirement.

v. Repos Involving ''End Users''

One commenter argued that transactions by commercial entities participating in the Treasury repo market solely for investing their extra cash balances should be excluded from the definition of an eligible secondary market transaction. The commenter stated that corporations are often required under their credit agreements to invest cash in specified cash equivalents, which typically include Treasury repos, and that these transactions are likely to be quite limited in size.[223] The commenter suggested that the Commission could leverage the definition of commercial end user in the uncleared security-based swap margin rules or non-financial end user in the uncleared swap margin rules (which both similarly contain exemptions for such entities).[224]

Another commenter requested a similar exclusion, stating that commercial entities that enter into cash or repo transactions do so for various, legitimate purposes, but that these entities' trading is rarely large in size and the costs of these transactions being cleared would ultimately outweigh the benefits. The commenter also stated that such an exclusion would be consistent with the exemption in the Commission's uncleared swap margin rules.[225] An additional commenter requested the same exclusion for non-financial commercial end users, such as corporations and municipalities. The commenter stated that these types of entities typically transact in U.S. Treasury repos for funding and liquidity management purposes, and that the increased costs of centrally clearing such transactions may outweigh the willingness of these types of entities to continue to use U.S. Treasury securities for funding and liquidity management purposes, thus eliminating an effective corporate management tool without advancing the Commission's stated policy objectives.[226]

The Commission understands that in addition to cash assets obtained through credit agreements, other sources of corporate cash exist that do not typically have accompanying investment limitations, such as equity capital, retained earnings, sales of assets, and legal settlements, among others. Investments of the combined surplus cash by corporate treasurers are typically aligned with the firm's projected cash needs and may include a range of investment options in addition to Treasury repos.[227] As of June 30, 2023, balances of liquid assets held by nonfinancial corporations are estimated at approximately $6.9 trillion.[228] While the commenter stated that such an exclusion may be warranted because the Treasury repo investments are likely to be limited in size, commercial end-users could change the size of their Treasury repo investments, including by entering into large Treasury repo investments, or by using alternative options for the short-term investment of cash that share a similar risk profile, such as a money market fund, depending on many firm-specific and market factors. For example, commercial end-users may increase allocations to U.S. Treasury repos for credit diversification, particularly at times of market stress. U.S. Treasury repos may offer higher yields, particularly at times when issuance of Treasury securities increases and dealers seek financing to complete settlement by borrowing more cash in the repo market. The high liquidity of Treasury repos could also be attractive to commercial end-users, especially if a significant amount of liquidity needs to be accumulated to complete a corporate transaction such as a merger or an acquisition.

An exemption for end users could permit commercial entities to enter into Treasury repo investments without the risk-reducing benefits of central clearing. In addition, due to the variety of sources of cash available to commercial entities besides those obtained through credit agreements and the size of corporate liquid assets held by commercial entities, excluding commercial entities from the scope of the definition of an eligible secondary market transaction would not be consistent with the intent to reduce risk and enhance efficiency of the U.S. Treasury market.[229] The Commission also disagrees with the contention that the increased costs arising from the clearing mandate would impede the willingness of commercial entities to continue to use the Treasury repo market for funding and liquidity management purposes. As discussed in part I *supra,* central clearing allows market participants to reduce costs and increase operational efficiency, among other benefits, which would, in turn, lead to lower funding costs in the repo market and greater availability of liquidity for all market participants, including commercial end-users.

Moreover, the Commission disagrees with the commenter's suggestion that it could leverage the definitions used in exempting certain end users from swap clearing requirements. The commercial end user in the uncleared security-based swap margin rules is defined as a counterparty to the swap that is (i) is not a financial entity; (ii) is using swaps to hedge or mitigate commercial risk; and (iii) meets certain reporting obligations associated with entering into non-cleared swaps.[230] The exemption is intended to ensure that certain types of commercial entities are able to continue to use swaps to manage their specific commercial risks and are not unduly burdened by the need to post margin. The end-user exemption from clearing for swaps may not be available to all commercial entities entering swaps. When implementing the exemption, the CFTC specifically required, among other things, that the end user must be using the swap to hedge or mitigate commercial risk, and that the swap that is hedging or mitigating commercial risk cannot be used for a purpose that is in the nature of speculation, investing, or trading.[231] In addition, the counterparty that elected the end-user exception must provide reports relating to its ability to meet financial obligations associated with entering into non-cleared swaps.[232]

In contrast, the commercial end user activity in the U.S. Treasury repo market is unrelated to the commercial activity of these users. Investment of surplus cash is an activity similar to that of institutional asset managers such as registered funds or other managed investments. As discussed above, investing is a type of activity that would not qualify the end-user exemption in the swap market. For the reasons here and above, the Commission does not believe that an exception for commercial end users is appropriate in the Treasury repo market.

vi. Interaffiliate Repos

One commenter recommended that the Commission exempt transactions in

[223] SIFMA/IIB Letter, *supra* note 37, at 22.

[224] *Id.* (citing 17 CFR 240.18a–3(b)(2), and 23.151; 12 CFR 45.2).

[225] AIMA Letter II, *supra* note 115, at 3.

[226] *See* Morgan Stanley Letter, *supra* note 85, at 2.

[227] Association of Finance Professionals, 2023 AFP Liquidity Survey, *available at https://www.afponline.org/publications-data-tools/reports/survey-research-economic-data/Details/liquidity-survey.*

[228] Federal Reserve, Financial Accounts of the United States, L.103 Nonfinancial Corporate Business (the broad measure of liquid assets includes cash held in banks' accounts and deposits, and cash invested in various liquid financial assets), *available at https://www.federalreserve.gov/releases/z1/20230908/html/l103.htm.*

[229] Association of Finance Professionals, 2023 AFP Liquidity Survey, *available at https://www.afponline.org/publications-data-tools/reports/survey-research-economic-data/Details/liquidity-survey.*

[230] Commodity Exchange Act section 2(h)(7); Exchange Act section 3C(g).

[231] 17 CFR 50.50(a)(1)(ii) and (c)(2)(i).

[232] 17 CFR 50.50(b).

U.S. Treasury securities between affiliates from any central clearing requirement. The commenter stated that inter-affiliate transactions are important to corporate groups, which may use them to achieve efficient risk and capital allocation and obtain flexibility for addressing customer demands.[233]

The commenter further stated that requiring inter-affiliate transactions to be centrally cleared would impose additional costs with limited benefits, for two reasons. First, if an inter-affiliate transaction is part of a ''back-to-back arrangement,'' meaning that the related external transaction between the affiliated counterparty and a non-affiliated counterparty is not centrally cleared, then subjecting the inter-affiliate transaction to a central clearing requirement does nothing to reduce the contagion risk presented by the non-affiliated counterparty. The commenter further asserted that if that external transaction is already centrally cleared, the contagion risk would already be addressed and requiring the inter-affiliate transaction to be cleared would not create additional benefits. Second, a direct participant's affiliate's credit risk is already part of the group-wide financial risks to which the Treasury CCP is exposed, and central clearing of inter-affiliate transactions is unlikely to meaningfully impact the risk profile.[234] The commenter stated that, for similar reasons, the CFTC has exempted inter-affiliate swaps from the swap mandatory clearing rules.[235]

Additional commenters made similar arguments. For example, one commenter stated that the definition of an eligible secondary market transaction should not apply to transactions between a direct participant of a U.S. Treasury securities CCA and its affiliates. The commenter explained that a CCA's direct participants provide a range of risk management, collateral management, asset-liability management, and funding and liquidity services to their affiliates, including affiliated U.S. broker-dealers, and that imposing the definition of those direct participants' transactions with affiliates would be potentially disruptive and unnecessary to advance the Commission's stated policy objectives.[236] Another commenter stated that a requirement to clear transactions between affiliates would create new, unnecessary costs without any benefits.[237]

As discussed in more detail in part IV.B, the Commission understands that inter-affiliate transactions represent an important tool to transfer liquidity and risk within an affiliated group. These transactions may serve different purposes, including, but not limited to, providing U.S. Treasury securities for delivery when an affiliate has taken a long or short position in U.S. Treasury securities as a hedge against other exposures, allowing the movement of U.S. Treasury securities to allow them to be posted as margin on an affiliate's transaction, ensuring that U.S. Treasury securities can serve as a liquidity buffer for an affiliated bank,[238] or to meet liquidity composition targets. To get the U.S. Treasury securities to the appropriate entity within an affiliated group, the affiliate often enters into repos or reverse repos with a direct participant of a U.S. Treasury securities CCA.

In certain circumstances, the counterparty credit risk posed by inter-affiliate transactions may be less than other transactions.[239] However, affiliated entities are separate legal entities and, generally, are not legally responsible for each other's contractual obligations. In the event that one or more affiliated entities becomes insolvent, the affiliates, as separate legal entities, would be managed as separate estates in a bankruptcy, with the trustee having a duty to the creditors of the affiliate, not the affiliated family. Thus, the Commission does not agree that a U.S. Treasury securities CCA is exposed to the group-wide financial risks of a direct participant's affiliated group.

In response to the comments received, the Commission is modifying the definition of an eligible secondary market transaction in Rule 17ad–22(a) to conditionally exclude inter-affiliate repurchase and reverse repurchase transactions. Specifically, the Commission is excluding from that definition any repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities entered into between a direct participant and an affiliated counterparty, provided that the affiliated counterparty submits for clearance and settlement all other repurchase or reverse repurchase agreements collateralized by U.S. Treasury securities to which the affiliated counterparty is a party. By referring to all *other* repos or reverse repos, the exemption clarifies that the requirement does not encompass transactions between the direct participant and the affiliate, *i.e.,* the transactions that are excluded, and also does not encompass the affiliate's transactions that would otherwise be excluded under sections (iii), (iv), or (v) of the definition of an eligible secondary market transaction. This exclusion is appropriate to ensure that affiliated groups can continue to use inter-affiliate repo transactions to transfer liquidity or risk, while also conditioning that ability on the affiliated counterparty's submission of its eligible secondary market repo transactions for clearance and settlement.[240]

Regarding the conditional nature of the exclusion, the Commission agreed with the commenter that if the external transaction of a ''back-to-back'' arrangement in which the related external transaction between the affiliated counterparty and a non-affiliated counterparty is centrally cleared, the contagion risk would already be addressed and requiring the inter-affiliate transaction to be cleared would not create additional benefits. To ensure that this is the case, the Commission is conditioning the availability of the exclusion for inter-affiliate transactions on an obligation for the affiliated counterparty to submit its repo transactions, other than those with its direct participant counterparty, for clearance and settlement. This condition should also help ensure that a direct participant cannot rely upon an inter-affiliate transaction to avoid the requirement to clear eligible secondary market transactions. If there were no such condition, a direct participant

[233] SIFMA/IIB Letter, *supra* note 37, at 21–22.

[234] SIFMA/IIB Letter, *supra* note 37, at 21–22.

[235] *See id.* at 22 n. 66 (citing generally 17 CFR 50.52).

[236] *See* Morgan Stanley Letter, *supra* note 85, at 1–2.

[237] AIMA Letter II, *supra* note 115, at 3.

[238] A liquidity buffer generally refers to liquid assets that a banking organization manages to enable it to meet expected and unexpected cash flows and collateral needs without adversely affecting the banking organization's daily operations. *See generally* FRB, FDIC, & OCC, Q&As on Statement Regarding the Use of Capital and Liquidity Buffers (Mar. 17, 2020), *available at https://www.fdic.gov/news/financial-institution-letters/2020/fil20020a.pdf.*

[239] *See, e.g.,* Clearing Exemption for Swaps Between Certain Affiliated Entities, 77 FR 50425, 50427 (Mar. 2012) (discussing the internalization of counterparty risk on inter-affiliate swap transactions as wholly owned members of the same corporate group, but also discussing that similar benefits may not accrue for other inter-affiliate swaps when the counterparties are not members of the same group).

[240] Although the commenter referred generally to inter-affiliate transactions, without specifying cash versus repo, the Commission is limiting the exclusion to repo transactions only for two reasons. First, inter-affiliate cash transactions would only be included in the definition of an eligible secondary market transaction if they met the definition of such transaction, as discussed further in part II.A.2.b. Second, as discussed in this section and in part IV.B.3.b.v, the Commission understands that the inter-affiliate transactions referenced by the commenter typically take the form of repo or reverse repo transactions.

could simply use inter-affiliate transactions to move securities and funds to affiliates, and the affiliated counterparty could then enter into external transactions with counterparties which, if entered into as a direct participant of a U.S. Treasury securities CCA, would be eligible secondary market transactions.[241] The Commission did not limit this condition to only the ''back-to-back'' transactions because such transactions may not serve as the only potential means by which inter-affiliate transactions can be used to evade the requirement to clear eligible secondary market transactions, and for that matter, may not serve as the only potential means by which such transactions can transfer risk.[242] This condition should lessen the potential for any impacts arising from the default of an inter-affiliate transaction to spread throughout an affiliated group because it would ensure that the external facing transactions of an affiliated counterparty would be centrally cleared, if the direct participant wanted to exclude its inter-affiliate transactions.[243]

This approach to an inter-affiliate exclusion for repos is consistent with the CFTC's treatment of this issue in the swaps market, as the commenter suggested. As part of its inter-affiliate swap exemption, the CFTC also included a requirement that that the swaps entered into by the affiliated counterparties with unaffiliated counterparties must be cleared.[244] This approach to an inter-affiliate exclusion for repos is also similar to the existing rules with respect to inter-affiliate transactions in place at FICC, as the only U.S. Treasury securities CCA. FICC's rules require that its direct participants submit the transactions of particular affiliated counterparties (referred to as a Covered Affiliate), *i.e.,* those that are not also direct participants, that are not foreign entities, and that are either broker-dealers, banks, trust companies, and/or FCMs, if that transaction is with another direct participant or another direct participant's Covered Affiliate.

To accommodate this exclusion, the Commission is also adopting in Rule 17ad–22(a) a definition of an affiliated counterparty for purposes of the definition of an eligible secondary market transaction. Specifically, an affiliated counterparty would be defined as any counterparty which meets the following criteria: (i) the counterparty is either a bank (as defined in 15 U.S.C. 78c(6)), broker (as defined in 15 U.S.C. 78c(4)), dealer (as defined in 15 U.S.C. 78c(5)), or futures commission merchant (as defined in 7 U.S.C. 1a(28)), or any entity regulated as a bank, broker, dealer, or futures commission merchant in its home jurisdiction; (ii) the counterparty holds, directly or indirectly, a majority ownership interest in the direct participant, or the direct participant, directly or indirectly, holds a majority ownership interest in the counterparty, or a third party, directly or indirectly, holds a majority ownership interest in both the direct participant and the counterparty; and (iii) the counterparty, direct participant, or third party referenced in (ii) as holding the majority ownership interest would be required to report its financial statements on a consolidated basis under U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of the majority-owned party or of both majority-owned parties. With respect to the types of entities that can be considered an affiliated counterparty, this definition is consistent with how the current U.S. Treasury securities CCA defines the terms for purposes of its rule regarding its participants' obligation to clear transactions with certain affiliates, and this consistency should be helpful to direct participants when considering compliance with this conditional exemption. The reference to entities that are regulated as banks, brokers, dealers, or futures commission merchants in their home jurisdictions encompasses foreign affiliates of direct participants of a U.S. Treasury securities CCA. This aspect of the definition of an affiliated counterparty is meant to ensure that, to take advantage of the conditional inter-affiliate exemption, a direct participant of a U.S. Treasury securities CCA would have to ensure that the transactions of both domestic and foreign affiliates are submitted for clearing. Similarly, with respect to what constitutes affiliated, that is, the specific identification of ownership interest to describe the requisite custody or control to be considered affiliated, this definition is consistent with the definition used by the CFTC for purposes of the inter-affiliate swap exemption. This consistency, and additional specificity about the requisite custody or control, should be helpful to the direct participants of a U.S. Treasury securities CCA when determining compliance with this conditional exemption.[245]

This exemption is conditional, and a direct participant of a U.S. Treasury securities CCA may choose not to use the exemption, meaning that its affiliated counterparty would not be required to submit its repo transactions, other than those with its direct participant counterparty, for clearance and settlement. If a direct participant chooses to use the exemption, its affiliated counterparty could submit its transactions in several ways, including through an indirect clearing model (*e.g.,* at FICC, the affiliated counterparty could be a Sponsored Member or use the Prime Broker or Correspondent Clearing models to submit its transactions for clearance and settlement) or by becoming a direct participant of the CCA.[246]

vii. Repos by State and Local Governments

Several commenters argued that regulatory and practical constraints on the state and local government level could limit their ability to centrally clear their Treasury repo and reverse repo transactions.[247] The commenters stated that authorizing statutes and local ordinances in several states only permit repo transactions with a bank or a government securities dealer counterparty.[248] As such, a centrally cleared repo, which is novated to a CCA may not comply with these statutes or ordinances, because the CCA would be

[241] The Commission acknowledges that the affiliated counterparty's transactions may encompass transactions to which the requirement to clear eligible secondary market transactions already applies, either because the affiliated counterparty is transacting with another direct participant of a U.S. Treasury securities CCA or because the affiliated counterparty is itself a direct participant of a U.S. Treasury securities CCA. The condition for the affiliate to clear its repo or reverse repo transactions would also apply, however, even if the affiliate is not a direct participant of a U.S. Treasury securities CCA.

[242] *See, e.g.,* Final Rule, Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750, 21761–62 (Apr. 11, 2013).

[243] Moreover, the condition is consistent with the commenters' views noting that in the event that the external transaction is centrally cleared, the benefits of central clearing would be realized. *See* AIMA Letter II, *supra* note 115, at 3.

[244] *See* 17 CFR 50.52(a)(4)(i)(E).

[245] Rule 17ad–22(a) currently contains a definition of a ''participant family'' for purposes of Rule 17ad–22(b)(3), (d)(14), (e)(4), and (e)(7). 17 CFR 240.17ad–22(a)(12). This term is defined to mean that if a participant directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, another participant then the affiliated participants shall be collectively deemed to be a single participant family for purposes of the specified portions of Rule 17ad–22. The Commission believes that a more specific and granular definition of an affiliated counterparty would be helpful for the purposes of the inter-affiliate exclusion because it would address any potential uncertainty about whether an entity controls, is controlled by, or is under common control with, another entity.

[246] *See* notes 680 and 681 *infra* and accompanying text regarding these models.

[247] SIFMA AMG Letter, *supra* note 35, at 14; Federated Letter, *supra* note 81, at 7; IDTA Letter, *supra* note 66, at 10.

[248] *Id.*

the counterparty. One commenter also highlighted specific collateralization requirements (*e.g.,* 102%) by several states to their repo counterparties and raised concerns that varying levels of margining in central clearing of such trades could create a conflict with state laws.[249] The commenters argued that amending state and local governments' authorizing statutes through the legislative actions of an applicable body would take a substantial amount of time and would disrupt investments of public funds in the Treasury repo market with a negative effect on market liquidity.[250] Considering these challenges, the commentors suggested exempting state and local governments from the scope of the definition of an eligible secondary market transaction.

The Commission agrees with the commenters that it would be appropriate to adopt an exclusion for any repurchase or reverse repurchase transaction collateralized by U.S. Treasury securities between a direct participant and a state or local government, in light of both the potential conflicts with state and local government authorities related to their investments and because of the nature and size of U.S. Treasury market activity by such entities.

According to the United States Census Bureau's 2017 Census of Governments data, there were over 90,000 local governments in the United States, including county, city, municipality, township, and special purpose governments as well as nearly 13,000 independent school district governments.[251] Many of these local governments operate only small budgets and access the Treasury repo market infrequently and on a small scale for secured investment of their surplus cash balances. While comprehensive data about investment activity of state and local governments are lacking, the costs of building legal and operational infrastructure to access central clearing by most of these governments may prevent them from accessing the Treasury repo market.

The Commission does not believe that such an exclusion should apply to any pension or retirement plan established or maintained by a state, any of its political subdivisions, or any agency or instrumentality of a state or any of its political subdivisions, for the benefit of its employees (or any beneficiaries of its employees). Such state pension and retirement plans generally do not face the same statutory restrictions as state and local governments regarding their investments,[252] and indeed, several such plans are currently Sponsored Members of FICC.[253]

Moreover, state pension and retirement plans manage a substantial amount of assets and are important participants in the Treasury repo market. In contrast to surplus cash balances of state and local governments that are expected to be managed with the principal preservation objective, public pension and retirement plans typically have more sizable assets under management and pursue a long-term return objective employing a variety of return-enhancing strategies, including the use of leverage.[254] As of March 31, 2023, total funded assets under management of these plans were approximately $5.3 trillion.[255] A survey conducted by the National Association of State Retirement Administrators found that the average public pension fund allocates around 2.5% of its assets to cash investments, which would include investments in the Treasury repo market.[256] Given the total asset size of the state pension and retirement plans and the variety of investment strategies that they can pursue as well as their ability to participate in central clearing under their governing statutes, excluding these plans from the scope of the definition of an eligible secondary market transaction would be inconsistent with the intent to reduce risk and enhance efficiency of the U.S. Treasury market.

The Commission is therefore excluding from the definition of an eligible secondary market transaction any repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities in which one counterparty is a state or local government. In addition, the Commission would add a definition of state and local government to Rule 17ad–22(a) to mean a state or any political subdivision thereof, or an agency or instrumentality of a State or any political subdivision thereof, but not to include any pension or retirement plan established or maintained by a state, any of its political subdivisions, or any agency or instrumentality of a state or any of its political subdivisions, for the benefit of its employees (or any beneficiaries of its employees).[257]

viii. Other Repo Comments

One commenter suggested that the Commission should provide further specificity around the definition of a repurchase or reverse repurchase agreement, suggesting that it may be advisable for the Commission to adopt the definition used by the current U.S. Treasury securities CCA.[258] The

[249] IDTA Letter, *supra* note 66, at 10.

[250] SIFMA AMG Letter, *supra* note 35, at 14; Federated Letter, *supra* note 81, at 7; IDTA Letter, *supra* note 66, at 10; *see also* Letter from James Tabacchi, Chairman, Independent Dealer and Trader Association and attached whitepaper at 5 (Sept. 1, 2023) (discussing the fact that most states and municipalities use Master Repo Agreements based on local law and would by statute be unable to sign a New York law-based agreement to clear through a U.S. Treasury securities CCA).

[251] United States Census Bureau, ''2017 Census of Governments—Organization,'' Table 2: Local Governments by Type and States and Table 9: Public School System by Types of Organization and State, available at *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

[252] *See, e.g.,* California Government Code section 20190 (providing that Board of Advisors of Public Employee Retirement System may, in its discretion, invest the assets of the fund through the purchase, holding, or sale thereof of any investment, financial instrument, or financial transaction when the investment, financial instrument, or financial transaction is prudent in the Board's informed opinion); N.Y. Retire. & Soc. Sec. Law 177 (identifying eligible investments of NY state public pension funds, without limiting the counterparties to a repo); Wis. Stat. 325.17 (identifying eligible investments for Wisconsin state public pension funds to various instruments, without limiting the counterparties to a repo).

[253] DTCC, FICC–GSD Member Directories, Sponsored Member Listings, *available at https://www.dtcc.com/client-center/ficc-gov-directories* (showing five state and local pension plans as Sponsored Members).

[254] *See, e.g.,* California Public Employees' Retirement System Total Fund Investment Policy, available at *https://www.calpers.ca.gov/docs/total-fund-investment-policy.pdf;* State of Wisconsin Investment Board, Investment Strategy, *available at https://www.swib.state.wi.us/investmentstrategy;* Teachers Retirement System of Texas, Investment Strategy, *available at https://www.trs.texas.gov/Pages/investment_strategy.aspx.*

[255] Federal Reserve, Financial Accounts of the United States, L.120 State and Local Government Employee Retirement Funds (total funded assets are considered), *available at https://www.federalreserve.gov/releases/z1/20230608/html/l120.htm.* This data set consists of retirement systems that are administered by a recognized unit of a state or local government as defined by the Bureau of the Census and whose members are public employees compensated with public funds. It includes the defined benefit (DB) and defined contribution (DC) retirement funds of both state governments and local government entities such as counties, municipalities, townships, school districts, and special districts.

[256] National Association of State Retirement Administrators, Investments, *available at https://www.nasra.org/investment.*

[257] ''State'' is defined in Exchange Act section 3(a)(16) as any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

[258] DTCC/FICC Letter, *supra* note 33, at 11–12 (citing the FICC definition of a Repo Transaction, which covers ''(1) an agreement of a party to transfer Eligible Securities to another party in exchange for the receipt of cash, and the simultaneous agreement of the former party to later take back the same Eligible Securities (or any subsequently substituted Eligible Securities) from the latter party in exchange for the payment of cash, or (2) an agreement of a party to take in Eligible Securities from another party in exchange for the

Continued

commenter suggested that this definition is indifferent to the method of documentation, making it clear that inclusion in the definition does not depend on the particular documentation the parties elect to use, such as a Master Securities Lending Agreement or Master Securities Loan Agreement.[259] The Commission does not believe that further revision of the definition is necessary.

The definition of an eligible secondary market transaction, both as proposed and as adopted, applies to all types of transactions that are of a type currently accepted for clearing at a U.S. Treasury securities CCA. It does not impose a requirement on a U.S. Treasury securities CCA to offer additional products for clearing. One commenter specifically agreed that the proposal should apply to the types of transactions that are eligible for clearing at a U.S. Treasury securities CCA, as those eligibility criteria evolve over time. The commenter stated that such an approach would ensure that the requirement would not inadvertently give rise to risk or undue costs by forcing into central clearing transaction types that have not gone through a methodical risk analysis or for which the costs may outweigh the benefits, while at the same time, it would allow the requirement to evolve as U.S. Treasury securities CCAs, their direct participants, and regulators identify transaction types that would benefit from central clearing.[260] The Commission agrees that the definition being adopted will allow for this type of approach to the clearing requirement.

Several commenters discussed whether securities lending should be included within the scope of this definition.[261] Securities lending transactions do not fall within the scope of the definition of an eligible secondary market transaction and are not currently available for central clearing.

One commenter requested clarification that the definition of an eligible secondary market transaction does not apply to final settlement under physical-delivery futures contracts on U.S. Treasury bonds or notes (''Treasury futures''). The commenter noted that such Treasury futures are already subject to a central clearing requirement and described how the physical delivery process works, that is, if a Treasury future goes to delivery, then the commenter, which centrally clears Treasury futures, would inform long clearing members of the U.S. Treasury securities that will be delivered by the short position holders to whom they have been matched and the invoice amounts that the short clearing members must receive in payment.[262] The Commission agrees with the commenter that the physical settlement of Treasury futures does not fall within the definition of an eligible secondary market transaction because it does not fit within the specific categories set forth in the rule. In addition, the Treasury futures are already subject to central clearing, thereby ensuring that the benefits of central clearing are already present in this aspect of the market.

Another commenter did not support a requirement to clear repos, but stated that if such a requirement were adopted, it should be limited to repos by interdealer brokers (''IDBs'') and broker-dealers because (1) the counterparties to such transactions are the most active participants in the Treasury repo markets, thereby allowing the Commission to meaningfully increase central clearing without applying a more categorical requirement, and (2) such transactions are more interconnected with the rest of the market and have a higher possibility to transfer risk to outside parties (including potentially a U.S. Treasury securities CCA).[263] The Commission disagrees that the definition of an eligible secondary market transaction should be limited in this manner. As discussed in part II.A.2.a supra, there are substantive benefits that will arise from the broad scope of the repo market, including with respect to balance sheet netting and greater capacity of dealers to intermediate repos. Further, the Commission disagrees that these transactions are ''more interconnected with the rest of the market,'' because it generally is not possible to quantify interconnectedness in this manner. Even if a repo is between a dealer and its customer neither of which is an IDB or a broker-dealer, the failure of that transaction could have an impact on its counterparties and transmit that risk to the broader market.

In addition, several commenters requested exemptions for transactions entered into outside of the operating hours of a U.S. Treasury securities CCA that would settle on or before the next day on which the CCA is open for business. For example, one commenter stated that firms routinely enter into U.S. Treasury securities transactions after the close of business at FICC, for legitimate business or operational reasons, including for treasury management purposes, and that firms will need the ability to enter into transactions at times that a CCA is not open to accept transactions for novation. The commenter compared the situation to the derivatives context in which a swap subject to mandatory clearing is executed after 4 p.m. or not on a business day, it must then be submitted by the next business day when a derivatives clearing organization is open.[264] Another commenter stated that market participants may enter into a transaction after the close of a CCA's operating/business hours, making it unable to accept the transaction for clearing and novation. The commenter stated that the Commission should therefore exempt these transactions from a final rule, unless and until the existing U.S. Treasury securities CCA can change its operating hours to account for such transactions or another CCA becomes available with 24/7 clearing capabilities.[265]

Such an exemption is not necessary. The existing U.S. Treasury securities CCA accepts all bilateral DVP trades for novation from 7 a.m. until 8 p.m. eastern time.[266] This window is available for submission and novation of bilateral repo transactions, which would be novated in real-time upon submission. The Commission understands that market participants may enter Treasury repo transactions outside the normal U.S. business hours when trades are accepted by U.S. Treasury CCA for novation. A review of repo trading data shows that the largest

payment of cash, and the simultaneous agreement of the former party to later transfer back the same Eligible Securities (or any subsequently substituted Eligible Securities) to the latter party in exchange for the receipt of cash'').

[259] DTCC/FICC Letter, *supra* note 33, at 11–12.

[260] DTCC/FICC Letter, *supra* note 33, at 12–13.

[261] *See* BNY Mellon Letter, *supra* note 33, at 2 (suggesting additional analysis before requiring the central clearing of securities lending transactions, as well as consideration of a non-cash model for central clearing such transactions); Federated Hermes Letter, *supra* note 85, at 7–8 (stating that securities lending transactions should not be included in a clearing mandate because they are subject to different market infrastructure than repurchase agreements, which has not been adapted to facilitate cleared securities lending transactions); Letter from Fran Garritt, Director, Securities Lending & Market Risk and Mark Whipple, Chairman, Committee on Securities Lending Risk Management Association (Dec. 23, 2022) (arguing generally that the scope of an eligible secondary market transaction not be expanded to include securities lending transactions because of the negative impact on beneficial owners, the increased costs, and lack of infrastructure); SIFMA/IIB Letter, *supra* note 37, at 22; ICI Letter, *supra* note 85, at 12 n.35.

[262] CME Letter, *supra* note 81, at 7–8.

[263] SIFMA/IIB Letter, *supra* note 37, at 19–20.

[264] SIFMA/IIB Letter, *supra* note 37, at 21 (citing CFTC Rules 50.1 and 50.2).

[265] AIMA Letter II, *supra* note 115, at 2–3.

[266] *See* FICC Rules, Schedule of Timeframes, *supra* note 19.

share of repo trading activity is conducted during the first 1.5 hours of a trading day from 7 a.m. to 8:30 a.m. eastern time.[267] This early morning activity may include repo trades that were arranged prior to the U.S. Treasury market opening at 7:00 a.m. The Commission does not anticipate the final rule affecting this established market practice. With respect to triparty repo, any U.S. Treasury securities CCA must interact with the timelines for triparty repo more generally, which rely upon the Fedwire Funds Service to transfer funds, and Fedwire has a deadline for initiating transfers for the benefit of a third party is 6 p.m. eastern time.[268] The existing U.S. Treasury securities CCA accepts triparty submissions from 7 a.m. until 5 p.m. and novates the activity upon settlement of the start leg of the triparty repos, provided that settlement occurs by 5:30 p.m.[269] The existing timeline accommodates completion of the activity at the CCA before the Fedwire deadline.

Finally, one commenter requested clarification that the definition of an eligible secondary market transactions would not include instances in which market participants post U.S. Treasury securities as collateral to secure transactions in a wide range of asset classes, including cleared and uncleared swaps and listed futures.[270] This type of transaction does not meet the definition of a repurchase or reverse repurchase agreement adopted in Rule 17ad–22(a); therefore, it would not be within the scope of an eligible secondary market transaction.

ix. Final Rule

For the reasons set forth in part II.A.2.a, the Commission is adopting the definition of an eligible secondary market transaction in Rule 17ad–22(a), specifically as it relates to repurchase and reverse repurchase agreements, as proposed, except that it is adopting exclusions from the scope of that definition for repos by other clearing organizations, repos by state and local governments, and inter-affiliate repos.

b. Purchases and Sales of U.S. Treasury Securities

With respect to cash transactions (*i.e.,* purchases and sales of U.S. Treasury securities), the proposal defined an eligible secondary market transaction as including:

- Any purchases and sales entered into by a direct participant and any counterparty if the direct participant (A) brings together multiple buyers and sellers using a trading facility (such as a limit order book) and (B) is a counterparty to both the buyer and seller in two separate transactions (''IDB transactions''); and
- Any purchases and sales of U.S. Treasury securities between a direct participant and a counterparty that is either (i) a registered broker-dealer, government securities dealer, or government securities broker (''broker-dealer transactions''), (ii) a hedge fund, that is any private fund (other than a securitized asset fund): (a) with respect to which one or more investment advisers (or related persons of investment advisers) may be paid a performance fee or allocation calculated by taking into account unrealized gains (other than a fee or allocation the calculation of which may take into account unrealized gains solely for the purpose of reducing such fee or allocation to reflect net unrealized losses); (b) that may borrow an amount in excess of one-half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or (c) that may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration) (''hedge fund transactions''), or (iii) an account at a registered broker-dealer, government securities dealer, or government securities broker where such account may borrow an amount in excess of one-half of the value of the account or may have gross notional exposure of the transactions in the account that is more than twice the value of the account (''leveraged account transactions'').

When describing the categories included within the definition, the Commission stated its belief that including this set of transactions in the eligible secondary market definition and therefore subjecting these transactions to the proposal represents an incremental first step to address potential risks arising to a U.S. Treasury securities CCA.[271] The Commission referenced recent data indicating that an estimated 68 percent of the overall dollar value of cash market transactions in U.S. Treasury securities are not centrally cleared, and an estimated 19 percent of the overall dollar value of such transactions are subject to so-called hybrid clearing (as described above).[272]

Regarding IDB transactions, in the Proposing Release, the Commission stated its belief that including these transactions in the definition of an eligible secondary market transaction would specifically address the potential for contagion risk associated with hybrid clearing that a number of commentators have highlighted. Hybrid clearing refers to transactions that are executed on an IDB platform in which one counterparty is a member of a CCA and submits its transaction with the IDB for central clearing, while the other counterparty is not a member of a CCA and bilaterally clears its transaction with the IDB.[273] As the Commission explained in the Proposing Release, the configuration of counterparty risk presented by hybrid clearing allows the U.S. Treasury securities CCA to manage the risks arising from the IDB–CCA direct participant transaction, but the U.S. Treasury securities CCA cannot manage the risks arising from the IDB's offsetting transaction with its non-member counterparty and the potential counterparty credit risk and settlement risk posed to the IDB from that trade.[274] Thus, under the current hybrid clearing model, the U.S. Treasury securities CCA is indirectly exposed to the IDB's non-centrally cleared transaction, but it lacks the ability to risk manage its indirect exposure to this non-centrally cleared leg of the transaction. Specifically, it does not know who the ultimate counterparty of the transaction is and cannot collect margin on that transaction. This, in turn, results in margin collection at the CCP which is based upon only one transaction and

[267] Clark *et al.,* Intraday Timing of General Collateral Repo Markets, Federal Reserve Bank of New York Liberty Street Economics (July 14, 2021), *available at https://libertystreeteconomics.newyorkfed.org/2021/07/intraday-timing-of-general-collateral-repo-markets.*

[268] *See* Fedwire Funds Services, *available at https://www.federalreserve.gov/paymentsystems/fedfunds_about.htm#:~:text=The%20Fedwire%20Funds%20Service%20business,p.m.%20on%20the%20preceding%20Sunday.*

[269] *See* FICC Rules, Schedule of Sponsored GC Trade Timeframes, *supra* note 19.

[270] *See* Morgan Stanley Letter, *supra* note 85, at 2–3.

[271] Proposing Release, *supra* note 14, 87 FR at 64622.

[272] *Id. (*citing 2021 IAWG Report, *supra* note 4, at 30; TMPG White Paper, *supra* note 13, at 12).

[273] Proposing Release, *supra* note 14, 87 FR at 64622 (citing TMPG, *supra* note 13, at 12). These estimates use FR2004 data, which are reports provided to the Federal Reserve Bank of New York regarding primary dealer market activity in U.S. Government securities, covering the first half of 2017 and are based on various assumptions specified in the TMPG White Paper. *See also* FR2004, Government Securities Dealer Reports, *available at https://www.federalreserve.gov/apps/reportforms/reportdetail.aspx?sOoYJ+5BzDZq2f74T6b1cw.*

[274] *See, e.g.,* Proposing Release, *supra* note 14, 87 FR at 64622 (citing TMPG White Paper, *supra* note 13, at 22 (noting that in a hybrid clearing arrangement, an IDB's rights and obligations to the CCP are not offset and the IDB is not in a net zero settlement position with respect to the CCP at settlement date)).

has been calculated to cover this seemingly directional position, as well as an inability to net these offsetting transactions and provide the benefits of central clearing. In particular, if the IDB's non-CCP member counterparty fails to settle a transaction that is subject to hybrid clearing, such IDB may not be able to settle the corresponding transaction that has been cleared with the U.S. Treasury securities CCA due to a lack of financial resources at the IDB, which could lead the IDB to default.[275] As part of its existing default management procedures, the U.S. Treasury securities CCA could seek to mutualize its losses from the IDB's default, which could in turn transmit stress to the market as a whole.

In the Proposing Release, the Commission reiterated its belief that membership requirements help to guard against defaults of any CCP member, as well as to protect the CCP and the financial system as a whole from the risk that one member's default could cause others to default, potentially including the CCP itself. Further, contagion stemming from a CCP member default could undermine confidence in the financial system as a whole, even if the health of the CCP is not implicated, causing others to back away from participating in the market. This risk of decreased participation could be particularly problematic if the defaulting participant was an IDB, whose withdrawal from the market could impact other market participants' ability to access the market for on-the-run U.S. Treasury securities, approximately 49.7% of which trade on IDBs.[276] Including such transactions as eligible secondary market transactions would therefore help protect against this risk by requiring that a U.S. Treasury securities CCA ensure that direct participants who are IDBs centrally clear both sides of their transactions, thereby eliminating the various aspects of potential contagion risk posed by so-called hybrid clearing.

Regarding broker-dealer transactions, in the Proposing Release, the Commission explained that the enumerated types of market participants (*i.e.,* a registered broker-dealer, government securities broker, or government securities dealer) are market intermediaries that are engaged in the business of effecting transactions in securities for the account of others (in the case of brokers) or for their own accounts (in the case of dealers).[277] The Commission relied upon data indicating that a majority of trades in the secondary cash Treasury market now clear bilaterally and estimated that the trading volume of non-FICC members exceeds that of FICC members.[278] The Commission stated its belief that their collective trading activity likely is responsible for a not insignificant portion of the volume of transactions involving Treasury securities and could present contagion risk to a U.S. Treasury securities CCA.

Regarding hedge fund transactions, the Commission in the Proposing Release described its intent in including transactions with hedge funds in the definition of an eligible market transaction as two-fold. First, hedge funds generally can engage in trading strategies that may pose heightened risks of potential financial distress to their counterparties, including those who are direct participants of a U.S. Treasury securities CCA. There are several characteristics of hedge fund strategies that could raise such issues, including using financial institutions that may have systemic importance to obtain leverage, employing investment strategies that may use leverage, derivatives, complex structured products, and short selling in an effort to generate returns, and relying upon strategies involving high volumes of trading and concentrated investments.[279] The Commission stated its belief that significant hedge fund failures, resulting from their investment positions or use of leverage or both, could result in material losses at the financial institutions that lend to them if collateral securing this lending is inadequate, and that these losses could have systemic implications if they require these financial institutions to scale back their lending efforts or other financing activities generally. For these reasons, the Commission stated its belief that that if any of a hedge fund's activities, even those that are not related to the U.S. Treasury market, cause financial stress to a counterparty that is a direct participant of a U.S. Treasury securities CCA, the inclusion of a hedge fund's U.S. Treasury securities cash transactions with a direct participant in the definition of an eligible secondary market transaction should help ensure that such financial stress would not transmit to the U.S. Treasury securities CCA and through to the U.S. Treasury market.

Second, the Commission relied upon the role of hedge funds in the overall U.S. Treasury market to support its proposal to include hedge fund transactions in the definition of an eligible secondary market transaction.[280] The Commission stated its belief that hedge funds transacting in the U.S. Treasury market present a potential contagion risk to a U.S. Treasury securities CCA because, similar to the risks posed to a U.S. Treasury securities CCA by non-centrally cleared trades entered into by an IDB, non-centrally cleared transactions entered into between hedge funds and direct participants of the CCA could cause risks to the CCA in the event that the hedge fund is not able to meet its obligations to the direct participant, which could, in turn, create stress to the direct participant and through to the CCA. Therefore, the Commission stated that including the direct participant's purchase and sale transactions with hedge funds within the definition of an eligible secondary market transaction should reduce the potential for financial distress arising from the transactions that could affect the direct participant and the U.S. Treasury securities CCA.

The proposed definition of a hedge fund was described as consistent with the Commission's definition of a hedge fund in Form PF.[281] The Commission

[275] *See* 2021 IAWG Report, *supra* note 4, at 31; Depository Trust and Clearing Corporation, *More Clearing, Less Risk: Increasing Centrally Cleared Activity in the U.S. Treasury Cash Market,* at 5 (May 2021), *available at https://www.dtcc.com/-/media/Files/PDFs/DTCC-US-Treasury-Whitepaper.pdf* (''DTCC May 2021 White Paper'').

[276] TMPG White Paper, *supra* note 13, at 32; *see* part IV.B.3.a.i *infra.*

[277] Proposing Release, *supra* note 14, 87 FR at 64623.

[278] *Id.* (citing TMPG White Paper, *supra* note 13, at 21; 2021 IAWG Report, *supra* note 4, at 30).

[279] Proposing Release, Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, Release No. IA–3145 (Jan. 26, 2011), 76 FR 8068, 8073 (Feb. 12, 2011) (''Form PF Proposing Release''). The Commission adopted the hedge fund definition with some amendments thereafter. Final Rule, Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, Release No. IA–3308 (Oct. 31, 2011), 76 FR 71127 (Nov. 16, 2011).

[280] Proposing Release, *supra* note 14, 87 FR at 64624 (citing Private Funds Statistics for Q4 2021, Table 46 (July 22, 2022), *available at https://www.sec.gov/divisions/investment/private-funds-statistics/private-funds-statistics-2021-q4.pdf;* Ayelen Banegas, *Sizing Hedge Funds' Treasury Market Activities and Holdings* (Oct. 6, 2021), *available at https://www.federalreserve.gov/econres/notes/feds-notes/sizing-hedge-funds-treasury-market-activities-and-holdings-20211006.htm; see also* Daniel Barth & R. Jay Kahn, *Hedge Funds and the Treasury Cash-Futures Disconnect* (Apr. 1, 2021), *available at https://www.financialresearch.gov/working-papers/2021/04/01/hedge-funds-and-the-treasury-cash-futures-disconnect/;* Hedge Fund Treasury Trading and Funding Fragility: Evidence from the COVID–19 Crisis, *available at https://www.federalreserve.gov/econres/feds/files/2021038pap.pdf;* 2021 IAWG Report, *supra* note 4, at 34; SEC Staff Report on U.S. Credit Markets Interconnectedness and the Effects of the COVID–19 Economic Shock (Oct. 2020), *available at https://www.sec.gov/files/US-Credit-Markets_COVID-19_Report.pdf*).

[281] 17 CFR 279.9 (Form PF Glossary of Terms).

stated its belief that defining a hedge fund in a manner consistent with Form PF is reasonable, because such definition should encompass those funds that use strategies that the Commission has determined merit additional reporting to allow a better picture of the potential systemic risks posed by such activities.[282] Including transactions with such funds within the definition of an eligible secondary market transaction should help to limit the potential contagion risk that could arise from any financial distress experienced at such a fund that could, in turn, be transmitted to a direct participant of a U.S. Treasury securities CCA (and to the CCA) via any non-centrally cleared transactions. The Commission further states its belief that using a definition consistent with that of Form PF to identify transactions with a U.S. Treasury securities CCA's direct participant as part of the definition of an eligible secondary market transaction should capture transactions with entities whose default would be most likely to cause potential contagion risk to the Treasury securities CCA. For example, hedge funds' use of leverage can make them more vulnerable to liquidity shocks, which could, in turn, make them unable to deliver in a transaction with a direct participant of a U.S. Treasury securities CCA.

Regarding leveraged account transactions, in the Proposing Release, the Commission stated its belief that the inclusion of transactions with such accounts, *i.e.,* those that can take on significant amounts of leverage, within the definition of an eligible secondary market transaction should encompass transactions between direct participants of a U.S. Treasury securities CCA and a prime brokerage account, which, based on the Commission's supervisory knowledge, may hold assets of entities, such as, for example, private funds or separately managed accounts, and may use leverage that poses a risk to U.S. Treasury securities CCA and the broader financial system. The Commission further stated that by including the account, and not the entity using the account, this aspect of the proposal is targeted to the activity that could bring the most potential risk to a U.S. Treasury securities CCA and the financial system more generally.

The Commission addresses each of these particular types of transactions in parts II.B.2.b.ii through iv *infra,* after addressing more general comments with respect to cash transactions.

i. Comments Regarding Cash Clearing Generally

Several commenters supported the Commission's proposal overall, including the cash clearing requirement.[283] By contrast, other commenters opposed cash clearing generally. One commenter did not support a clearing requirement or otherwise see the current imperative for incentivizing the central clearing of cash transactions. The commenter stated that any requirement to clear cash transactions will serve to increase costs, generate operational complexities, and reduce liquidity without producing meaningful benefits to address perceived issues with respect to the cash market.[284] The commenter explained that the increased costs would be substantial and would include, among other things, increased margin, default fund contributions, and clearing fees, as well as the costs incurred to put in place the operations, infrastructure, and standard documentation required to support central clearing.[285] The commenter also explained that intra-day margin calls will ''simply create operational burdens and costs'' with no obvious benefit given that many margin calls will be met late in the day only to be returned to the posting party the next day. The commenter stated that to the extent that dealers are required to post collateral to a covered clearing agency without compensation or to incur other costs associated with client clearing, those costs will have to be absorbed either by clients or dealers, which may reduce their capacity and further constrain liquidity.[286] The commenter also stated that additional netting benefits for dealers are unclear as accounting rules already allow dealers to net unsettled cash transactions across all counterparties on their balance sheets.[287] Another commenter also opposed the requirement to clear cash transactions, but supported the exclusion of money market funds from the scope of included cash transactions within the definition of an eligible secondary market transaction.[288]

In response to the commenters opposed to the inclusion of any cash transactions in the definition of an eligible secondary market transaction, the Commission disagrees. As discussed in the Proposing Release, currently, the majority of cash market transactions are not centrally cleared, which is in contrast to the market conditions in the mid-2000s when most cash transactions were centrally cleared. The fact that more than half of market activity occurs outside central clearing could represent a contagion risk to any U.S. Treasury securities CCA serving the market. Therefore, the Commission identified a set of cash transactions to include in the definition of an eligible secondary market transaction that would represent an incremental first step in the cash market, to address risks to the CCA, and identified a specific rationale with respect to each set of categories, as discussed in part II.A.2.b *supra.* Addressing these risks is a meaningful benefit in that it would ensure that a U.S. Treasury securities CCA is well positioned to understand and manage the risks posed by its participants' transactions.

Further, as discussed in more detail in part IV.C, although, as the commenter states, additional clearing likely would result in increased margin contributions and clearing fees, simply to account for the increased clearing volume, as well as the one-time costs regarding the institution of new contractual arrangements to access central clearing,[289] the benefits of central clearing, as discussed in part II.A.1 *supra,* justify these costs.

The commenter's discussion regarding the operational issues of intraday margin calls does not specify the particular operational complexities that would arise, and it does not take into account the risk management

[282] Final Rule, Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, Release No. IA–3308 (Oct. 31, 2011), 76 FR 71127 (Nov. 16, 2011). The reporting requirements for Form PF vary based on the amount of private fund assets under management for an investment adviser registered with the Commission. For example, if an investment adviser's private fund assets under management, including with respect to hedge funds, are less than $150 million on the last day of the most recent fiscal year, then the investment adviser is not required to file Form PF. Separately, additional reporting requirements apply to large hedge fund advisers with at least $1.5 billion in hedge fund assets under management. *See* Form PF, Instructions 1 and 3. However, the Commission believes that including all hedge funds within paragraph (ii)(C) of the definition of an ''eligible secondary market transaction'' in Proposed Rule 17ad-22(a) would be consistent with its overall policy goals for central clearing in the U.S. Treasury market and ensuring that hedge fund transactions with direct participants in a U.S. Treasury securities CCA do not adversely impact the direct participant and, potentially, the CCA.

[283] AFREF Letter, *supra* note 33, at 2; Better Markets Letter, *supra* note 33, at 2, 6–8.

[284] SIFMA AMG Letter, *supra* note 35, at 3.

[285] *Id.* at 3; *see also* MFA Letter II, *supra* note 125, at 5 (regarding increased costs associated with clearing cash transactions).

[286] SIFMA AMG Letter, *supra* note 35, at 7.

[287] SIFMA AMG Letter, *supra* note 35, at 3.

[288] Federated Letter, *supra* note 85, at 2.

[289] The commenter also references increased default fund contributions. However, the only U.S. Treasury securities CCA serving the U.S. Treasury market does not currently maintain a default fund; therefore, the Commission disagrees that some increase in such contributions would result from the proposal.

benefit arising from such calls, that is, ensuring that a covered clearing agency can address the risks presented by significant intraday changes to market volatility or a member's portfolio of net unsettled positions. Without such an ability, a covered clearing agency would face potential exposure in the event of the default of a clearing member; therefore, the additional risk management that a clearing agency can accomplish using intraday margin calls must be considered.

Moreover, the Commission disagrees with the commenter's implication that this proposal needs to address the entirety of the ''perceived issues'' with respect to the cash market. The Commission stated in the Proposing Release that the requirement to clear eligible secondary market transactions will not, by itself, necessarily prevent future market disruptions, but that it could improve the functioning of the U.S. Treasury market.[290] Although it may have other effects beyond the immediate requirement for U.S. Treasury securities CCAs, the requirement being adopted in this release is designed to improve the resilience of such CCAs by expanding their ability to manage the risks arising from direct participants who currently engage in non-centrally cleared transactions away from the CCA [291] and need not solve all the issues that commentators have identified regarding the U.S. Treasury market.

By contrast, several commenters suggested that the scope of eligible secondary market transactions in the cash market be broadened. One commenter stated that the Commission should align the scope of the definition with respect to cash transactions with the proposed scope for repos, subject to certain limited exceptions for investors that trade de minimis volumes. The commenter argued that the Commission's approach with respect to cash transactions will increase costs for a specific subset of market participants (*i.e.,* hedge funds, leveraged accounts, and those using IDBs), thereby putting them at a competitive disadvantage, while failing to deliver the envisaged market-wide benefits associated with central clearing (*i.e.,* it would materially reduce the associated multilateral netting benefits, impair the risk management practices of clearing agencies, and hinder the evolution in trading protocols that can be expected from a market-wide clearing requirement).[292] For similar reasons, another commenter also stated that the benefits of central clearing detailed will only materialize if ''a market-wide mandate is implemented'' and supported defining the scope of eligible secondary market transactions for cash transactions as broadly as that proposed for repos.[293] Another commenter stated that limiting the scope of the cash clearing mandate would result in unwarranted competitive disadvantages and related market distortions for some types of investors, such as hedge funds, or some types of trading platforms, such as anonymous trading facilities.[294] An additional commenter stated that the proposed definition leaves out other important market participants' cash Treasury transactions that also make up a large segment of Treasury market liquidity, and that the Commission should require other market participants' cash Treasury transactions in which a direct participant is involved to be cleared, so that the benefits of central clearing that the Commission cites will accrue throughout the broader cash Treasury market.[295] In addition, another commenter acknowledged the benefits of a comprehensive clearing requirement, but acknowledged the need for a pragmatic approach and supported the Commission's proposed requirements as a reasonable foundation to begin mandatory central clearing in this market.[296]

In response to the comments that the scope of the cash transactions that are included in the definition of an eligible secondary market transaction should be broadened, the scope is not being broadened and, in fact, is being further narrowed, as discussed further in part II.A.2.b.iii regarding hedge fund and leveraged account cash transactions (unless captured by another portion of the rule, *e.g.,* as an IDB transaction). As stated in the Proposing Release and discussed in part II.2.b *supra,* the Commission proposed a deliberate and targeted approach to clearing in the cash market in the Proposing Release, limiting the clearing requirement to specific types of entities transacting with members of a U.S. Treasury securities CCA that pose heightened risks when clearing cash market treasury transactions bilaterally. Specifically, the Commission proposed eligible secondary market transaction to be defined as, with reference to cash market transactions, a purchase or sale between a direct participant of a covered clearing agency and (A) any participant if the direct participant is an IDB; (B) a registered broker-dealer, government securities broker, or government securities dealer that is not a member of a covered clearing agency; (C) a hedge fund; or (D) a leveraged account. In each case, the Commission explained the reasoning for why such counterparties were to be included in the scope of the proposal.[297]

In response to the comments that the benefits of central clearing would only materialize with a market-wide mandate and that the targeted cash scope would fail to deliver the market-wide benefits associated with central clearing, the Commission disagrees because the increased clearing of cash transactions, targeted to address the differing risk profiles of each market segment, would still bring the benefits of central clearing to some portion of the market, even if not as widely as the scope for repo transactions, while also addressing the risks inherent in these particular market segments. The Commission does not believe that the benefits of central clearing exist only if the entire market is centrally cleared. The increased costs for certain market participants, that is, those whose transactions with direct participants of a U.S. Treasury securities CCA are included in the definition of an eligible secondary market transaction, are justified by the benefit of addressing the risks inherent in those particular transactions, and the Commission addresses each of these categories separately in parts II.A.2.b.ii through iii *infra.* Moreover, other types of cash transactions do not present the same types of risk to the CCA in terms of potential contagion risk.

ii. IDB Transactions

The proposed definition of an eligible secondary market transaction would include, among other things, any purchase or sale between a direct participant of a U.S. Treasury securities CCA and any counterparty, if the direct participant of the covered clearing agency (A) brings together multiple buyers and sellers using a trading facility (such as a limit order book) and

[290] Proposing Release, *supra* note 14, 87 FR at 64614.

[291] *Id.*

[292] Citadel Letter, *supra* note 81, at 5.

[293] ARB et al. Letter, *supra* note 81, at 4 (stating that the netting benefits associated with transitioning only proprietary trading firm (''PTF'') transactions into central clearing are much smaller, given the substantial netting that already occurs directly with IDBs; the trading-related benefits of central clearing will only accrue to market participants if their transactions are covered by the proposed mandate; and that clearing agency resiliency will be negatively impacted if only one segment of the market is cleared).

[294] MFA Letter, *supra* note 81, at 2.

[295] AIMA Letter, *supra* note 81, at 7.

[296] GTS Letter, *supra* note 81, at 3–5.

[297] Proposing Release, *supra* note 14, 87 FR at 64622–25.

(B) is a counterparty to both the buyer and seller in two separate transactions.

One commenter anticipated that certain other commenters would advocate for a definition of eligible secondary market transaction that would include IDB transactions and would exclude dealer-to-client over-the-counter trades, which is not what the Commission proposed.[298] The commenter cautioned against such an ''uneven'' approach because it would incentivize market participants to trade bilaterally instead of using an IDB to avoid central clearing.[299]

Thus, the commenter supports the scope of the definition of an eligible secondary market transaction as proposed, that is, including both IDB transactions and the other categories of transactions set forth in the definition.[300] The Commission agrees with the commenter that the definition, as proposed, would not incentivize market participants to trade away from IDBs to avoid central clearing because the definition of what constitutes an eligible secondary market transaction is broader than simply IDB transactions, such that avoiding IDBs alone would not be sufficient to avoid the requirement to submit eligible secondary market transactions for clearing.

In addition, commenters expressed concerns that including IDB transactions in the definition of an eligible secondary market transaction could draw trading activity away from IDBs, thereby reducing market liquidity and market stability.[301] The commenters also noted that IDBs are anonymous platforms that currently support all-to-all trading, and that the Commission has recognized that all-to-all trading would improve market structure and stability.[302] The commenters argued that including IDB transactions in the definition of an eligible secondary market transaction could, therefore, hinder all-to-all trading.[303] One of these commenters further argued that by discouraging market participants from trading on IDBs, the definition of an eligible secondary market transaction could limit the choices of market participants with respect to trading venues.[304] The inclusion of IDB transactions, along with other types of transactions, would not necessarily lead to decreased liquidity and market stability or negatively impact all-to-all trading in the U.S. Treasury market. The market function provided by IDBs, that is, bringing together buyers and sellers anonymously, will continue to be desirable, even if such transactions are eligible secondary market transactions, meaning that market participants likely still would use IDBs to transact in the U.S. Treasury market. Because market participants likely would continue to transact on IDBs, the commenters' concerns regarding decreased liquidity and market stability would not materialize.

Moreover, even if some of these concerns materialize from the inclusion of IDB transactions, including them is justified as it would allow the U.S. Treasury securities CCA to better risk manage ''hybrid'' transactions that are currently not being submitted for central clearing.[305] Specifically, including IDB transactions in the definition of an eligible secondary market transaction would address the potential for contagion risk associated with hybrid clearing. As explained in the Proposing Release, the configuration of counterparty risk presented by hybrid clearing allows the U.S. Treasury securities CCA to manage the risks arising from the IDB–CCA direct participant transaction, on the one hand, but the U.S. Treasury securities CCA cannot manage the risks arising from the IDB's offsetting transaction with its non-member counterparty and the potential counterparty credit risk and settlement risk arising to the IDB from that trade.[306] Thus, under the current hybrid clearing model, the U.S. Treasury securities CCA is indirectly exposed to the IDB's non-centrally cleared transaction, but it lacks the ability to risk manage its indirect exposure to this non-centrally cleared leg of the transaction. Specifically, it does not know who the ultimate counterparty of the transaction is and cannot collect margin on that transaction. This, in turn, results in margin collection at the CCP which is based upon only one transaction and has been calculated to cover this seemingly directional position, as well as an inability to net these offsetting transactions and provide the benefits of central clearing. In particular, if the IDB's non-CCP member counterparty fails to settle a transaction that is subject to hybrid clearing, such IDB may not be able to settle the corresponding transaction that has been cleared with the U.S. Treasury securities CCA due to a lack of financial resources at the IDB, which could lead the IDB to default.[307] As part of its existing default management procedures, the U.S. Treasury securities CCA could seek to mutualize its losses from the IDB's default, which could in turn transmit stress to the market as a whole.

The Commission has previously stated that membership requirements help to guard against defaults of any CCP member, as well as to protect the CCP and the financial system as a whole from the risk that one member's default could cause others to default, potentially including the CCP itself.[308] Further, contagion stemming from a CCP member default could undermine confidence in the financial system as a whole, even if the health of the CCP is not implicated. This is because the default could cause others to back away from participating in the market. This risk of decreased participation could be particularly problematic if the defaulting participant was an IDB, whose withdrawal from the market could impact other market participants' ability to access the market for on-the-run U.S. Treasury securities, approximately 49.7% of which trade on IDBs.[309] Including such transactions within the definition of an eligible secondary market transaction would therefore help protect against this risk by requiring that a U.S. Treasury securities CCA ensure that direct participants who are IDBs centrally clear both sides of their transactions, thereby eliminating the various aspects of potential contagion risk posed by so-called hybrid clearing.

One commenter urged the Commission to consider adopting the proposal in increments based on further

[298] *See* CME Letter, *supra* note 81, at 5.

[299] *See id.*

[300] *See* CME Letter, *supra* note 81, at 5–6 (stating the commenter's belief that the proposal appears to have been carefully drafted to avoid encouraging market participants to trade away from IDBs).

[301] *See* ICI Letter, *supra* note 85, at 3, 11; MFA Letter, *supra* note 81, at 20; Tradeweb Letter, *supra* note 81, at 3–4.

[302] *See* ICI Letter, *supra* note 85, at 3, 11; MFA Letter, *supra* note 81, at 20–21; Tradeweb Letter, *supra* note 81, at 3–4.

[303] *See id.*

[304] *See* MFA Letter, *supra* note 81, at 20.

[305] The term ''IDB'' typically refers only to IDBs that are also ATSs. *See* note 643 *infra.*

[306] *See, e.g.,* Proposing Release, *supra* note 14, 87 FR at 64622 (citing TMPG White Paper, *supra* note 13, at 22 (noting that in a hybrid clearing arrangement, an IDB's rights and obligations to the CCP are not offset and the IDB is not in a net zero settlement position with respect to the CCP at settlement date)). Thus, the IDB is not able to net all of its positions for clearing at a U.S. Treasury securities CCA, and the IDB's positions appear to the CCA to be directional, which impacts the amount of margin that the CCA collects for the transaction.

[307] *See* 2021 IAWG Report, *supra* note 4, at 31; Depository Trust and Clearing Corporation, *More Clearing, Less Risk: Increasing Centrally Cleared Activity in the U.S. Treasury Cash Market,* at 5 (May 2021), *available at https://www.dtcc.com/-/media/Files/PDFs/DTCC-US-Treasury-Whitepaper.pdf* (''DTCC May 2021 White Paper'').

[308] *See* Proposing Release, *supra* note 14, 87 FR at 64623.

[309] TMPG White Paper, *supra* note 13, at 32; section IV.B.4 (Table 1) *infra.*

study, with IDB transactions as the first market segment to be included in the definition due to the distinct settlement risks associated with the IDBs' hybrid clearing model.[310] In contrast, another commenter supported adopting the proposal as drafted, arguing that to include only IDB transactions would be an uneven approach that would incentivize market participants to execute their transactions bilaterally, damaging liquidity on IDB platforms.[311] Commenters identified the inclusion of IDB transactions as a targeted option to include in the definition of an eligible secondary market transaction to address contagion risk.[312] One commenter stated that, if the Commission's concern is the hybrid clearing at IDBs, it would be more effective to focus on the regulation of the platforms.[313]

The Commission agrees with all of the commenters regarding the appropriateness of Commission action to mitigate the risks associated with IDBs' hybrid clearing model. The Commission included IDB transactions in the definition of an eligible secondary market transaction in order to eliminate the potential contagion risk posed by hybrid clearing. However, the Commission disagrees with the commenters arguing in favor of limiting the scope of the definition to include IDB transactions only or taking an entirely different approach that would simply regulate IDB platforms. As discussed above, to single out IDBs (whether in the definition of eligible secondary market transaction or through another regulatory approach), without including the other cash transactions included in the definition of an eligible secondary market transaction, could incentivize market participants to trade away from IDBs, creating the potential for negative effects on market liquidity, market stability, all-to-all trading, and participant choice of trading venue. Accordingly, the Commission is adopting the definition as proposed.

Two commenters argued that transactions by registered funds that take place on an IDB should be excluded from the definition of an eligible secondary market transaction. Specifically, one commenter urged the Commission to expressly exclude registered funds (*e.g.,* mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts) from the effects of including IDB transactions in the Membership Proposal.[314] Similarly, another commenter supported an exclusion for registered money market funds.[315]

The Commission does not agree with these commenters and is not including any exclusion for registered funds transacting on an IDB. If a fund chooses to transact on an IDB, the same potential hybrid contagion risk to the U.S. Treasury securities CCA arises as when other market participants transact on an IDB. Therefore, the Commission does not believe that such an exclusion is appropriate.

iii. Other Cash Transactions

The Commission also proposed to include certain additional categories of cash transactions of U.S. Treasury securities by the direct participants of a U.S. Treasury securities CCA in the definition of an eligible secondary market transaction subject to the Membership Proposal.

First, the Commission proposed that the definition of an eligible secondary market transaction include those cash purchase and sale transactions in which the counterparty of the direct participant is a registered broker-dealer, government securities broker, or government securities dealer. Each of these entities is a type of market intermediary that is engaged in the business of effecting transactions in securities for the account of others (in the case of brokers) or for their own accounts (in the case of dealers).[316]

Commenters did not address this aspect of the definition of an eligible secondary market transaction. For the reasons stated in the Proposing Release and as discussed in part II.A.2.b *supra,* the Commission continues to believe that these portions of the definition are appropriate.[317] The Commission is therefore adopting this aspect of the exclusions as proposed.

Second, the Commission proposed to include within the definition of an eligible secondary market transaction any purchase and sale transaction between a direct participant of a U.S. Treasury securities CCA and a hedge fund, that is any private fund (other than a securitized asset fund): (a) with respect to which one or more investment advisers (or related persons of investment advisers) may be paid a performance fee or allocation calculated by taking into account unrealized gains (other than a fee or allocation the calculation of which may take into account unrealized gains solely for the purpose of reducing such fee or allocation to reflect net unrealized losses); (b) that may borrow an amount in excess of one-half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or (c) that may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration). Third, the Commission proposed to include within the definition of an eligible secondary market transaction any purchase and sale transaction between a direct participant of a U.S. Treasury securities CCA and an account at a registered broker-dealer, government securities dealer, or government securities broker that either may borrow an amount in excess of one-half of the net value of the account or may have gross notional exposure of the transactions in the account that is more than twice the net value of the account. This would apply to accounts that can take on significant leverage, that is, by borrowing an amount that is more than one half of its net value or take on exposures worth more than twice the account's net value (referred to herein as ''leveraged accounts'').

Some commenters supported the proposed inclusion of transactions with hedge funds within the definition of an eligible secondary market transaction.[318] However, other commenters asserted that transactions with a hedge fund or a leveraged account[319] should not be within the definition of an eligible secondary market transaction.

One commenter stated that the inclusion of hedge funds within the counterparties to an eligible secondary market transaction would arbitrarily single out hedge funds' cash Treasury transactions.[320] Another commenter

[310] *See* SIFMA/IIB Letter, *supra* note 37, at 2–3, 16–18 (limiting the proposal to IDB transactions in the cash market would address the most salient risks that could be addressed through central clearing).

[311] *See* CME Letter, *supra* note 81, at 5–6.

[312] AIMA Letter, *supra* note 81, at 7; SIFMA/IIB Letter, *supra* note 37, at 16–18.

[313] SIFMA AMG Letter, *supra* note 35, at 11.

[314] *See* ICI Letter, *supra* note 85, at 11.

[315] *See* Federated Letter, *supra* note 85, at 2.

[316] *See generally* TMPG, *Automated Trading in Treasury Markets* (White Paper, June 2015), *available at https://www.newyorkfed.org/TMPG/medialibrary/microsites/tmpg/files/TPMG-June-2015-Automated-Trading-White-Paper.pdf* (''TMPG Automated Trading White Paper'').

[317] Proposing Release, *supra* note 14, 87 FR at 64623.

[318] *See* DTCC/FICC Letter, *supra* note 33, at 12; Better Markets Letter, *supra* note 33, *generally;* AFREF Letter, *supra* note 33, at 2–3.

[319] Commenters generally addressed the inclusion of leveraged account transactions in the definition of an eligible secondary market transaction as part of a broader discussion including both hedge fund transactions and leveraged account transactions. Therefore, the Commission is considering both types of transactions together for purposes of discussing the comments.

[320] AIMA Letter, *supra* note 81, at 7.

stated that there is no data to support imposing a clearing requirement that targets hedge funds and leveraged accounts and expressed concern that a partial mandate may result in some dealers choosing to offer liquidity only in a cleared environment thereby reducing the liquidity available today to accounts in the uncleared cash market.[321] Another commenter stated that the inclusion of hedge funds within the counterparties to an eligible secondary market transaction would create an uneven playing field that will subject hedge funds to much higher costs than other market participants.[322]

In addition, certain commenters also raised concerns with the definition of a hedge fund in the Proposing Release, stating that because of the nature of the definition, eligible secondary market transactions would include those with firms that may (but in practice might not actually) exceed the quantitative thresholds without regard to the risks that these firms actually take on, or their investment models and strategies.[323]

The Commission is not adopting proposed sections (ii)(C) and (D) of the definition of an eligible secondary market transaction with respect to hedge funds and leveraged accounts in light of questions raised by commenters regarding the inclusion of a hedge fund and a leveraged account as proposed that merit further consideration, and the Commission will continue to evaluate the issues raised to determine if any further action is appropriate with respect to transactions in the cash market. This change from the proposal allows for a more incremental approach to requiring central clearing of transactions in the cash market. However, the requirement to clear eligible secondary market transactions that are repos encompasses repos between a direct participant of a U.S. Treasury securities CCA and a hedge fund or leveraged account, as discussed in part II.A.2.a *supra.* This requirement should ensure that many of the risks posed by hedge funds, including the repo portion of a basis trade,[324] would be addressed by the proposal.

Moreover, repo transactions between a direct participant of a U.S. Treasury securities CCA and a hedge fund or leveraged account would be within the scope of the definition of an eligible secondary market transaction discussed in part II.A.2.a *supra.* This inclusion is important because it addresses the risks posed by hedge fund and leveraged account repo activity in the U.S. Treasury market, which is often highly leveraged and subject to low or zero haircut.[325]

iv. Comments Regarding Cash Transactions for Registered Funds

As discussed in part II.A.2.b *supra,* the definition of eligible secondary market transactions does not include transactions between direct participants of a U.S. Treasury securities CCA and registered funds. However, if a registered fund were transacting on an IDB, that transaction would be an eligible secondary market transaction because it otherwise meets the definition of such a transaction (*i.e.,* it is an IDB transaction) and not because it is a registered fund.

Certain commenters addressed cash market transactions specifically with respect to registered funds. One commenter supported an exclusion from the definition of an eligible secondary market transaction for registered funds.[326] The commenter stated that applying a cash Treasury clearing mandate to funds would not promote risk reduction or enhancements to market liquidity to a degree that would justify the considerable costs and burdens to funds, which would have to build out an entire new clearing infrastructure, with such costs borne indirectly by fund investors. The commenter stated that the characteristics of typical fund cash Treasury transactions are distinguishable from the types of transactions that the Commission is seeking to capture under the mandate for risk reduction purposes, *i.e.,* those using significant leverage and/or giving rise to potential contagion risk. According to the commenter, registered funds, by contrast, invest in cash Treasury securities for purposes such as obtaining desired exposure, hedging risks associated with investments in other markets, diversifying their portfolios, and protecting capital, among other reasons. The commenter stated that these transactions are generally not linked to other leveraged strategies, and observed that funds are limited in their ability to incur leverage, both by statute (*i.e.,* Section 18 of the 1940 Act) and by SEC rules (*e.g.,* Rule 18f–4 under the 1940 Act). The commenter further asserted that as a matter of investment strategy as well, buy-side market participants such as bond funds generally do not acquire significant leverage, including when investing in Treasury securities. For these reasons, the commenter asserted that including registered fund transactions in the definition of an eligible secondary market transaction would not yield additional risk reduction benefits.[327]

An additional commenter stated that applying this mandate to money market funds would yield minimal benefits while potentially imposing significant costs on such funds.[328] The commenter stated that its money market funds do not normally utilize leverage in the cash purchase of Treasury securities, but instead are generally investing in Treasury securities on a long-term basis or are using them to hedge risks, for capital protection or for diversifying the risk in their investment portfolios. The commenter stated that these strategies are generally not linked to other leveraged strategies and therefore there is minimal contagion risk evident in these transactions. The commenter further stated that the costs of such a mandate would be significant as the commenter currently does not clear cash Treasury transactions and therefore would need to establish the technological, operational and legal frameworks that are necessary to support such a clearing mandate, meaning that any anticipated benefits of money market funds, as well as other registered funds, clearing their cash Treasury purchases would be vastly outweighed by the costs and burdens associated with such a mandate. The commenter also supported a broader exclusion for transactions with registered funds from the definition of an eligible secondary market transaction.[329]

As stated in the Proposing Release, the Commission identified certain categories of purchases and sales of U.S. Treasury securities that should be part of the definition of an eligible secondary market transaction, and these categories represented an incremental first step to address potential risks arising to a U.S. Treasury securities CCA. The Proposing Release did not include transactions with registered funds as a counterparty within the definition of an eligible secondary market transaction, and the Commission does not believe that a

[321] SIFMA AMG Letter, *supra* note 35, at 11; *see also* MFA Letter II, *supra* note 125, at 7 (regarding decreased liquidity and potentially shifting transactions away from the requirement to clear eligible secondary market transactions).

[322] MFA Letter II, *supra* note 125, at 7.

[323] MFA Letter, *supra* note 81, at 18–20; AIMA Letter, *supra* note 81, at 6; SIFMA AMG Letter, *supra* note 35, at 11.

[324] *See* note 723 *infra.*

[325] *See, e.g.,* Ayelen Banegas and Phillip Monin, *Hedge Fund Treasury Exposures, Repo, and Margining* (Sept. 8, 2023), *available at https://www.federalreserve.gov/econres/notes/feds-notes/hedge-fund-treasury-exposures-repo-and-margining-20230908.html.*

[326] ICI Letter, *supra* note 85, at 10.

[327] ICI Letter, *supra* note 85, at 10.

[328] Federated Letter, *supra* note 85, at 5.

[329] *Id.*

specific exclusion for registered funds is necessary. Although a transaction with a registered fund may constitute an eligible secondary market transaction if the transaction otherwise meets the definition, it would not be because of the fact of the registered fund as a counterparty, but, rather, because the transaction met some other criteria of the definition.

The Commission understands generally that, consistent with the commenters' statements, registered funds, including money market funds, typically do not use cash transactions in U.S. Treasury securities to take on leverage, both as a matter of strategy and because of applicable regulatory requirements, and that they instead use cash transactions to obtain desired exposure, hedge risks associated with investments in other markets, diversify portfolios, or protect capital.

However, in response to the commenters that argued that registered funds' lack of leverage means that they pose no counterparty risk, the Commission believes that, to the extent that a registered fund chooses to transact on an inter-dealer broker, such transactions would pose the same type of contagion risk as other transactions executed on an inter-dealer broker. For the reasons discussed in part II.A.2.b.ii *supra,* in such cases, it is appropriate that registered funds' cash transactions, if on an IDB, would be encompassed within the definition of an eligible secondary market transaction because of the risks such transactions present as an IDB transaction and the potential for a default at the IDB to have a knock-on effect at the CCA.

v. Final Rule

For the reasons set forth in part II.A.2.b, the Commission is adopting the definition of an eligible secondary market transaction in Rule 17ad–22(a), as set forth in sections (ii)(A) and (B) of that definition with respect to IDB transactions and transactions with a registered broker-dealer, but it is not adopting the definition of an eligible secondary market transaction as set forth in sections (ii)(C) and (D) of that definition with respect to hedge fund and leveraged account transactions.

3. Other Exclusions From the Definition of an Eligible Secondary Market Transaction

Proposed Rule 17ad–22(a) would exclude transactions between direct participants of a U.S. Treasury securities CCA and certain counterparties from the definition of an eligible secondary market transaction in U.S. Treasury securities. These exclusions would apply to any purchase or sale transaction in U.S. Treasury securities or repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities between a direct participant and a central bank, a sovereign entity, or an international financial institution. A central bank would, in turn, be defined as a reserve bank or monetary authority of a central government (including the Board of Governors or any of the Federal Reserve Banks) and the Bank of International Settlements. A sovereign entity would be defined as a central government (including the U.S. Government), or an agency, department, or ministry of a central government. An international financial institution would be defined by specifying the entities, *i.e.,* (1) African Development Bank; (2) African Development Fund; (3) Asian Development Bank; (4) Banco Centroamericano de Integración Económica; (5) Bank for Economic Cooperation and Development in the Middle East and North Africa; (6) Caribbean Development Bank; (7) Corporación Andina de Fomento; (8) Council of Europe Development Bank; (9) European Bank for Reconstruction and Development; (10) European Investment Bank; (11) European Investment Fund; (12) European Stability Mechanism; (13) Inter-American Development Bank; (14) Inter-American Investment Corporation; (15) International Bank for Reconstruction and Development; (16) International Development Association; (17) International Finance Corporation; (18) International Monetary Fund; (19) Islamic Development Bank; (20) Multilateral Investment Guarantee Agency; (21) Nordic Investment Bank; (22) North American Development Bank, and providing that the term would also include any other entity that provides financing for national or regional development in which the United States government is a shareholder or contributing member.

In addition, Proposed Rule 17ad–22(a) would also exclude transactions in U.S. Treasury securities between a direct participant of a U.S. Treasury securities CCA and a natural person.

Commenters expressed support for these exclusions.[330] For the reasons stated in the Proposing Release, the Commission believes that these exclusions are appropriate.[331] The Commission is therefore adopting the exclusions as proposed.

In addition, several commenters requested an exclusion for market participants that engage in cash or repo transactions but are unable to access a U.S. Treasury securities CCA. For example, one commenter stated that this inability to access a CCA could be because of the CCA's existing rules or otherwise.[332] Another commenter stated that this inability could result from being ineligible under the CCA's existing rules, regulatory burdens, or other material impediments that prevent such access. The commenter further stated that that not all market participants will be able to work with a U.S. Treasury securities CCA to determine if there are serious obstacles to access during the proposal's comment period and that it may take more time for any possible issues to surface.[333] It is difficult to determine what entities will be ''unable'' to access central clearing and for what reasons, given that, for example, the existing rules of a CCA may change during the implementation period, *see* part III *infra,* and that different market participants may face different regulatory or other requirements that could have an effect on its access to central clearing. Therefore, such an exclusion would be overly broad and would undermine the policy goals of the requirement to clear eligible secondary market transactions. The Commission has identified a number of exclusions in this release and would consider any additional specific requests for exclusions in the future as market participants work to finalize arrangements to implement the requirements of this release.

4. Policies and Procedures Regarding U.S. Treasury Securities CCA's Monitoring of Its Direct Participants' Transactions

The proposed amendments to Rule 17ad–22(e)(18)(iv)(B) would require that a U.S. Treasury securities CCA establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, identify and monitor its direct participants' required submission of transactions for clearing, including, at a minimum, addressing a direct participant's failure to submit transactions.

One commenter supported this aspect of the proposal.[334] The commenter

[330] SIFMA/IIB Letter, *supra* note 37, at 20; CME Letter, *supra* note 81, at 6.

[331] Proposing Release, *supra* note 14, 87 FR at 64625–26.

[332] *See* AIMA Letter II, *supra* note 115, at 4.

[333] SIFMA/IIB Letter, *supra* note 37, at 21.

[334] *See* DTCC/FICC Letter, *supra* note 33, at 21–22.

noted that this aspect of the proposal uses the phrase ''identify and monitor,'' which is an understood phrase used elsewhere in the Covered Clearing Agency Standards.[335] Accordingly, the commenter anticipated that implementation of this aspect of the proposal would be similar to implementation of other Covered Clearing Agency Standards provisions that use that phrase.[336] For example, the commenter stated that it expects a U.S. Treasury securities CCA would require its direct participants to submit information regarding their U.S. Treasury transactions as well as attestations from senior officials that the participant is in compliance with its obligations.[337] The commenter stated that it further expects that a U.S. Treasury securities CCA would review publicly available information (*e.g.,* information collected through FINRA's Trade Reporting and Compliance Engine (''TRACE'') reporting) as well as information made available to it by regulatory and self-regulatory organizations.[338] Additionally, the commenter stated that it expects a U.S. Treasury securities CCA would seek to identify opportunities to coordinate with market participants and self-regulatory organizations to examine collected data and identify possible instances of non-compliance.[339] The commenter cautioned, however, that the ability of a U.S. Treasury securities CCA to effectively identify and monitor its direct participants' required submission of transactions for clearing would depend on the quality and comprehensiveness of available data, and the commenter asked that the Commission continually review and improve the quality of available data.[340] The commenter stated that it expects a U.S. Treasury securities CCA would take steps to remediate non-compliance on the part of its direct participants in a manner consistent with the Covered Clearing Agency Standards and breaches of the CCA's own rules.[341] The commenter cautioned, however, that a U.S. Treasury securities CCA's capacity to monitor participant non-compliance is limited because a CCA does not have authority over non-participants that may seek to evade the requirement to clear eligible secondary market transactions.[342] Therefore, the commenter asked that the Commission utilize its supervisory authority to help support any requirement to clear eligible secondary market transactions.[343]

Consistent with the commenter, the Commission continues to believe that such a requirement should ensure that a U.S. Treasury securities CCA has a framework in place for oversight of participants' compliance with the policies that would be adopted as part of the requirement to submit eligible secondary market transactions for clearing. Without such policies and procedures, it would be difficult for the CCA to assess if the direct participants are complying with the amendments to Rule 17ad–22(e)(18)(iv)(A) that would require the submission of eligible secondary market transactions for clearing.

The Commission continues to believe that there are a number of possible methods that a U.S. Treasury securities CCA could establish to assess its direct participants' compliance with the policies and procedures adopted pursuant to the Membership Proposal. For example, the Commission agrees with the commenter that a U.S. Treasury securities CCA could require direct participants to submit to the CCA information regarding their U.S. Treasury securities transactions or to require attestations from senior officials of the CCA's direct participants as to their submission of the required transactions and compliance with their obligations to submit such transactions. The Commission further agrees that a U.S. Treasury securities CCA also could review publicly available information and information made available to it by regulatory and self-regulatory organizations as part of its assessment of its direct participants' compliance.

The Commission continues to believe that requiring a U.S. Treasury securities CCA to adopt policies and procedures that address a failure of a direct participant to submit transactions that are required to be submitted is consistent with section 17A(b)(3)(G) of the Exchange Act. That section requires that the rules of a registered clearing agency provide that its participants shall be appropriately disciplined for violation of any provision of the rules of the clearing agency by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, or any other fitting sanction. The Commission continues to believe that policies and procedures consistent with this aspect of the proposal should specify how a U.S. Treasury securities CCA would penalize its participants who do not submit the required transactions, whether by a particular fine or other action.

For these reasons, the Commission is adopting the requirement in Rule 17ad–22(e)(18)(iv)(B) as proposed.

5. Alternative Approaches Proposed by Commenters

As discussed in part II.A.1.a *supra,* commenters identified several methods by which the Commission could or should incentivize additional central clearing without adopting a requirement to clear eligible secondary market transactions. The Commission discusses its views on each of these in turn, including whether it has the authority to adopt certain initiatives. However, as a general matter, the Commission is not persuaded that incentivizing central clearing would be sufficient at this point, as those types of changes would not ensure that the current risks to U.S. Treasury securities CCAs are addressed. Therefore, the requirement to clear eligible secondary market transactions is necessary.

First, commenters identified the proposed amendments to Rule 15c3–3 discussed in part II.C *infra* as a method to incentivize additional central clearing.[344] One commenter stated that the practical effect of this change would be to allow broker-dealers to use margin collected from customers to satisfy margin requirements associated with such customers' transactions, rather than using proprietary funds to finance customer margin as is the case today, and expressed its support for this amendment because it will free up broker-dealer resources by reducing the amount of proprietary funds needed to finance customer margin and therefore lower the cost of clearing, while continuing to protect customer funds.[345] Another commenter stated that the proposed change to allow a debit under the Rule 15c3–3a customer reserve formula should incentivize central clearing of U.S. Treasury securities transactions by reducing costs.[346] One commenter stated that this change would reduce the costs of centrally clearing U.S. Treasury securities transactions and thus incentivize more central clearing of such transactions.[347]

Second, commenters identified the proposed amendments to require U.S. Treasury securities CCAs to segregate customer positions and margin

[335] *See* DTCC/FICC Letter, *supra* note 33, at 21.

[336] *See id.*

[337] *See id.*

[338] *See id.*

[339] *See id.*

[340] *See* DTCC/FICC Letter, *supra* note 33, at 21–22.

[341] *See* DTCC/FICC Letter, *supra* note 33, at 22.

[342] *See id.*

[343] *See id.*

[344] SIFMA AMG Letter, *supra* note 35, at 8; SIFMA/IIB Letter, *supra* note 37, at 12; MFA Letter, *supra* note 81, at 3, 10.

[345] MFA Letter, *supra* note 81, at 10.

[346] SIFMA AMG Letter, *supra* note 35, at 8.

[347] SIFMA/IIB Letter, *supra* note 37, at 12.

discussed in part II.C.1 *infra* as a method to incentivize additional central clearing.[348] One commenter stated that this change would ensure that a direct participant's proprietary positions would be available to net against other proprietary positions, which would incentivize additional central clearing.[349] An additional commenter stated that the segregation of customer positions should allow for a dealer's proprietary positions to be netted against that dealer's proprietary positions vis-à-vis other dealers, allowing more central clearing of U.S. Treasury securities transactions.[350]

Third, commenters identified requiring CCAs to review their access models and/or adopt particular access models or features thereof as a method to incentivize clearing, as discussed in part II.B.2 *infra*.[351]

The Commission agrees that the methods identified by the commenters could incentivize and facilitate additional central clearing. The Commission therefore is adopting the amendments to Rule 15c3–3, the requirement to segregate house and customer margin, and the requirement to ensure access to central clearing, as discussed in parts II.C, II.B.1, and II.B.2 *infra* respectively. However, the Commission disagrees with these commenters that these changes alone, without also requiring that U.S. Treasury securities CCAs obligate their direct participants to submit eligible secondary market transactions for clearing, are enough. Merely incentivizing and facilitating greater central clearing is not sufficient, as those types of changes would not ensure that the current risks to U.S. Treasury securities CCAs are addressed. Therefore, for the reasons discussed in part II.2.a and b, the requirement to clear is also necessary.

Fourth, one commenter argued that another way the Commission could incentivize greater central clearing without requiring it was to require FICC to consider amending its clearing fund structure to separate initial margin from default fund requirements that can be subject to loss mutualization, which would result in capital efficiencies for bank or bank-affiliated dealers and also may allow for increased participation from counterparty types that are restricted from participating in loss mutualization arrangements (*e.g.,* money market funds).[352] Another commenter also stated that changing the sponsored member clearing fund contribution to a pool of margin that is used in the event of a default of the underlying sponsored member would more closely align a sponsored member's exposure to potential losses in a default scenario with its own creditworthiness (*i.e.,* the defaulter pays first) and be more cost effective for sponsoring members.[353] Another commenter stated that FICC must be required to separate initial margin from default fund requirements that can be subject to loss mutualization, prior to the imposition of a clearing requirement.[354]

The Commission recognizes that the particular clearing fund structure used by FICC may bring some level of capital inefficiency to banks who choose to join a CCA.[355] However, the Commission previously has declined a commenter's suggestion to impose such a requirement.[356] As it stated when considering a similar comment when adopting the Covered Clearing Agency Standards, the Commission acknowledges that loss mutualization and other pooling-of-resources arrangements involve tradeoffs that a CCA generally should carefully assess and balance. A CCA may be better able to manage multiple defaults in extreme conditions more efficiently using pooled resources because the pooled resources would be greater than the resources of any single defaulting participant. Further, because the arrangements are prefunded, participants can model and manage the risks they face from the clearing agency while being able to take into account the amount of resources that they have provided to the clearing agency. The pooling of resources, however, can increase interdependencies among, and therefore the potential risks to, participants of the CCA. The use of loss mutualization and other pooling-of-resources arrangements generally should, to minimize systemic risk, balance the safety and soundness of the CCA against the potential for increased exposures among participants that may arise from the manner the CCA holds financial resources. For all these reasons, the Commission continues to believe that it should not impose such a requirement on CCAs, notwithstanding the potential capital efficiencies arising from a different clearing fund structure at a CCA.

Pursuant to Rule 17ad–22(e)(23), a covered clearing agency must establish, implement, maintain and enforce written policies reasonably designed to disclose, among other things, key aspects of its default rules and procedures and the risks, fees, and other material costs participants incur by participating in the covered clearing agency. The availability of these policies and procedures should allow participants to understand in advance a covered clearing agency's reliance on such resources and to consider their own ability to meet the CCA's membership obligations, including with respect to financial resources, prior to becoming members of the covered clearing agency.

Fifth, several commenters discussed facilitating cross-margining of indirect participants' transactions in U.S. Treasury securities with those in U.S. Treasury futures as a method to incentivize additional clearing.[357] One commenter stated that the Commission should take steps to allow cross-margining of customer transactions between Treasury securities and U.S. Treasury futures, because the reduced margin requirements obtained through cross-margining serves an important function in increasing market liquidity through balance sheet savings and incentivizing risk reduction through hedging. The commenter also referred to the work of the G–30, which observed that wider use of cross-margining would reduce the risk that increases in initial margin requirements on the futures leg of cash-futures basis trades result in forced sales of Treasury securities, which may have contributed to selling pressures in the market in March 2020.[358] Another commenter stated that cross-margining would lower costs for market participants by allowing them to apply margin across positions submitted for clearing through various clearinghouses. The commenter stated that this would ensure that a market participant can post margin adequate to support its positions without having to

[348] SIFMA AMG Letter, *supra* note 35, at 8; SIFMA/IIB Letter, *supra* note 37, at 12; MFA Letter, *supra* note 81, at 3.

[349] SIFMA/IIB Letter, *supra* note 37, at 12, 25.

[350] SIFMA AMG Letter, *supra* note 35, at 8.

[351] SIFMA/IIB Letter, *supra* note 37, at 13; SIFMA AMG Letter, *supra* note 35, at 8; MFA Letter, *supra* note 81, at 3, 6–10.

[352] SIFMA/IIB Letter, *supra* note 37, at 3.

[353] ICI Letter, *supra* note 85, at 14.

[354] MFA Letter II, *supra* note 125, at 4.

[355] Banking regulations may result in different treatment for collateral posted as margin to a CCP if that collateral is potentially subject to loss mutualization versus collateral that is not subject to loss mutualization. Specifically, a bank has to treat potentially mutualized collateral, like clearing fund posted to FICC or, more generally, the guaranty fund posted to derivatives CCPs, differently from collateral that would be used only in the event of the specific bank member's default to the CCP. Such banking regulations are outside the scope of this rulemaking or the Commission's authority in general.

[356] CCA Standards Adopting Release, *supra* note 10, 81 FR at 70813.

[357] MFA Letter, *supra* note 81, at 11; SIFMA/IIB Letter, *supra* note 37, at 13; SIFMA AMG Letter, *supra* note 35, at 8.

[358] SIFMA/IIB Letter, *supra* note 37, at 13.

post margin in excess of regulatory requirements due to an inability to apply margin across platforms.[359] Another commenter stated that the Commission should explore developing a framework that would allow cross margining of futures and securities transactions, and an additional commenter added that this type of framework would ensure a level playing field between direct and indirect members and noting that, unlike direct participants, clients are not permitted to cross-margin positions cleared at FICC with futures positions cleared at CME Group under FICC's current cross-margining framework, which significantly increases clearing costs for clients (depending on the trading strategies involved), discouraging clearing and creating an unlevel playing field between direct members and clients at FICC.[360]

The current cross-margining agreement between FICC and CME is part of FICC's rulebook, any changes to which have to be filed with the Commission pursuant to Section 19(b) of the Exchange Act. The Commission historically has supported and approved cross-margining at clearing agencies and recognized the potential benefits of cross-margining systems, which include freeing capital through reduced margin requirements, reducing clearing costs by integrating clearing functions, reducing clearing agency risk by centralizing asset management, and harmonizing liquidation procedures.[361] The Commission has stated that cross-margining arrangements may be consistent with Section 17A(b)(3)(F) of the Exchange Act in that they may strengthen the safeguarding of assets through effective risk controls that more broadly take into account offsetting positions of participants in both the cash and futures markets, and promote prompt and accurate clearance and settlement of securities through increased efficiencies.[362] For these reasons, the Commission continues to believe that market participants can benefit from cross-margining arrangements and encourages U.S. Treasury securities CCAs to consider the potential of such benefits.

Sixth, commenters identified a number of regulations that purportedly could be changed to further incentivize central clearing that are outside the Commission's jurisdiction. For example, one commenter stated that requiring counterparties to post margin for non-centrally cleared bilateral repos through internationally agreed upon standards could level the playing field for margin requirements in Treasury repos, whether or not centrally cleared, and therefore incentivize market participants to centrally clear repos.[363] The Commission alone cannot prescribe standards applicable to all market participants with respect to uncleared repo, and imposing requirements solely upon entities regulated by the Commission could lead to potential regulatory arbitrage. In addition, the commenter stated that FICC should have the ability to access a Federal Reserve standing repurchase facility for FICC as a systemically important financial market utility, which would (i) reduce the need for a participant-funded liquidity resources at a CCA, thereby reducing costs and incentivizing further central clearing, and (ii) mitigate the increased concentration risk of substantially increasing the Treasury transactions cleared at FICC.[364] However, the Commission does not have the authority to provide that access.

In addition, the commenter stated that exempting a clearing member's exposure to FICC's CCLF from the Single Counterparty Credit Limits ("SCCL") or increasing the SCCL with respect to exposures to FICC, due to the larger possible CCLF exposure that bank holding companies may end up incurring, would allow market participants to clear additional transactions at FICC without risking exceeding SCCL limits.[365] Another commenter suggested that the Commission work with other regulators to advocate for improvements to prudential rules which would have the effect of enhancing liquidity in the U.S. Treasury market (*i.e.,* the Supplementary Leverage Ratio and other capital requirements).[366] The SCCL and the Supplementary Leverage Ratio, as well as other bank capital requirements, arise from regulations of the Board of Governors.[367] Therefore, any changes to the SCCL and banking capital regulations are outside the Commission's jurisdiction.

One commenter suggested promoting alternatives to central clearing that could improve liquidity and strengthen the U.S. Treasury market. The commenter stated that CUSIP aggregation has been applied successfully in the past to agency mortgage-backed securities and may improve liquidity by increasing the size of certain off-the-run U.S. Treasury issuances. The commenter further stated that the U.S. Treasury could also continue to consider engaging in buybacks of existing U.S. Treasury securities as a way of improving liquidity. The commenter also stated that the Commission could further engage with the industry in discussions on how to expand all-to-all trading in secondary market cash transactions as a way to promote liquidity. Finally, the commenter stated that other recent rule proposals and enhancements to the TRACE reporting obligations for U.S. Treasury securities will in time give the Commission greater visibility into this market.[368]

In response to the comments regarding CUSIP aggregation and buyback of U.S. Treasury securities, those actions would be undertaken by either the Federal Reserve Bank of New York (or other market participants) or the U.S. Department of the Treasury, respectively.[369] The Commission does not have the authority to conduct such actions, and these actions would not impact the overall level of central clearing in the market. In response to the comments regarding all-to-all liquidity, the Commission agrees that increased all-to-all trading could improve liquidity in the U.S. Treasury market and, as stated in the Proposing

[359] MFA Letter, *supra* note 81, at 11. The commenter further stated that the Commission should ensure indirect participants also can take into account offsetting positions when calculating margin requirements. MFA Letter II, *supra* note 125, at 4.

[360] SIFMA/AMG Letter, *supra* note 35, at 8; ARB et al. Letter, *supra* note 81, at 9.

[361] Self-Regulatory Organizations; the Fixed Income Clearing Corporation; Order Granting Approval of Proposed Rule Change To Amend and Restate the Cross-Margining Agreement Between FICC and CME, Exchange Act Release No. 98327 (Sept. 8, 2023), 88 FR 63185, 63187 (Sept. 14, 2023); *see also* Exchange Act Release No. 90464 (Nov. 19, 2020), 85 FR 75384, 75386 (Nov. 25, 2020) (approving a second amended and restated cross-margining agreement between the Options Clearing Corp. and CME); Exchange Act Release No. 38584 (May 8, 1997), 62 FR 26602, 26604–05 (May 14, 1997) (establishing a cross-margining agreement with the Options Clearing Corp., CME, and the Commodity Clearing Corporation).

[362] *Id.*

[363] SIFMA/IIB Letter, *supra* note 37, at 13.

[364] SIFMA/IIB Letter. *supra* note 37, at 13–14.

[365] SIFMA/IIB Letter, *supra* note 37, at 14.

[366] SIFMA AMG Letter, *supra* note 35, at 8.

[367] *See* 12 CFR part 252 subpart H (regulations regarding SCCL); 12 CFR 217.10(c) (SLR regulation) and part 217 generally regarding bank capital requirements); *see also* Final Rule, Single-Counterparty Credit Limits for Bank Holding Companies and Foreign Banking Organizations, 83 FR 38460 (Aug. 6, 2018).

[368] SIFMA AMG Letter, *supra* note 35, at 8.

[369] *See* FRBNY, Statement Regarding Aggregation of Agency Mortgage-Backed Securities Holdings (Oct. 6, 2022), *available at https://www.newyorkfed.org/markets/opolicy/operating_policy_221006;* 31 CFR part 375, Marketable Treasury Securities Redemption Operations (establishing the terms and conditions by which the U.S. Department of the Treasury may redeem outstanding, unmatured marketable Treasury securities).

Release, believes that increased central clearing could, in fact, increase all-to-all trading.[370] However, all-to-all trading does not, on its own, address the risks to CCAs that the proposal was designed to address. The Commission therefore believes that imposing requirements on CCAs to have their members centrally clear eligible secondary market transactions should proceed, regardless of the current status of all-to-all trading, to address these issues. Similarly, in response to the comments regarding TRACE reporting, the Commission does not believe that the increased reporting would address the risks to CCAs arising from current clearing practices in the U.S. Treasury market. Therefore, relying on reporting alone would not be sufficient.

Eighth, one commenter stated that the Commission should require enhanced transparency regarding FICC's margining calculations and default management procedures. The commenter states that the proposal does not set default management standards or require disclosure of such standards. The commenter asserts that while FICC has disclosed ''key aspects'' of its default rules and procedures, greater transparency into these procedures, including, in particular, with respect to how FICC manages the default risk of indirect participants, would be beneficial. The commenter also stated that the proposal does not set margin requirements or require transparency into how margin requirements are set. The commenter states that with respect to both default management and margin calculations, enhanced transparency would enhance confidence in, and the resilience of, FICC, which will, in turn increase market participants' confidence in submitting additional transactions for clearing.[371] Another commenter also referenced the ''broad opacity'' of FICC margin models and the challenges that posed for participants, stating that the participants' inability to replicate FICC's margin models left the direct and indirect participants as not being able to accurately predict the daily (or more) margin calls to a reasonable degree.[372]

The Commission's existing rules address these issues and require transparency into default management, and margin methodology. On default management, Rule 17ad–22(e)(13) requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure the covered clearing agency has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meet its obligations by, at a minimum, requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing and review of its default procedures, including any close-out procedures, at least annually and following material changes thereto.[373] When adopting the Covered Clearing Agency Standards, the Commission declined to prohibit or adopt specific loss allocation or default management tools suggested by commenters, relying upon the Commission's belief that, when determining the content of its policies and procedures with respect to default management, each CCA must have the ability to enhance its policies and procedures to meet the evolving challenges and risks in the securities market that the CCA serves.[374] For these reasons, the Commission continues to believe that it should not set particular default management procedures for CCAs.

In addition, Rule 17ad–22(e)(6) requires that a CCA establish, implement, maintain and enforce written policies and procedures reasonably designed to cover, if the covered clearing agency provides central counterparty services, its credit exposures to its participants by establishing a risk-based margin system.[375] Thus, CCAs are required to develop policies governing how they calculate margin. In addition, under the amendments to Rule 17ad–22(e)(6) being adopted in this release, CCAs will be obligated to have policies and procedures to calculate house margin separately from customer margin.

Further, both default management and margin calculation generally constitute material aspects of the operations of a CCA, meaning that they should be considered stated policies, practices, or interpretations under Exchange Act Rule 19b–4.[376] As such, they are subject to the filing obligations applicable to SROs under Section 19(b) of the Exchange Act. This means that the default management processes and margin methodologies are described in SRO rule filings upon which market participants may comment and that the Commission must review and approve. CCAs have adopted rules on these topics pursuant to the SRO rule filing process.[377] The filing obligations under Section 19(b) of the Exchange Act provide transparency into the covered clearing agencies' default management processes and margin methodologies.

Second, in addition to the aforementioned obligations under the Covered Clearing Agency Standards specific to default management and margin, Rule 17ad–22(e)(23) also imposes a set of requirements related to transparency and disclosure. Specifically, a CCA is obligated to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for publicly disclosing all relevant rules and material procedures, including key aspects of its default rules and procedures, and providing sufficient information to enable participants to identify and evaluate the risks, fees, and other material costs they incur by participating in the CCA.[378] In addition, a CCA must produce a comprehensive public disclosure that describes its material rules, policies, and procedures regarding its legal, governance, risk management, and operating framework, accurate in all material respects at the time of publication, that includes, among other things, a standard-by-standard summary narrative for each applicable standard set forth in

[370] Proposing Release, *supra* note 14, 87 FR at 64628; *see also* FRBNY Staff Report No. 1036, All-to-All Trading in the U.S. Treasury Market at 12–13 (Oct. 2022), *available at https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr1036.pdf?sc_lang=en* (discussing how central clearing could make all-to-all trading more likely to expand in the Treasury market, while also potentially increasing the costs).

[371] MFA Letter, *supra* note 81, at 11–12; *see also* MFA Letter II, *supra* note 125, at 5.

[372] SIA Partners Comment, *supra* note 52, at 18; *see also id.* at 74–75.

[373] 17 CFR 240.17ad–22(e)(13).

[374] CCA Standards Adopting Release, *supra* note 10, 81 FR at 70829.

[375] 17 CFR 240.17ad–22(e)(6).

[376] 17 CFR 240.19b–4(a)(6)(i).

[377] *Regarding default management, see, e.g.,* FICC Rule 4, sections 6, 7, 7a, and 7b (addressing application of clearing fund deposits and other Amounts to defaulting members' obligations, loss allocation waterfall, corporate contribution, and withdrawal from membership in the event of a loss allocation); FICC Rule 3A, sections 12, 15, and 16 (addressing loss allocation in the Sponsored Service and the insolvency of either a sponsoring or sponsored member), *supra* note 19; Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend the Loss Allocation Rules and Make Other Changes, Exchange Act Release No. 83970 (Aug. 28, 2018). *Regarding margin methodologies, see e.g.,* FICC Rule 4, section 1b (setting forth the GSD unadjusted margin portfolio amount) and section 2a (describing the intraday supplemental required fund deposit), in conjunction with Rule 1 (defining the various components of the margin methodology, including, among other things, the VaR Charge, the Backtesting Charge, and the Margin Liquidation Adjustment Charge), *supra* note 19; *see also* Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Implement Changes to the Required Fund Deposit Calculation in the Government Securities Division Rulebook, Exchange Act Release No. 83362 (June 1, 2018), 83 FR 26514 (June 7, 2018).

[378] 17 CFR 240.17ad–22(e)(23)(i) and (ii).

paragraph (e)(1) through (23) of the Covered Clearing Agency Standards section with sufficient detail and context to enable a reader to understand the CCA's approach to controlling the risks and addressing the requirements in each standard.[379] Thus, each CCA issues a public document designed to address each standard, including those with respect to fees, default management, and margin.[380] In addition, CCAs provide a variety of additional tools to assist their participants in understanding their margin obligations, such as descriptions of the components, including their calculations, and margin calculators that can be used to estimate margin requirements based on potential changes to a participant's portfolio.[381]

Accordingly, because of the existing framework applicable to transparency, the Commission disagrees that enhanced transparency into margining calculations and default management procedures is necessary or that it would meaningfully incentivize greater clearing. However, the Commission encourages market participants and CCAs to engage regarding the existing tools and potential additional resources that could be provided to better assist market participants at understanding potential margin obligations.

Finally, one commenter encouraged the Commission to consider whether proposal should specifically require FICC to establish rules ensuring that fees charged by direct participants are transparent and reasonable.[382] Section 17A(b)(3)(E) of the Exchange Act requires that the rules of a clearing agency do not impose any schedule of prices, or fix rates or other fees, for services rendered by its participants. In light of this statutory provision, a rule such as that suggested by the commenter would not be appropriate.

For all these reasons, the Commission disagrees with commenters that would support not requiring the clearance of eligible secondary market transactions. The Commission believes that requiring direct participants of U.S. Treasury securities CCAs to clear their eligible secondary market transactions is essential to improving risk management at U.S. Treasury securities CCAs (including contagion risk) and to obtaining the benefits of central clearing in the U.S. Treasury market, as discussed in part II.A.1.a *supra.* As discussed in more detail in parts III and IV *infra,* the Commission does not believe that further study is necessary, but believes that, as discussed in more detail in part III, a phased implementation schedule for the requirements discussed in part II, beginning with some of the items identified as incentives to central clearing, should address commenters' concerns that the necessary market infrastructure is not in place to support the requirement to clear eligible secondary market transactions.

B. Additional Changes to Covered Clearing Agency Standards

The Commission also proposed additional changes to the Covered Clearing Agency Standards, designed to address the likely increase in the volume of U.S. Treasury securities transactions submitted for central clearing resulting from the proposed requirement that direct participants of a U.S. Treasury securities CCA submit eligible secondary market transactions for clearance and settlement. The Commission is adopting these additional changes, for the reasons discussed in more detail below.

1. Netting and Margin Practices for House and Customer Accounts

The proposed amendments to Rule 17ad–22(e)(6)(i) would require a U.S. Treasury securities CCA to establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, calculate, collect, and hold margin amounts from a direct participant for its proprietary U.S. Treasury securities positions separately and independently from margin calculated and collected from that direct participant in connection with U.S. Treasury securities transactions by an indirect participant that relies on the services provided by the direct participant to access the covered clearing agency's payment, clearing, or settlement facilities. This rule would prohibit a U.S. Treasury securities CCA from netting customer and proprietary positions.

In the Proposing Release, the Commission stated it believed that the separation of house and customer positions could reduce the potential risk to the U.S. Treasury securities CCA arising from such transactions. Such changes should allow a U.S. Treasury securities CCA to better understand the source of potential risk arising from the U.S. Treasury securities transactions it clears and potentially further incentivize central clearing.[383]

Importantly, the amendment to Rule 17ad–22(e)(6)(i) would not require that a CCA's direct participant collect a specified amount of margin from its customers or determine customer margin in a particular manner, such as on a gross basis; the calculation and collection of margin between a CCA direct participant and its customers would be left to other applicable regulations and, to the extent applicable, bilateral negotiation between the member and its customer. As the Commission stated in the Proposing Release,[384] the amendments to Rule 17ad–22(e)(6)(i) would, in this way, require policies and procedures that closely resemble the calculation, collection, and holding of margin for listed options.[385] When considering and adopting the Covered Clearing Agency Standards, the Commission noted that customer segregation can be achieved through such an omnibus account structure, where all collateral belonging to all customers of a particular member is commingled and held in a single account segregated from that of the member,[386] which is consistent with the practice at the clearing agency for listed options and this amendment to Rule 17ad–22(e)(6)(i).

[379] 17 CFR 240.17ad–22(e)(23)(iii).

[380] *See, e.g.,* FICC Disclosure Framework, *available at https://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/FICC_Disclosure_Framework.pdf.*

[381] *See, e.g.,* FICC Government Securities Division, Overview of the Clearing Fund Methodology (Oct. 2023), *available at https://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/GSD-Clearing-Fund-Methodology-Overview-October-2023.pdf;* Comment Letter from FICC re: SR–FICC–2020–017 and SR–FICC–2020–804, *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017-8451684-229787.pdf* (describing the different capabilities provided at FICC to enable direct participants to determine their margin requirements, including, but not limited to a calculator that provides functionality to direct participants to enter ''what if'' position data and recalculate their VaR Charge to determine margin impact pre-trade execution and to see the impact to VaR if specific transactions are executed or to anticipate the impact of an increase or decrease to a current clearing position).

[382] MFA Letter, *supra* note 81, at 11.

[383] Proposing Release, *supra* note 14, 87 FR at 64633.

[384] Proposing Release, *supra* note 14, 87 FR at 64634.

[385] Currently, the covered clearing agency that clears and settles listed options transactions holds margin for customer trades separately from the proprietary trades of the submitting participant in an omnibus account. *See* Options Clearing Corp. Rules 601(c) and (d), *available at https://www.theocc.com/getmedia/9d3854cd-b782-450f-bcf7-33169b0576ce/occ_rules.pdf* (''OCC Rules''). This approach is also similar to the approach used for futures customers. *See* 17 CFR 1.22 and Advanced Notice of Proposed Rulemaking, Protection of Cleared Swaps Customers Before and After Commodity Broker Bankruptcies, 75 FR 75162, 75163 (Dec. 2, 2010) (describing the futures model).

[386] *See* Proposing Release, *supra* note 14, 87 FR at 64634 (discussing CCA Standards Proposing Release, *supra* note 8, 79 FR at 29547; CCA Standards Adopting Release, *supra* note 10, 81 FR at 70832–33).

Commenters generally supported the proposed amendment to Rule 17ad–22(e)(6)(i).[387] One commenter agreed that this amendment would further the risk management benefits associated with central clearing and help avoid a direct participant's disorderly default because FICC would have a more holistic view of the market than currently available, and that because a direct participant's margin would be calculated, collected and held separately and independently than that of its customers, the direct participant's trades with its customers can be netted against the direct participant's trades with other direct participants.[388] One commenter stated that the proposed changes with respect to risk management requirements would facilitate the proposal's goals of increased central clearing, and that it would also appropriately assign the risk of centrally cleared customer U.S. Treasury securities transactions to the customer.[389]

However, commenters also raised several additional issues with respect to the separation of house and customer margin that the Commission will address below.

First, several commenters argued that this rule should also prohibit the use of separate customer margin for any other purpose, including loss mutualization (*i.e.,* when a clearing agency uses non-defaulting customers' funds in the event of a default, thereby ''mutualizing'' the loss).[390] Another commenter stated that prohibiting the use of customer margin for loss mutualization would mitigate higher risk-weighted assets under certain bank capital rules and may also facilitate clearing for market participants that are subject to restrictions regarding exposure to loss mutualization.[391]

What the commenters seek is akin to the requirements applicable to derivatives clearing organizations clearing swaps, that is, the ''legally segregated, operationally commingled'' (''LSOC'') model, which, as the Commission stated in the Proposing Release, differs from the requirements proposed in Rule 17ad–22(e)(6)(i).[392] Under such an approach, customer collateral may be held in one combined account and commingled, but in the event of a customer default, the collateral of non-defaulting customers would not be available to cover any losses attributable to the defaulting customer (*i.e.,* they would be legally separated from the collateral of the defaulting customer and not available for loss mutualization).[393] As discussed in the Proposing Release, the Commission previously has declined to require such an approach for covered clearing agencies, preferring to allow each covered clearing agency to determine the method that works best for the products it clears and markets it serves.[394] When discussing that conclusion, the Commission also noted that this type of segregation does not occur at the CCP level under the current market structure for cash securities and listed options, and that customer positions and funds in the cash securities and listed options markets are eligible for protection under SIPA, which is not the case for futures and cleared swaps.[395]

The Commission continues to believe that it would not be appropriate to require an LSOC model for U.S. Treasury security CCAs, because customer positions and funds in the market for cash securities and listed options would be eligible for protection under SIPA, unlike in other markets which use an LSOC model. However, a U.S. Treasury securities CCA may choose to offer such a model, based upon what works best for both direct and indirect participants or to satisfy other regulatory obligations. In practice, U.S. Treasury securities CCAs seeking to provide services that would allow broker-dealers to rehypothecate customer margin to the CCA, as discussed further in part II.C.2 *infra,* would, consistent with that flexibility, choose to adopt practices that would ensure that customer funds can be used only for a loss arising from customer activity and could not be used for loss mutualization. Thus, adopting the changes described in section II.C.2 below should also result in U.S. Treasury securities CCAs incorporating access models that provide for the type of segregation requested by the commenters.

Another commenter argued that the Commission should consider additional changes that would compel FICC to require that all margin requirements related to customer positions be satisfied by those customers, to appropriately allocate risk to those customers and lower barriers to participation in central clearing for customers by direct participants who otherwise may not be able to submit margin on behalf of their customers.[396] The requirement to collect, calculate, and hold customer margin separate from proprietary margin should ensure that, at the CCA level, the risks arising from customer clearing are sufficiently margined to protect the CCA from the exposure arising from customer clearing. In the event that a direct participant of the CCA is not able to submit margin on behalf of its customers, such participants could elect to take advantage of the amendments to Rule 15c3–3, as discussed in part II.C.2 *infra,* regarding Rule 15c3–3, which would require the participant to collect 100% customer margin in order to be able to onward post the margin.

An additional commenter described the proposed rule as requiring customers to be margined individually and requiring FICC to collect margin even where a member's overall customer position is netted, which would ''exponentially'' increase the margin requirement on all those involved in the U.S. Treasury market.[397] The Commission disagrees that the proposed amendments to Rule 17ad–22(e)(6)(i) would require customers to

[387] ICE Letter, *supra* note 33, at 3; DTCC/FICC Letter, *supra* note 33, at 25; ICI Letter, *supra* note 85, at 25–26; SIFMA/IIB Letter, *supra* note 37, at 25–26; Tradeweb Letter, *supra* note 81, at 3; AIMA Letter, *supra* note 81, at 8; AFREF Letter, *supra* note 33, at 5; SIFMA AMG Letter, *supra* note 35, at 8.

[388] AIMA Letter, *supra* note 81, at 8.

[389] SIFMA/IIB Letter, *supra* note 37, at 25.

[390] SIFMA/IIB Letter, *supra* note 37, at 26–27; ICI Letter, *supra* note 85, at 19 (supporting strong protections for funds in whatever models FICC chooses to adopt, including LSOC protections, and stating that customer funds must be identified as fund assets and have the benefit of customer treatment); AIMA Letter, *supra* note 81, at 8 (stating that the Commission should specify that client initial margin should not be included as part of a clearing agency's default waterfall and subject to loss mutualization); ARB et al. Letter, *supra* note 81, at 8 (''in no event should margin posted for client positions be available for use as part of a clearing agency's default waterfall''); MFA Letter, *supra* note 81, at 7 (''it is crucial that indirect participants are able to post margin on a segregated basis such that their clients are not subject to the credit risk of others (and, likewise, that their funds are not subject to loss mutualization''); *see also* SIFMA AMG Letter, *supra* note 35, at 12–13 (''it will be difficult to support expanding cleared trading in U.S. Treasury securities until we have a framework which ensures customers can access clearing solutions where their margin and collateral will be adequately protected, including from loss mutualization by the clearing agency'').

[391] Letter from Ann Battle, Senior Counsel, Market Transitions, International Swaps and Derivatives Association, Inc., at 2 (Dec. 27, 2022) (''ISDA Letter'').

[392] Proposing Release, *supra* note 14, 87 FR at 64634 (discussing 17 CFR 22.15).

[393] *See, e.g.,* Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 FR 6336, 6339 (Feb. 7, 2012) (describing the LSOC approach and adopting final rules for this approach).

[394] *See* Proposing Release, *supra* note 14, 87 FR at 64634 (discussing CCA Standards Adopting Release, *supra* note 10, 81 FR at 70832).

[395] *Id.*

[396] SIFMA/IIB Letter, *supra* note 37, at 26 (analogizing to the CFTC requirement that DCOs collect at least 100% of margin to cover customer positions, *see* 17 CFR 39.13(g)(8)).

[397] IDTA Letter, *supra* note 66, at 4.

be margined individually or that FICC would be required to collect margin even where a participant's overall position is netted. As discussed in the Proposing Release, the proposed changes would require that a U.S. Treasury securities CCA calculate, collect, and hold margin for positions in U.S. Treasury securities transactions of a direct participant in a U.S. Treasury securities CCA separately from those of customers or other indirect participants that rely on the direct participant to access the covered clearing agency's payment, clearing, or settlement facilities, but this does not mandate the calculation of margin for individual customers, that is, on a gross basis for each customer.[398] A U.S. Treasury securities CCA would have the discretion to collect a single netted amount for each clearing member's customer account as a whole, that is, netting each customer's margin against that of other customers within the overall customer account.[399]

The commenter also discusses the impact of this purported gross margining on small and mid-size broker-dealers who are disproportionately affected by FICC's Excess Capital Premium (''ECP'') charge, which is a margin add-on that collects a premium when a member's VaR charge exceeds the member's Net Capital, net assets or equity capital (as applicable to that member based on its type of regulation).[400] The commenter explained the potential impact of the ECP charge in conjunction with FICC's Sponsored Service, stating that ''the combination of gross margining and ECP currently in use under the Sponsored Model, and what is prescribed in the Proposed Rule, effectively prevents smaller and middle market broker dealers from materially participating in the Treasury market.''[401] The commenter states that the potential effect of the ECP charge would be exacerbated when customer/institutional counterparty margin is included in the calculation, and the surcharge prevents smaller independent broker-dealers from sponsoring institutional counterparties/customers.[402] The commenter states that the proposal must be changed to ensure that the combined effect of gross margining and the ECP does not excessively burden smaller, middle-market broker dealers and their institutional investor customers.[403] The commenter's concerns regarding the interplay between purported required gross margining and the ECP charge rests on the assumption that gross margin is required under the proposal, which, as discussed in the prior paragraph, is not the case. In addition, FICC recently has indicated that it intends to make available client clearing models that do not require gross margin, consistent with its current offerings.[404] Therefore, the Commission does not believe that the proposal needs to be changed to address this issue. With respect to the ECP charge on its own, the Commission is not taking any action with respect to the ECP charge as part of adopting these new requirements. The ECP charge is part of FICC's existing rulebook, and any change to that rulebook would be made pursuant to the proposed SRO rule change process under Section 19(b).[405]

Another commenter stated that the Commission should encourage FICC to hear and consider input from indirect participants regarding potential changes to fee and governance models.[406] The Commission has adopted a requirement that registered clearing agencies must establish, implement, maintain and enforce written policies and procedures reasonably designed to solicit, consider, and document its consideration of the views of participants and other relevant stakeholders of the registered clearing agency regarding material developments in its governance and operations on a recurring basis.[407] Requiring these policies and procedures should ensure that FICC considers input from indirect participants regarding potential changes to fee and governance models.

For the reasons discussed above, the Commission is therefore adopting the amendments to Rule 17ad–22(e)(6)(i) as proposed.

2. Facilitating Access to U.S. Treasury Securities CCAs

Proposed Rule 17ad–22(e)(18)(iv)(C) would require that a U.S. Treasury securities CCA establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, ensure that it has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants, which policies and procedures the U.S. Treasury securities CCA's board of directors reviews annually. In the Proposing Release, the Commission explained that this provision does not prescribe specific methods for market participants to obtain indirect access to a U.S. Treasury securities CCA.[408]

In the Proposing Release, the Commission stated its understanding that indirect participants may have significantly different preferences with respect to how they access and obtain clearing services from direct participants of U.S. Treasury securities CCAs. The Commission explained that this proposed requirement is intended to help ensure that all U.S. Treasury security CCAs review their indirect access models and ensure that they facilitate access to clearance and settlement services in a manner suited to the needs and regulatory requirements of market participants throughout the U.S. Treasury securities market, including indirect participants.[409]

a. Comments Supporting the Commission's Proposed Rule

Commenters generally supported the Commission's attention to the need for appropriate access to the U.S. Treasury securities CCA,[410] and several commenters specifically agreed that the Commission should not prescribe any particular model. One commenter cautioned that dictating a single model of clearing would close off clearing to many market participants, force indirect participants to bear additional clearing costs, increase concentration, reduce competition, and negatively impact market liquidity.[411] In addition, another commenter stated that clearing agencies should have flexibility to innovate in this area.[412] Another commenter stated that it supported the proposal's approach of allowing clearing agencies to engage on potential reforms directly with affected market participants via the clearing agencies' existing rulemaking processes, particularly given the many

[398] Proposing Release, *supra* note 14, 87 FR at 64634.

[399] *Id.*

[400] IDTA Letter, *supra* note 66, at 4; *see also* FICC Rule 4, section 14, *supra* note 19.

[401] IDTA Letter, *supra* note 66, at 5.

[402] IDTA Letter, *supra* note 66, at 5.

[403] IDTA Letter, *supra* note 66, at 6.

[404] *See* DTCC 2023 White Paper, *supra* note 107, at 6 (discussing that the proposal would allow the option to calculate and collect margin associated with customer activity on a gross or net basis depending on the client clearing model selected by the member and stating that FICC would offer options via different access models that would allow those parties to balance the benefits of netting and segregation in different ways).

[405] 15 U.S.C. 78s(b); *see also* 15 U.S.C. 78s(c).

[406] AIMA Letter, *supra* note 81, at 8.

[407] Adopting Release, Clearing Agency Governance and Conflicts of Interest, Exchange Act Release No. 98959 (Nov. 16, 2023), 88 FR 84454 (Dec. 5, 2023) (adopting Rule 17ad–25(j)).

[408] Proposing Release, *supra* note 14, 87 FR at 64635.

[409] *Id.*

[410] MFA Letter, *supra* note 81, at 5.

[411] DTCC/FICC Letter, *supra* note 33, at 14, 18.

[412] ICE Letter, *supra* note 33, at 3.

risks involved and given that various models may be appropriate for different firms and different situations.[413]

Another commenter asked the Commission to retain optionality in access models for U.S. Treasury securities CCAs, because all access models have costs and benefits and different access models may be appropriate for different market participants or commercial arrangements. The commenter agreed with the Commission that neither the Commission nor the rulebook of a U.S. Treasury securities CCA should mandate a single approach to access or require that direct participants that clear for indirect participants offer all possible access models. The commenter stated that a U.S. Treasury securities CCA should provide the flexibility necessary to allow market participants to match access models with optimal use cases, which would encourage maximum market participation from a diverse group.[414]

The Commission agrees with these commenters regarding the need for flexibility in a U.S. Treasury securities CCA's access models. These CCAs should be able to develop models that meet the needs of different market participants, and they should not mandate a single approach to access or require that direct participants that clear for indirect participants offer all possible access models. When considering whether its models meet the needs of different market participants, a U.S. Treasury securities CCA generally should consider certain topics related to its access models, such as their sustainability, the need for additional models or revisions, and potential applicability of models used in other markets, as part of the CCA's consideration of its compliance with this proposed rule. Many commenters also expressed that the Commission should impose additional requirements regarding access to a U.S. Treasury securities CCA. These comments are discussed in the following parts II.B.2.b and c.

b. Comments Regarding the Commission's Authority To Require a CCA To Accept Done Away Transactions

Several commenters stated that the Commission should require that a U.S. Treasury securities CCA obligate its members to accept done-away transactions and/or that the Commission should prohibit anticompetitive practices at CCPs, including prohibiting clearing members from requiring clients to bundle execution and clearing.[415] The commenters argued that the Commission had the statutory authority to implement such a requirement. First, the commenters stated that ''since a clearing requirement cannot be implemented in the Treasury market unless the Commission ensures that both direct and indirect participant have a way to access a clearing agency, the two topics are inseparable and the Commission can rely on the statutory authority underlying the clearing requirement in order to address related access issues, including promoting the prompt and accurate clearance and settlement of Treasury securities.'' [416] Second, the commenters stated that Section 17A of the Exchange Act grants the Commission broad authority to improve access and competitive practices at a clearing agency. The commenters identified the Commission's authority to adopt rules for clearing agencies that are necessary or appropriate in the public interest or otherwise in furtherance of the purposes of this chapter, noting that the purposes of Section 17A include maintaining fair competition among brokers and dealers and scrutinizing clearing agency rules to ensure they do not permit unfair discrimination among participants in the use of the clearing agency and do not impose any burden on competition not necessary or appropriate.[417] Another commenter stated that the Commission has the authority in Section 17A to prohibit anticompetitive practices at all CCAs.[418]

Similarly, one commenter asserted that requiring a direct participant that offers clearing services to indirect participants to accept those indirect participants' done away transactions would be consistent with Exchange Act Section 17A, including, in particular, requirements relating to addressing unnecessary costs, maintaining fair competition, removing impediments to a national market system, and promoting the public interest and protection of investors. The commenter also suggested, at a minimum, that the Commission should require that if a clearing agency permits its direct participants to condition an indirect participant's access to clearing on the indirect participant also executing transactions with the direct participant or its affiliate, the clearing agency must specify in its rules when such conditional access is permitted, which should be limited to circumstances where the clearing agency can show such conditional access is consistent with the Exchange Act.

The commenters cited several provisions of Section 17A in support of their views. First, several commenters referenced language in Section 17A(a)(1), which sets forth the Congressional findings underpinning Section 17A. Specifically, Congress found that, inefficient procedures for clearance and settlement impose unnecessary costs on investors and persons facilitating transactions by and acting on behalf of investors, and that the linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors. These findings, including the reference to ''unnecessary costs,'' do not provide the Commission with authority to adopt rules requiring CCAs to impose particular requirements on their direct participants regarding the direct participants' business models. Instead, they represent Congress' findings about the consequences of the situation at the time Section 17A was adopted in 1975.

Second, the commenters relied upon language in Section 17A(a)(2) setting forth the Congressional direction to the Commission regarding a national system for clearance and settlement. This direction instructs the Commission to take into account, among other things, the maintenance of fair competition among brokers and dealers when facilitating the establishing of a national system for the prompt and accurate clearance and settlement of securities transactions.

Third, commenters relied upon language in Section 17A(b)(3)(F) and (I). These provisions set forth certain requirements for a clearing agency's rules that must be met in order for the Commission to register the clearing agency. In the portions cited by commenters, Section 17A(b)(3)(F) states that the clearing agency's rules should be, among other things, designed to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest, and that they should not be designed to permit unfair discrimination among participants in the use of the clearing agency. Section

[413] ISDA Letter, *supra* note 391, at 3.

[414] SIFMA/IIB Letter, *supra* note 37, at 23.

[415] *See, e.g.,* ARB et al. Letter, *supra* note 81, at 7; MFA Letter II, *supra* note 125, at 3–4; *see also* Citadel Letter, *supra* note 81, at 7.

[416] ARB et al. Letter, *supra* note 81, at 7; *see also* Citadel Letter, *supra* note 81, at 7.

[417] *See* Citadel Letter, *supra* note 81, at 7; ARB et al. Letter, *supra* note 81, at 6.

[418] AIMA Letter, *supra* note 81, at 6.

17A(b)(3)(I) states that the clearing agency's rules should not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.

The type of requirement sought by commenters differs from the requirement to clear eligible secondary market transactions, in that the requirement to clear eligible secondary market transactions relates to transactions that the direct participant already has determined to enter into, based on its own business model.[419] It is not requiring the direct participant to engage in particular transactions or to offer particular business models. By contrast, the commenters' support for a prohibition on anti-competitive practices or a requirement to accept done-away transactions would require clearing agencies to, in turn, require their direct participants to transact with their customers in specific ways and limit their ability to offer certain types of pricing services. As discussed in the Proposing Release, the current client clearing models in place at FICC allow for the submission of done-away transactions and allows non-FICC entities to access the CCA through multiple direct participants, but do not require any direct participant to submit done-away transactions on behalf of other market participants.[420] Therefore, the Commission disagrees that the failure to require the submission of done-away transactions necessarily constitutes ''unfair discrimination,'' as discussed in Section 17A(b)(3)(F). Moreover, in order to encourage market participants to provide services to enable indirect access to central clearing, the Commission believes it is best not to remove the ability of a direct participant of a U.S. Treasury securities CCA to determine what risk it will take with respect to guaranteeing transactions to the CCA. In addition, the Commission would not agree with the commenter that, at this time, the current access models offered by the existing U.S. Treasury securities CCA constitute a burden on competition that is not necessary or appropriate, as discussed in Section 17A(b)(3)(I).

More generally, the Commission disagrees that it should impose a particular access model at this time. The Commission is adopting a number of changes with regard to the method by which CCAs will provide services to the U.S. Treasury market, including the segregation of house and customer margin and the potential ability to use Rule 15c3–3 to rehypothecate customer margin to the CCA to meet margin requirements, and regarding the CCA's obligations with respect to ensuring access. These changes will present both new obligations, but also potentially new business opportunities, for existing direct participants of the U.S. Treasury securities CCA. It is appropriate to allow the U.S. Treasury market to take these new requirements into account, before determining that additional access models are needed. Currently, FICC's models do allow for done-away transactions, and the Commission therefore disagrees that an additional model is a prerequisite to the requirement to clear eligible secondary market transactions.[421]

Finally, a commenter also stated that in order to satisfy the proposal's principles-based access requirement, a clearing agency should have to demonstrate that, for each clearing model it considers necessary to offer to satisfy that access standard, the clearing agency is clearing a material volume of transactions through that model (*i.e.,* if permitting done away clearing is necessary for the clearing agency to satisfy the proposal, then the clearing agency must demonstrate that material volume of done away clearing is actually taking place).[422] The Commission agrees with the commenter that the CCA generally should consider the volumes and proportion of the market that are being centrally cleared through different access models as part of the CCA's consideration of whether its access models are meeting the needs of the market.

c. Other Comments Regarding Access

Other commenters supported additional Commission requirements regarding customer clearing models, particularly with respect to done-away transactions. One commenter stated that the Commission needs to be more prescriptive in directing covered clearing agencies on how they design their access models, disagreeing with the amount of discretion left to the clearing agency and its board. The commenter stated that a successful clearing model must also facilitate and incentivize the clearing of ''done away'' transactions, which will require changes to incentives so that clearing brokers are compensated for facilitating this activity. The commenter identified ''the only viable path'' to a clearing requirement as the Commission's issuing a detailed rulemaking establishing a common clearing model and standards which must be met by any U.S. Treasury securities CCA, including FICC.[423]

The Commission addressed similar comments in the discussion in part II.B.2.b *supra.* As discussed there, the Commission is not prescribing particular access models. The Commission agrees with commenters that a workable done-away model will be critical to this market, to accommodate the increased central clearing that would result from implementation of this rule, and encourages FICC and other market participants to consider how to offer and price the currently available models to ensure that indirect participants can access central clearing.

One commenter stated that the Commission should adopt more robust and direct measures to ensure fair and open access, specifically to make sure that market participants have sufficient access to clearing.[424] This commenter identified three overarching principles or concerns with respect to FICC's current clearing access models ''that must be addressed in any final rule.'' First, the commenter stated that FICC's rules must ensure that an indirect participant can consolidate the clearing of its portfolio in one or a small number of direct participants by requiring a direct participant offering customer clearing to accept transactions executed by the customer with third-party executing firms (that is, to accept ''done-away'' transactions). The commenter stated that under the current FICC rules, indirect participants may be prevented by their clearing firms from clearing these ''done-away'' transactions, which means that the indirect participant often needs to establish a clearing relationship with each executing counterparty, which divides portfolios, increases margin costs and operational complexity, and potentially reduces netting efficiencies.[425] In response to this comment, for the reasons explained above, the Commission is not prescribing particular access models.

Second, the commenter stated that indirect participants should be able to access central clearing models providing for FICC to guarantee settlement of their

[419] Specifically, the definition of an eligible secondary market transaction would simply identify various types of transactions but would not favor or require one over another.

[420] Proposing Release, *supra* note 14, 88 FR at 64635.

[421] In addition, the Commission notes that any additional model would have to be consistent with Section 17A(b)(3)(E), which requires that the rules of a registered clearing agency not impose any schedule of prices, or fix rates or other fees, for services rendered by its participants.

[422] MFA Letter, *supra* note 81, at 9.

[423] SIFMA AMG Letter, *supra* note 35, at 9–10.

[424] MFA Letter, *supra* note 81, at 5; MFA Letter II, *supra* note 125, at 3–4.

[425] MFA Letter, *supra* note 81, at 7; MFA Letter II, *supra* note 125, at 3–4.

transactions, which the commenter asserts is not the case with certain models today including FICC's correspondent and prime broker models. The commenter states that these models do not afford indirect participants the benefits of central clearing because settlement of the transactions they clear through those models remains dependent upon the direct participant because the indirect participant does not face FICC directly. The commenter states that because a clearing mandate would, in practice, force many market participants to contract with FICC direct participants to access clearing (and would disallow various bilateral settlement models), it is critical that the Commission ensure that settlement of such market participants' transactions is not contingent upon circumstances outside the indirect participants' control, including, for example, the solvency of a direct participant.[426]

The Commission recognizes that certain access models offered by FICC may not result in a contractual relationship or direct obligation between FICC and the indirect participant, meaning that FICC itself cannot guarantee settlement of such transactions. The Commission observes that this generally would be the case in any agent clearing relationship in which an indirect participant relies upon a direct participant to submit transactions for clearing on its behalf. For example, customers who access DCOs through an FCM that is a direct participant in the DCO may face exposure if the FCM fails. DCO rules generally require that it take steps to port the customer transactions (*i.e.,* to transfer the customer positions to a new direct participant if the customer's original direct participant defaults), but ultimately retain the ability to close out the transactions if needed, leaving the customer to seek redress from its direct participant.[427] However, this structure still provides the benefits of central clearing to the market as a whole, as described in part II.A.1 *supra,* despite the fact that an indirect participant may face continued exposure to its agent direct participant.

Third, the commenter states that an indirect participant should have the ability (although not the obligation) to fund the margin obligations of the direct participant clearing on its behalf which are attributable to the indirect participant. The commenter states that given that many indirect participants have fiduciary obligations to their own clients, it is crucial that indirect participants are able to post margin on a segregated basis such that their clients are not subject to the credit risk of others (and, likewise, that their funds are not subject to loss mutualization), which would promote systemic risk mitigation by facilitating a defaulter-pays model for clearing by indirect participants.[428] The Commission addressed this issue in its discussion of a similar comment in part II.A.2.a.ii *supra.*

One commenter stated that the Commission should undertake a study of possible models to access U.S. Treasury securities CCAs, including models used in other markets. The commenter stated that current access models may not be suited for all participants or commercial arrangements, for various reasons including FICC membership requirements, operational constraints, and resource costs associated with legal documentation. The commenter stated that implementing a central clearing requirement without a comprehensive analysis regarding the suitability of current models to access U.S. Treasury securities CCAs and whether there is a need for additional models or revisions to current models could drive market participants away from transacting with direct participants or from the Treasury market entirely, if such participants do not believe there is a reasonable means of accessing a CCA. The commenter stated that such study should take place prior to the adoption of any rule requiring additional central clearing.[429] Another commenter suggested that the Commission conduct a holistic review of FICC rules to ensure fair access for all market participants (both direct participants and indirect participants), prior to imposing any requirements.[430]

The Commission does not agree that a formal study or holistic review of access models must occur before adoption of the proposal. As discussed in part II.C.2 *supra,* a U.S. Treasury securities CCA generally should consider these topics, such as the sustainability of current models and the need for additional models or revisions, as well as the potential applicability of models used in other markets, as part of the CCA's consideration of its compliance with this proposed rule. The Commission will have the opportunity to consider these issues as well, in its review of any changes to access models filed pursuant to Section 19(b) of the Exchange Act.

Finally, one commenter stated that the Commission's goal of ensuring access for indirect participants to U.S. Treasury securities CCAs should be balanced against sufficiently robust membership criteria to ensure risk is appropriately managed.[431] The commenter cautioned that any expansion of access to U.S. Treasury securities CCA services should not relax membership requirements essential for appropriate risk management.[432] The commenter stated that less stringent membership requirements in the name of increasing access to central clearing would increase the risk of a participant default, increasing risk to FICC.[433] The Commission agrees with the commenter that membership requirements are essential to a covered clearing agency's risk management. As the Commission stated in the Proposing Release, membership requirements help to guard against defaults of any CCP member, as well as to protect the CCP and the financial system as a whole from the risk that one member's default could cause others.[434] Membership requirements will remain essential even with the requirement to clear eligible secondary market transactions, and U.S. Treasury securities CCAs generally should not relax membership requirements to accommodate such a requirement. A U.S. Treasury securities CCA is subject to Rule 17ad–22(e)(18)(i), (ii), and (iii), which requires that a CCA establish, implement, maintain and enforce written policies and procedures reasonably designed to establish objective, risk-based, and publicly disclosed criteria for participation, which permit fair and open access by direct and, where relevant, indirect participants and other financial market utilities, require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the clearing agency, and monitor compliance with such participation requirements on an ongoing basis. These requirements should help ensure that CCAs are not able to use less stringent membership requirements to comply with the requirement to clear eligible secondary market transactions. Moreover, any changes to FICC's membership

[426] MFA Letter, *supra* note 81, at 7; *see also* MFA Letter II, *supra* note 125, at 4.

[427] *See, e.g.,* ICE Clear Credit Rule 20A–02(a) (describing what happens in the event that FICC determines to effect the closing-out Process for client-related positions of a defaulting participant); CME Group Exchange Rule 802.G(1) (describing the DCO's ability to terminate transactions in a customer futures account).

[428] MFA Letter, *supra* note 81, at 7.

[429] SIFMA/IIB Letter, *supra* note 37, at 24.

[430] MFA Letter II, *supra* note 125, at 5.

[431] SIFMA/IIB Letter, *supra* note 37, at 23.

[432] SIFMA/IIB Letter, *supra* note 37, at 24.

[433] *Id.* at 25.

[434] Proposing Release, *supra* note 14, 87 FR at 64623.

requirements would necessarily encompass a change to FICC's Rules, which would be subject to Commission review and consideration pursuant to Section 19(b) of the Exchange Act.

One commenter stated that the Commission must address other aspects of the Sponsored Service to better promote the objectives of central clearing, with such issues including the treatment of the start leg of the transaction, FICC's obligations to complete settlement of a Sponsored Member's positions in the event of a Sponsoring Member's default, and a Sponsored Member's ability to engage with FICC to address issues arising from repo transactions that have been submitted through sponsored clearing.[435]

With respect to the start leg of the transaction, the commenter stated that, within the Sponsored Service, FICC does not novate the settlement of the start leg of a repo transaction that is submitted for clearing between a Sponsoring Member and a Sponsored Member, although it does novate the end leg of the transaction, meaning that the counterparties continue to be responsible for settlement outside of FICC and bear the risk of a settlement fail vis à vis one another. The commenter also states that the lack of central clearing for the start leg of repo transactions in the Sponsored Service means that a requirement to clear eligible secondary market transactions may not eliminate counterparty credit risk issues to the extent the Commission anticipates, which, in turn, means that the proposal may not increase competition or reduce spreads as the Commission predicted in the Proposing Release.

A U.S. Treasury repo transaction generally encompasses both the start leg and the end leg of a U.S. Treasury repo. The Commission understands that, currently, the only U.S. Treasury securities CCA novates the start legs of many types of repo transactions cleared by the CCA, but does not provide central clearing for the start legs of repo transactions cleared through a particular client clearing access model.

The Commission understands that, contrary to transactions cleared at FICC outside the Sponsored Service, FICC currently does not novate the start legs of same-day settling Sponsored DVP Repos where the Sponsored Member's pre-novation counterparty is its Sponsoring Member (*i.e.,* ''done-with'' Sponsored DVP Repo) or of Repos. The Commission acknowledges that this transaction occurring outside central clearing could somewhat reduce the benefits of central clearing in this limited instance, but the counterparty credit risk arising from the start legs of such transactions are largely addressed by the fact that they usually settle on a delivery-versus-payment basis between the counterparties, meaning that the securities and funds are exchanged simultaneously and resulting in less counterparty credit risk to address. The Commission does not believe that the lack of clearing for the start leg undermines the overall benefits of the requirement to clear eligible secondary market transactions. However, the Commission further understands that FICC has stated that it is able to clear the start leg of any repo transaction and currently does clear the start leg of all repos between two direct participants, the start leg of any Sponsored DVP repo where the Sponsored Member's pre-novation counterparty is a third-party member of FICC (*i.e.,* ''done-away'' from the Sponsoring Member), and any Sponsored DVP Repo where the start leg of such repo is scheduled to settle on some business day in the future (*i.e.,* forward-settling repos).[436] The Commission would consider any proposal to provide additional clearing of repo start legs in particular access models in due course, consistent with its obligations under Section 19(b) of the Exchange Act.

With respect to the completion of settlement of a Sponsored Member's transactions if the Sponsoring Member defaults, the commenter states that neither the Sponsored Bilateral DVP Service nor the Sponsored GC Repo Service compel FICC to complete the settlement of a sponsored member's transactions in the event of a sponsoring member's default, and that this approach is not consistent with the Commission's assumption that central clearing increases the likelihood of settlement.[437] The Commission agrees that in most cases of a Sponsoring Member's default, the ability for the CCA to settle its sponsored transactions likely would tend to minimize market disruption. However, the Commission understands that the current structure of the Sponsored Service, as set forth in FICC's rules, would allow FICC the ability to, potentially, terminate the Sponsored Member's transaction in such circumstances, and that this structure arises from the fact that, by design, the Sponsoring Member serves as the processing agent for all movement of funds and securities for its Sponsored Members. FICC is not able to guarantee that an insolvent Sponsoring Member, which may be subject to the control of another legal entity, such as a bankruptcy trustee, would be able to continue processing such transactions, thereby allowing settlement to occur. This aspect of FICC's rules is consistent with how other central counterparties have addressed the potential termination of customer transactions in the event of their agent's default.[438] The Commission does not believe that the potential for FICC to terminate these transactions, in the unlikely event of a Sponsoring Member default in which it is unable to work with the controlling legal entity, means that the benefits in the Proposing Release would not be, to a great extent, realized. Based on its supervisory knowledge, the Commission is not aware of any instance in which FICC was unable to work with the controlling legal entity for a defaulting member (*i.e.,* a member for which FICC has ceased to act). Therefore, this is an extremely infrequent event and would depend on the facts and circumstances of a particular insolvency.

With respect to the overall structure of the Sponsored Service, one commenter stated that market participants have raised concerns about the ability, as sponsored members, to engage with FICC to address issues arising from repo transactions that have been submitted through sponsored clearing, which, if not addressed, may prove to be a further impediment to the expansion of sponsored repo clearing. The commenter also states that market participants have cited challenges with seeking recourse from FICC in cases where the sponsoring member is in default.[439] As discussed in the prior paragraph, the Commission understands that this is inherent to the design of the Sponsored Service, in that the Sponsoring Member serves as a processing agent for all the Sponsored Member's cleared transactions. FICC's rules address how it would proceed in the event of a Sponsoring Member default, including in the event that it closes out a Sponsored Member's transactions.[440] In the event that FICC chooses to revisit this structure to provide some additional ability for the Sponsored Member to directly access FICC, without relying on its Sponsoring Member, the Commission would consider such a proposal in due course,

[435] ICI Letter, *supra* note 85, at 26–28.

[436] *See* FICC Rule 11, section 2, *supra* note 19; FICC Buyside FAQ, *supra* note 169, at 2–3.

[437] ICI Letter, *supra* note 85, at 27.

[438] *See* note 427 *supra.*

[439] ICI Letter, *supra* note 85, at 27–28.

[440] *See* FICC Rule 3A, section 14(c) (stating that FICC would rely upon Rule 22, section 3 to close out Sponsored Member transactions and to determine the amount owed to or due from a Sponsoring Member), *supra* note 19.

consistent with its obligations under Section 19(b) of the Exchange Act.

d. Final Rule

For the reasons discussed in parts II.B.2.a through c, the Commission is adopting Rule 17ad–22(e)(18)(iv)(C) as proposed. To facilitate compliance with this requirement, a U.S. Treasury securities CCA generally should conduct and document an initial review of its access models and related policies and procedures. As it conducts this review, in view of the critical services it provides, the U.S. Treasury securities CCA generally should seek to provide access in as flexible a means as possible, consistent with its responsibility to provide sound risk management and comply with other provisions of the Exchange Act, the Covered Clearing Agency Standards, and other applicable regulatory requirements. A U.S. Treasury securities CCA generally should consider a wide variety of appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants. To ensure that it considers a sufficiently broad set of perspectives, the U.S. Treasury securities CCA generally should consult with a wide-range of stakeholders, including indirect participants, as it seeks to comply with proposed rule 17ad–22(e)(18)(iv)(C).

A U.S. Treasury securities CCA generally should review and document any instance in which its policies and procedures treat transactions differently based on the identity of the participant submitting the transaction, the fact that an indirect participant is a party to the transaction, or the method of execution, or in any other way, and confirm that any variation in the treatment of such transactions is necessary and appropriate to meet the minimum standards regarding, among other things, operations, governance, and risk management identified in the Covered Clearing Agency Standards. The review by a U.S. Treasury securities CCA's board of directors under proposed Rule 17ad–22(e)(18)(iv)(C) generally should include consideration of whether to establish policies and procedures that enable direct members to submit to the U.S. Treasury securities CCA eligible transactions for clearance and settlement that have been executed by two indirect participants of the U.S. Treasury securities CCA, which could potentially help address some of the concerns potential participants raised about the inability to present ''done away'' trades for clearance and settlement described above. Finally, as part of its consideration, a U.S. Treasury securities CCA generally should consider the volumes and proportion of the market that are being centrally cleared through different access models as part of the CCA's consideration of whether its access models are meeting the needs of the market. To the extent that a U.S. Treasury securities CCA's initial (or any subsequent) review occasions a change to its rules, such U.S. Treasury securities CCA would need to file such changes for Commission review and approval, as appropriate, under section 19(b) of the Exchange Act and Title VIII of the Dodd-Frank Act.[441] The review by a U.S. Treasury securities CCA's board of directors under proposed Rule 17ad–22(e)(18)(iv)(C) generally should include consideration whether the U.S. Treasury securities CCA's written policies and procedures are reasonably designed to ensure appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants.

C. Amendments to Rule 15c3–3a

1. Introduction

The rules adopted above could cause a substantial increase in the margin broker-dealers must post to a U.S. Treasury securities CCA resulting from their customers' cleared U.S. Treasury positions.[442] Currently, Rules 15c3–3 and 15c3–3a do not permit broker-dealers to include a debit in the customer reserve formula equal to the amount of margin required and on deposit at a U.S. Treasury securities CCA. This is because no U.S. Treasury securities CCA has implemented rules and practices designed to segregate the margin and limit it to being used solely to cover obligations of the broker-dealer's customers. Therefore, increases in the amount of margin required to be deposited at a U.S. Treasury securities CCA as a result of the adoption of the Membership Proposal would result in corresponding increases in the need to use broker-dealers' cash and securities to meet these new requirements.[443]

To facilitate implementation of the Membership Proposal, the Commission proposed to amend Rule 15c3–3a to permit margin required and on deposit at a U.S. Treasury securities CCA to be included as a debit item in the customer reserve formula, subject to the conditions discussed below. This new debit item would offset credit items in the Rule 15c3–3a formula and, thereby, free up resources that could be used to meet the margin requirements of a U.S. Treasury securities CCA. The debit item would be reported on a newly created Item 15 of the Rule 15c3–3a reserve formula. The proposed amendments also set forth a number of conditions that would need to be met to include the debit in the reserve formula. As discussed below, these proposed conditions were designed to permit the inclusion of the debit under conditions that would provide maximum protection to the broker-dealer's customers. The goal of the proposed amendments was to facilitate implementation of the Membership Proposal in a way that does not diminish the customer-protection objective of Rules 15c3–3 and 15c3–3a.[444]

The proposed conditions would be set forth in a new Note H to the reserve formula similar to how the conditions for including a debit in the reserve formula with respect to margin required and on deposit at a securities futures clearing agency or DCO are set forth in Note G. The proposed amendments were based, in part, on the conditions in Note G and the requirements in Rules 15c3–3 and 15c3–3b for including a debit with respect to margin required and on deposit at security-based swap clearing agency. The Note G conditions and requirements of Rules 15c3–3 and 15c3–3b similarly were designed to permit the debit under circumstances that provide protection to customers.[445]

Overall, commenters supported the proposal to permit this debit item.[446] Commenters stated that the proposed amendments would make clearing more efficient and free up resources that could be used to meet the CCA's margin requirements, while continuing to protect customer funds.[447] Commenters also stated that the proposal would incentivize central clearing.[448] A commenter stated that the proposal would extend to margin held at a U.S. Treasury securities CCA the same

[441] *See* 15 U.S.C. 78s(b); 17 CFR 240.19b–4; 12 U.S.C. 5465(e).

[442] *See* Proposing Release, *supra* note 14, 87 FR at 63637.

[443] Proposing Release, *supra* note 14, 87 FR at 64637.

[444] Proposing Release, *supra* note 14, 87 FR at 64637.

[445] Proposing Release, *supra* note 14, 87 FR at 64637.

[446] *See* AIMA Letter, *supra* note 81, at 8; CME Letter, *supra* note 81, at 4; DTCC/FICC Letter, *supra* note 33, at 28–29; ICE Letter, *supra* note 33, at 3; MFA Letter, *supra* note 81, at 10; ISDA Letter, *supra* note 391, at 2; SIFMA AMG Letter, *supra* note 35, at 8.

[447] *See* AIMA Letter, *supra* note 81, at 8; MFA Letter, *supra* note 81, at 10; SIFMA/IIB Letter, *supra* note 37, at 27–28.

[448] *See* CME Letter, *supra* note 81, at 4; SIFMA AMG Letter, *supra* note 35, at 8.

treatment as margin posted to other clearing organizations.[449] As a result, this commenter stated that the proposal would facilitate greater access to clearing and eliminate an undue burden on competition. Another commenter—in supporting this aspect of the proposal—stated that it does not make sense that margin cannot be freely rehypothecated from a customer through a broker-dealer to a U.S. Treasury securities CCA without the broker-dealer receiving a beneficial adjustment as part of its customer reserve formula calculation.[450] For greater and more efficient client clearing, another commenter encouraged the Commission to adopt this proposal irrespective of whether the Membership Proposal is adopted.[451]

Commenters did suggest certain modifications to the proposal. The Commission's responses to comments, modifications to the proposed rule text made in response to comments, and the final amendments are discussed below.

2. Credit Items

Cash delivered by a customer to the broker-dealer to be posted by the broker-dealer to a U.S. Treasury securities CCA would be a free credit balance or other credit balance in the customer's securities account. Thus, this cash will need to be included in Item 1 to the Rule 15c3–3a formula. Further, when a broker-dealer uses customer margin securities to borrow funds or execute a securities loan transaction, the firm must put a credit in the formula.[452] The credit items are designed to require the broker-dealer to reserve sufficient funds to be able to retrieve securities that collateralize the borrowed funds or have been loaned. There is not a specific Item in the Rule 15c3–3a formula to include the credit arising from the broker-dealer's use of customers' securities to meet a margin requirement imposed on the broker-dealer by a U.S. Treasury securities CCA. Consequently, the Commission proposed to amend Note B to Item 2 of the Rule 15c3–3a formula to instruct broker-dealers to include as a credit in Item 2 the market value of customers' U.S. Treasury securities on deposit at a U.S. Treasury securities CCA that meets the definition of a ''qualified clearing agency'' in Note H.[453] The Commission did not receive any comments on this aspect of the proposal and is adopting it substantially as proposed.[454]

3. New Debit Item

On the debit side of the formula, the Commission proposed renumbering current Item 15 of the Rule 15c3–3a formula as Item 16.[455] As proposed, new Item 15 would identify as a debit in the Rule 15c3–3a formula margin required and on deposit with a clearing agency registered with the Commission under section 17A of the Exchange Act resulting from the following types of transactions in U.S. Treasury securities in customer accounts that have been cleared, settled, and novated by the clearing agency: (1) purchases and sales of U.S. Treasury securities; and (2) U.S. Treasury securities repurchase and reverse repurchase agreements (together ''customer position margin'').[456] As proposed, this debit item was limited to customer position margin required and on deposit at a clearing agency that clears, settles, and novates transactions in U.S. Treasury securities. Except for the debits identified in current Items 13 and 14 of the Rule 15c3–3a formula, margin required and on deposit at other types of clearing agencies or for other types of securities transactions would not qualify as a debit item under the proposal. Further, this debit item would be limited to customer position margin required and on deposit at the U.S. Treasury securities CCA resulting from U.S. Treasury positions in customer accounts. Margin required and on deposit at the U.S. Treasury securities CCA as result of the broker-dealer's proprietary U.S. Treasury positions could not be included in this debit item. This proposed limitation would effectuate a fundamental aspect of Rule 15c3–3: that customer cash and securities not be used by the broker-dealer to finance its proprietary business activities.

Finally, the debit would be limited to customer position margin *required* and on deposit at the U.S. Treasury securities CCA. This would mean that the broker-dealer could not include in this debit item amounts on deposit at the U.S. Treasury securities CCA that exceed the broker-dealer's margin requirement resulting from its customers' cleared U.S. Treasury securities positions. This limitation is designed to prevent the broker-dealer from artificially increasing the amount of the debit item by depositing cash and securities at the U.S. Treasury securities CCA that are not needed to meet a margin requirement resulting from its customers' U.S. Treasury securities positions. The Commission did not receive any comments on these aspects of the proposal and is adopting them as proposed.[457]

4. Note to New Debit Item

As proposed, Item 15 of the Rule 15c3–3a formula would have a Note H (''Note H'') that sets forth conditions that would need to be met to include the amount of customer position margin required and on deposit at the U.S. Treasury securities CCA as a debit.[458] Each of the conditions in Note H to Item 15 would need to be met for a broker-dealer to include a debit equal to the amount of customer position margin required and on deposit at the U.S. Treasury securities CCA. As discussed below, the Commission is adopting the conditions largely as proposed, with some modifications in response to comments.[459]

a. First Condition—Permitted Collateral

The first condition—set forth in paragraph (a) of Note H—provided that the debit item could be included in the Rule 15c3–3a formula to the extent that the customer position margin is in the form of cash or U.S. Treasury securities and is being used to margin U.S. Treasury securities positions of the customers of the broker-dealer that are cleared, settled, and novated at the U.S. Treasury securities CCA.[460] The objective was to limit the assets underlying the debit item to the safest and most liquid instruments, given that the debit item would offset credit items (cash owed to customers).[461] As

[449] *See* DTCC/FICC Letter, *supra* note 33, at 28.

[450] *See* SIFMA AMG Letter, *supra* note 35, at 8.

[451] *See* ISDA Letter, *supra* note 391, at 2.

[452] *See* Items 2 and 3 to Rule 15c3–3a.

[453] *See* Proposing Release, *supra* note 14, 87 FR at 64638, n. 232.

[454] *See* Note B to Item 2 of Rule 15c3–3a, as adopted. The phrase ''customers' U.S. Treasury securities'' in the note—as proposed—has been replaced with the more generic phrase ''customers' securities'' in the note, as adopted. *Id.* This modification conforms the note to modifications discussed below that expand the type of customer collateral that can be posted to the U.S. Treasury securities CCA. As proposed, the broker-dealer was limited to posting customer cash or U.S. Treasury securities. *See* Proposing Release, *supra* note 14, 87 FR at 64638. This provision is being modified to include any securities accepted as margin by the U.S. Treasury securities CCA, subject to certain conditions. *See* Note H(a)(1) to Item 15, as adopted.

[455] Current Item 15 is where the broker-dealer reflects the amount, if any, that total credits exceed total debits.

[456] *See* Proposing Release, *supra* note 14, 87 FR at 64637.

[457] *See* Item 15 of the Rule 15c3–3a formula, as adopted.

[458] Proposing Release, *supra* note 14, 87 FR at 64638–40.

[459] *See* Note H to Rule 15c3–3a, as adopted.

[460] Proposing Release, *supra* note 14, 87 FR at 64638.

[461] *See, e.g.,* 17 CFR 240.15c3–3(e) (limiting the assets that can be deposited into the customer reserve account to cash and qualified securities); 17 CFR 240.15c3–3(a)(6) (defining the term ''qualified security'' to mean a security issued by the United

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discussed above, the liquidity of the debit items protects the customers whose cash or securities are used to finance or facilitate customer transactions.

In response to the proposed first condition, commenters stated that the Commission should expand the types of securities that could be used to meet the customer position margin requirement.[462] Specifically, one commenter stated that the use of the debit should not be limited to margin in the form of cash or Treasury securities.[463] This commenter stated that FICC accepts additional securities for clearing fund deposits, including eligible obligations of U.S. agencies or government sponsored entities and eligible mortgage-backed securities.[464] The commenter also stated that the Commission found—in the context of approving a FICC rule change—that the expanded scope of acceptable forms of clearing fund collateral deposits would ''better enable FICC to assure the safeguarding of securities and funds in its custody or control or for which it is responsible,'' and therefore was consistent with the requirements of the Exchange Act and other governing regulations.[465]

In response to comments, the Commission is modifying paragraph (a) of Note H to permit ''qualified customer securities'' to be used to meet the customer position margin requirement in addition to cash and U.S. Treasury securities.[466] The term ''qualified customer securities'' is defined to mean securities of a customer of the broker-dealer (other than U.S. Treasury securities) that are held in custody by the broker-dealer for the customer and that under the rules of the U.S. Treasury securities CCA are eligible to be used to margin U.S. Treasury securities positions of the customer that are cleared, settled, and novated by the CCA.[467] Therefore, a broker-dealer may post cash, U.S. Treasury securities, and qualified customer securities (*i.e.,* securities other than U.S. Treasury securities that are accepted by the U.S. Treasury securities CCA) to meet a customer position margin requirement.

As proposed, paragraph (b) of Note H set forth the second, third, and fourth conditions that would need to be met to include the amount of customer position margin required and on deposit at the U.S. Treasury securities CCA as a debit item.[468]

b. Second Condition—Customer Position Margin

The second condition—set forth in paragraph (b)(1) of Note H—provided that the customer position margin must consist of cash owed to the customer of the broker-dealer or U.S. Treasury securities held in custody by the broker-dealer for the customer that was delivered by the broker-dealer to meet to meet a margin requirement resulting from that customer's U.S. Treasury securities positions cleared, settled, and novated at the U.S. Treasury securities CCA and not for any other customer's or the broker-dealer's U.S. Treasury securities positions cleared, settled, and novated at the U.S. Treasury securities CCA.[469] In sum, to meet this condition, the broker-dealer would need to: (1) use customer assets exclusively to meet the customer position margin requirement; (2) use a particular customer's assets exclusively to meet the amount of the customer position margin requirement resulting from that customer's cleared U.S. Treasury securities positions; and (3) have delivered the customer's assets to the U.S. Treasury securities CCA.

The objective of the first component of the second condition—the need to use customer assets exclusively—was to segregate the customer assets being used to meet the customer position margin requirement from the broker-dealer's proprietary assets.[470] Additional conditions—under the proposal—provided that the U.S. Treasury securities CCA must hold the assets being used to meet the customer position margin requirement in an account of the broker-dealer that is segregated from any other account of the broker-dealer and is identified as being held for the exclusive benefit of the broker-dealer's customers.[471] The first prong of the condition was designed to ensure that only customer assets are held in the account.

The objective of the second component of the second condition—the need to use a particular customer's assets exclusively to meet the amount of the customer position margin requirement resulting from that customer's cleared U.S. Treasury securities positions—was to avoid the use of one customer's assets to meet another customer's margin requirement.[472] For example, FICC's Sponsored Member program allows its members to sponsor a person's (*i.e.,* a Sponsored Member's) U.S. Treasury securities transactions for clearance and settlement. FICC interacts solely with the sponsoring member as processing agent for purposes of the day-to-day satisfaction of the Sponsored Member's obligation to or from FICC, including the Sponsored Member's cash and securities settlement obligations. However, FICC calculates a separate margin requirement for each Sponsored Member's trading activity and the sum of each sponsored member's margin calculation is the aggregate margin requirement that must be met by the sponsoring member. Further, this margin is held in an omnibus account that is separate from the account that holds the Sponsoring Member's net margin obligation for non-sponsored securities transactions. In this scenario, the U.S. Treasury securities CCA's margin calculations and resulting requirements can be traced to a specific customer's cleared U.S. Treasury securities positions. Consequently, the broker-dealer would be able to allocate the amount of the U.S. Treasury securities CCA's daily customer position margin requirement attributable to a specific customer. Under this component of the second condition, the broker-dealer would need to deliver cash or U.S. Treasury securities belonging to that specific customer to meet the amount of the U.S. Treasury securities CCA's customer position margin requirement resulting from that customer's cleared U.S. Treasury securities positions. This would mitigate the risk to all the broker-dealer's customers by limiting when their assets can be used to meet the U.S.

States or a security in respect of which the principal and interest are guaranteed by the United States).

[462] *See* ISDA Letter, *supra* note 391; SIFMA/IIB Letter, *supra* note 37, at 29.

[463] *See* SIFMA/IIB Letter, *supra* note 37, at 29.

[464] *See* SIFMA/IIB Letter, *supra* note 37, at 29.

[465] *See* SIFMA/IIB Letter, *supra* note 37, at 29 (citing Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving Proposed Rule Change to Modify its Rules to Diversify and Standardize Clearing Fund Collateral Requirements Across the Divisions to Improve Liquidity and Minimize Risk for its Members, Exchange Act Release No. 54969 (Dec. 26, 2006), 71 FR 77837, 77838 (Dec. 27, 2006)).

[466] *See* Rule 15c3–3a, Note H(a)(1), as adopted. To implement this modification, paragraph (a) of Note H is being divided into subparagraphs (a)(1) and (2). Subparagraph (a)(1) identifies the types of collateral that can be used to meet the customer position margin requirement (*i.e.,* cash, U.S. Treasury securities, and qualified customer securities), and subparagraph (a)(2) contains the text that provides that the collateral must be used to margin U.S. Treasury securities positions of the customers of the broker-dealer that are cleared, settled, and novated by the qualified clearing agency, as was proposed. *See* Rule 15c3–3a, Note H(a)(1) and (2), as adopted.

[467] *See* Rule 15c3–3a, Note H(c), as adopted.

[468] *See* Note H(b)(1) through (3) of Rule 15c3–3a, as proposed.

[469] Proposing Release, *supra* note 14, 87 FR at 64638.

[470] Proposing Release, *supra* note 14, 87 FR at 64638.

[471] *See* Proposing Release, *supra* note 14, 87 FR at 64639–40 (discussing these additional conditions). As discussed below, the Commission is adopting these additional conditions, substantially as proposed.

[472] Proposing Release, *supra* note 14, 87 FR at 64638.

Treasury securities CCA's customer position margin requirement.

The objective of the third component of the second condition—that the broker-dealer had delivered the customer's assets to the U.S. Treasury securities CCA—was to address the potential that a customer may use more than one broker-dealer to engage in U.S. Treasury securities transactions.[473] In this case, two or more broker-dealers may be subject to customer position margin requirements of the U.S. Treasury securities CCA resulting from the customer's cleared U.S. Treasury securities positions. The intent was to prevent a broker-dealer from including as a debit the amount of customer position margin that another broker-dealer delivered to the U.S. Treasury securities CCA with respect to U.S. Treasury securities positions of a customer of both the broker-dealers. The amount that a given broker-dealer's debit items can offset its credit items should be limited to the amount of customer position margin it delivered to the U.S. Treasury securities CCA. Otherwise, the customers of the broker-dealer would be put at risk for transactions effected by another broker-dealer.

Two commenters stated that broker-dealers should not be limited to posting the same assets received from its customer to a U.S. Treasury securities CCA.[474] One stated that in many instances, broker-dealers post proprietary assets to a clearing agency on behalf of a customer given timing and operational constraints.[475] The other commenter stated that FICC collects clearing fund margin on a faster timeline than broker-dealers are able to collect margin from their customers.[476] More specifically, this commenter stated that FICC collects margin from direct participants on an overnight and intraday basis, while most broker-dealers generally provide their customers with a full business day to post margin. As a result, this commenter stated that most broker-dealers generally post clearing fund margin to FICC and then subsequently collect that clearing fund margin from their customers. One of these commenters stated that posting proprietary collateral is permissible in the context of margin posted to the other clearing agencies and should also be permissible with respect to margin posted to a U.S. Treasury Securities CCA.[477] Finally, one of these commenters stated that not allowing the use of proprietary assets would significantly undercut the benefits to the Rule 15c3–3a proposal.[478]

In response to comments, the Commission is modifying Note H under the final rule to permit broker-dealers to elect to deliver proprietary U.S. Treasury securities to meet a margin requirement of a customer resulting from that customer's U.S. Treasury securities positions cleared, settled, and novated at the qualified clearing agency.[479] This will address the concern raised by commenters that the U.S. Treasury securities CCA may call for margin from a broker-dealer arising from a customer's cleared U.S. Treasury security transaction before the customer is able to deliver the requisite margin to the broker-dealer. However, the final rule places strict limits on this requirement. First, the broker-dealer must use proprietary U.S. Treasury securities for this purpose and, therefore, it cannot use other types of securities collateral acceptable to the U.S. Treasury securities CCA.[480] For example, as discussed above, a broker-dealer can post qualified customer securities (which are securities other than U.S. Treasury securities acceptable to the U.S. Treasury securities CCA), provided the customer has delivered them to the broker-dealer. However, the broker-dealer could not post these types of securities if they belong to the broker-dealer. This is designed to ensure that the safest most liquid securities of the broker-dealer are commingled with the customer cash and securities in the account.[481] It also will prevent the broker-dealer from using customer cash deposited with the broker-dealer to purchase less liquid securities and post them to the U.S. Treasury securities CCA to meet a customer position margin requirement.

Second, the broker-dealer's ability to post proprietary U.S. Treasury securities is limited to circumstances where the broker-dealer did not owe the customer or hold in custody for the customer sufficient cash, U.S. Treasury securities, and/or qualified customer securities to meet a margin requirement resulting from that customer's U.S. Treasury securities positions cleared, settled, and novated at the qualified clearing agency at the time the margin requirement arose.[482] Thus, the broker-dealer is limited to using proprietary U.S. Treasury securities to address the specific concern raised by commenters: a timing mismatch between when margin must be delivered to the U.S. Treasury securities CCA and when the broker-dealer receives the margin from the customer.

Third, the broker-dealer must call for the customer to deliver a sufficient amount of cash, U.S. Treasury securities, and/or qualified customer securities to meet the margin requirement on the day the margin requirement arose and must receive a sufficient amount of cash, U.S. Treasury securities, and/or qualified customer securities to meet the margin requirement by the close of the next business day after the margin requirement arose.[483] Thus, the broker-dealer can deliver proprietary U.S. Treasury securities to meet a margin call related to its customers' transactions as an interim step before receiving the associated margin from its customer no later than the close of the next business day. The objective is to narrowly confine the ability to use proprietary U.S. Treasury securities and thereby promote the final rule's objective of using a specific customer's collateral to meet a customer position margin requirement generated by that customer's cleared U.S. Treasury securities transactions.

[473] Proposing Release, *supra* note 14, 87 FR at 64638–39.

[474] *See* DTCC/FICC Letter, *supra* note 33, at 32; SIFMA/IIB Letter, *supra* note 37, at 30.

[475] *See* SIFMA/IIB Letter, *supra* note 37, at 30.

[476] *See* DTCC/FICC Letter, *supra* note 33, at 32.

[477] *See* SIFMA/IIB Letter, *supra* note 37, at 30.

[478] *See* DTCC/FICC Letter, *supra* note 33, at 32.

[479] *See* Note H(b)(1)(iii) of Rule 15c3–3a, as adopted. To implement this modification, paragraph (b)(1) is being divided into subparagraphs (b)(1)(i) through (iii). Subparagraphs (b)(1)(i) and (ii) contain the proposed components of the second condition that the broker-dealer can use cash owed to a customer or U.S. Treasury securities held in custody by the broker-dealer for the customer to meet a margin requirement of the U.S. Treasury securities CCA resulting from that customer's U.S. Treasury securities transactions cleared at the CCA, with the modifications that cash and securities are now addressed in a separate subparagraphs (subparagraphs (b)(1)(i) and (ii), respectively) and qualified customer securities held in custody by the broker-dealer for the customer also can be used for this purpose. *See* Note H(b)(1)(i) and (ii) of Rule 15c3–3a, as adopted. Subparagraph (b)(1)(iii) contains the new provision—discussed below—permitting the use of the broker-dealer's proprietary securities, subject to certain conditions. *See* Note H(b)(1)(iii) of Rule 15c3–3a, as adopted.

[480] *See* prefatory text of Note H(b)(1)(iii) of Rule 15c3–3a, as adopted.

[481] *See supra* note 461; *see also* Section I. Introduction (describing the critical and unique role that U.S. Treasury securities play a critical in the U.S. and global economy) and Section IV.B. Economic Analysis—Baseline (describing U.S. Treasury securities and repos, and clearance and settlement of these positions); *see also* 17 CFR 240.15c3–1(c)(2)(vi)(A)(*1*) (prescribing haircuts under the broker-dealer net capital rule for a security issued or guaranteed as to principal or interest by the United States or any agency thereof ranging from 0 to 6%).

[482] *See* Note H(b)(1)(iii)(A) of Rule 15c3–3a, as adopted.

[483] *See* Note H(b)(1)(iii)(B) and (C) of Rule 15c3–3a, as adopted.

c. Third Condition—Rules of U.S. Treasury Securities CCA

The third condition for including customer position margin as a debit in the Rule 15c3–3a formula was set forth in proposed paragraph (b)(2) of Note H.[484] Under this condition, the customer position margin needed to be treated in accordance with rules of the U.S. Treasury securities CCA designed to protect and segregate the customer position margin, and the U.S. Treasury securities CCA and broker-dealer would need to be in compliance with those rules (as applicable). As proposed, paragraph (b)(2) of Note H identified five sets of rules that would need to be implemented by the U.S. Treasury securities CCA.[485]

The first rule set—identified in paragraph (b)(2)(i) of Note H—provided that the customer position margin must be treated in accordance with rules requiring the qualified U.S. Treasury securities CCA to calculate a separate margin amount for each customer of the broker-dealer and the broker-dealer to deliver that amount of margin for each customer on a gross basis.[486] As discussed above, a component of the second condition—set forth in paragraph (b)(1) of Note H, as proposed—was that the broker-dealer use a particular customer's assets exclusively to meet the amount of the customer position margin requirement resulting from that customer's cleared U.S. Treasury securities positions.[487] The proposal that the U.S. Treasury securities CCA implement these margin calculation rules was designed to facilitate that condition. This would allow the broker-dealer to allocate the amount of the customer position margin requirement attributable to each of its customers. In addition, the rules needed to require the broker-dealer to deliver the margin amount calculated for each customer on a gross basis. This would mean that the risk of one customer's positions could not be offset by the risk of another customer's positions in determining the amount of customer position margin the broker-dealer would need to have on deposit at the U.S. Treasury securities CCA. As a result, the broker-dealer would not be able to deliver assets belonging to one customer to meet the margin requirement of another customer.

[484] Proposing Release, *supra* note 14, 87 FR at 64639.

[485] Proposing Release, *supra* note 14, 87 FR at 64639–40.

[486] Proposing Release, *supra* note 14, 87 FR at 64639.

[487] Proposing Release, *supra* note 14, 87 FR at 64638–39.

In response to this aspect of the proposal, a commenter suggested that the Commission modify the requirement to be consistent with the requirements of Item 13 and Note F to the reserve formula which covers margin required and on deposit with the Options Clearing Corporation (''OCC'') for all option contracts written or purchased in customer accounts.[488] In particular, the permitted debit under Item 13 and Note F is based on a margin amount posted to OCC that is calculated on a net basis across all the broker-dealer's customers with listed options positions. This is different than the proposal to permit a debit with respect to margin posted to a U.S. Treasury securities CCA in that the margin amount needed to be calculated for each customer on a gross basis and that gross amount to be delivered to the CCA. For the reasons discussed below, the Commission is retaining the requirement that the U.S. Treasury securities CCA implement rules requiring that the margin be calculated and delivered on a gross basis for each customer.[489]

Listed options cleared at the OCC are subject to customer margin requirements of the broker-dealer SROs.[490] Under Rule 15c3–3, a broker-dealer can use customer cash or securities that are serving as margin for listed options positions under SRO margin rules, subject to certain limitations.[491] If the margin is in the form of cash, the broker-dealer needs to treat it as an ''other credit balance'' in the customer's securities account and include it in Item 1 in the Rule 15c3–3a reserve formula.[492] The broker-dealer can use this cash to finance a margin loan to another customer, to borrow securities to effect a short sale of another customer, or to deliver it to the OCC to meet a margin requirement for other customers' listed options positions cleared at the OCC.[493] In each case, the ''other credit balance'' on the credit side of the Rule 15c3–3a reserve formula is offset by a corresponding debit balance on the debit side of the formula. If the margin is in the form of securities, the broker-dealer can rehypothecate them to obtain a bank loan, to deliver on a securities loan, or to meet a margin requirement of the OCC.[494] The broker-dealer's use of the customer's margin securities generates a credit in the Rule 15c3–3a reserve formula that generally is offset by debits in the formula stemming from the broker-dealer's financing of the customer's margin loan, facilitating the customer's short sale, or delivering margin to the OCC to meet margin requirements arising from customer options positions.[495]

SRO options margin requirements help to protect the broker-dealer from the consequences of a customer default, because the required equity in a customer's account (because of the SRO option margin requirements) serves to over-collateralize an option customer's obligations to the broker-dealer. This buffer also protects the customers whose cash was used to facilitate the broker-dealer's financing of securities transactions of other customers (*i.e.,* margin loans, short sales, or to meet a margin requirement for other customers' listed options positions cleared at the OCC). For example, if the broker-dealer fails, the customer debits, because they generally are over-collateralized, should be attractive assets for another broker-dealer to purchase or, if not purchased by another broker-dealer, they should be able to be liquidated to a net positive

[488] *See* DTCC/FICC Letter, *supra* note 33, at 31.

[489] *See* Note H(b)(2)(i) of Rule 15c3–3a, as adopted.

[490] *See, e.g.,* FINRA Rule 4210(f)(2); Cboe Rules 10.1 *et seq.; see also* 12 CFR 220.12(f). Generally, buyers of options (*i.e.,* long options) that expire in nine months or less must pay for these positions in full. Margin requirements for option writers (*i.e.,* short options) are complex and are not the same for every type of underlying security or component value. SRO rules generally require an option writer to post 100% of the options proceeds to the margin account, plus a specific percentage of the market value of the underlying securities or component value as options margin (*e.g.,* 20% for an option on a single equity security). SRO rules also recognize certain spread positions. Finally, equity-based options also are eligible positions under SRO securities portfolio margin rules. *See, e.g.,* FINRA Rule 4210(f)(2) and (g); Cboe Rules 10.3 and 10.4.

[491] *See* 17 CFR 240.15c3–3.

[492] *See* 17 CFR 240.15c3–3a, Item 1.

[493] *See* 17 CFR 240.15c3–3(e)(2) (providing, in pertinent part, that a broker-dealer must not accept or use any of the amounts under items comprising Total Credits under the Rule 15c3–3a reserve formula except for the specified purposes indicated under items comprising Total Debits under the formula); 17 CFR 240.15c3–3a, Items 10, 11, and 13.

[494] *See* 17 CFR 240.15c3–3(a)(3), (4), and (5) (defining, respectively, the terms ''fully paid securities,'' ''margin securities,'' and ''excess margin securities''); 17 CFR 240.15c3–3(b)(1) (providing, in pertinent part, that a broker-dealer shall promptly obtain and shall thereafter maintain the physical possession or control of all fully-paid securities and excess margin securities carried by a broker-dealer for the account of customers but not applying this requirement to margin securities).

[495] *See* 17 CFR 240.15c3–3a, Items 2 and 3 (requiring, respectively, credits to be added to the Rule 15c3–3a reserve formula for: (1) monies borrowed collateralized by securities carried for the accounts of customers; and (2) monies payable against customers' securities loaned); 17 CFR 240.15c3–3a, Items 10, 11, and 13 (requiring, respectively, debits to be added to the reserve formula for: (1) debit balances in customers' cash and margin accounts; (2) securities borrowed to effectuate short sales by customers; and (3) margin required and on deposit with the Options Clearing Corporation for all option contracts written or purchased in customer account).

equity.[496] The proceeds of the debits sale or liquidation can be used to repay the customer cash used to finance the customer obligations. This cash plus the funds and/or U.S. government securities held in the customer reserve account should equal or exceed the total amount of customer credit items (*i.e.,* the total amount owed by the broker-dealer to its customers).[497]

In contrast, although SRO margin rules require the collection of margin for certain transactions in U.S. Treasury securities, transactions between dealers and institutional customers generally are subject to a variable ''good-faith'' margin standard, which the Commission understands—based on its supervisory experience—can often result in a broker-dealer collecting less (or no) margin collateral from a customer with respect to transactions in U.S. Treasury securities.[498] Consequently, the SRO margin requirements for U.S. Treasury securities transactions do not result in the same levels of over-collateralization that the SRO margin requirements for listed options impose and, therefore, would not provide the same level protection to the broker-dealer's customers. Accordingly, modifying the proposal to align it with how margin posted to the OCC is treated would diminish an important protection that the proposal is designed to achieve in terms of protecting the broker-dealer's customers: preventing one customer's cash or securities to be used to meet a margin requirement of the U.S. Treasury securities CCA resulting from another customer's cleared U.S. Treasury securities transactions. This protection is achieved through the proposed requirements that the U.S. Treasury securities CCA calculate a gross margin amount for each of the broker-dealer's customers and that the broker-dealer must meet that gross margin amount with cash or securities owned by the customer whose U.S. Treasury securities transactions generated the margin requirement.[499]

Moreover, cash delivered by a customer to the broker-dealer to be posted by the broker-dealer to a U.S. Treasury securities CCA generally would be a free credit balance, given the minimal margin requirements of the SROs with respect to the types of U.S. Treasury securities transactions that would be cleared (*i.e.,* the cash would not have the same status as cash serving as margin for a listed options position under the SRO margin rules). For the same reason, securities delivered by a customer to the broker-dealer to be posted by the broker-dealer to a U.S. Treasury securities CCA generally would be fully paid securities (*i.e.,* they would not have the same status as margin securities serving as margin for listed options under the SRO margin rules). The proposal—consequently—set forth strict limitations on the broker-dealer's ability to use the cash or securities to meet a margin requirement the U.S. Treasury securities CCA imposed on the broker-dealer. These limitations were designed to restrict the broker-dealer's ability to use the customer cash and securities—and thereby protect them—given that these customer assets generally otherwise would need to be treated as a free credit balance or fully paid securities in the customer's securities account.

For these reasons, the Commission is retaining the requirement that the U.S. Treasury securities CCA implement rules requiring that the margin be calculated and delivered on a gross basis for each customer.[500] Therefore, the Commission is adopting the gross margining requirement, as proposed.

The second rule set—identified in paragraph (b)(2)(ii) of Note H—provided that the customer position margin be treated in accordance with rules requiring that the U.S. Treasury securities CCA be limited to investing it in U.S. Treasury securities with a maturity of one year or less.[501] The objective was to limit the assets underlying the debit item to the safest and most liquid instruments. The Commission did not receive comments on this aspect of the proposal and is adopting it as proposed.[502]

However, one commenter sought clarification that the conditions of Rule 15c3–3 would not preclude a U.S. Treasury securities CCA from entering into a repurchase transaction using customer cash margin, so long as the purchased securities under such repurchase transaction consist of U.S. Treasury securities held in a segregated account for the benefit of customers and satisfy certain other requirements.[503] The commenter stated that the proposal was not clear whether the conditions related to Rule 15c3–3 would preclude a U.S. Treasury securities CCA from using customer margin for liquidity purposes, and that there are ways to use customer margin for liquidity purposes that ensure that cash or Treasury securities having a value equal to or exceeding the posted customer margin remain in a segregated account for the benefit of customers.[504] The commenter further explained that if a U.S. Treasury securities CCA could not use customer margin as a qualifying liquid resource, for purposes of its obligations under Rule 17ad–22(e)(7), it might need to obtain liquidity resources from other sources, which could mean increasing certain requirements applicable to direct participants or increasing the cash margin requirements applicable to direct participants and/or other indirect participants.[505] Finally, the commenter suggested adding language to Note H that a CCA's use of cash margin for liquidity purposes would not cause item 15 to cease to apply, so long as (i) the CCA only uses the cash margin after it determines that it does not have the

[496] The attractiveness of the over-collateralized debits facilitates the bulk transfer of customer accounts from a failing or failed broker-dealer to another broker-dealer.

[497] *See Net Capital Requirements for Broker-Dealers; Amended Rules,* Exchange Act Release No. 18417 (Jan. 13, 1982), 47 FR 3512, 3513 (Jan. 25, 1982) (''The alternative approach is founded on the concept that, if the debit items in the Reserve Formula can be liquidated at or near their contract value, these assets along with any cash required to be on deposit under the [customer protection] rule, will be sufficient to satisfy all liabilities to customers (which are represented as credit items in the Reserve Formula).'').

[498] SRO rules provide for the collection of margin for cash U.S. Treasury transactions. *See, e.g.,* FINRA Rule 4210(e)(2)(A) (setting forth margin requirements for U.S. Treasury securities and certain other bonds). However, these rules do not necessarily apply to exempt accounts. *See* FINRA Rule 4210(e)(2)(F) (permitting FINRA-member broker-dealers to not collect margin for certain good faith securities held in exempt accounts and providing for a capital charge for any uncollected mark-to-market loss); FINRA Rule 4210(a)(13) (defining exempt account). Although SRO rules also require a broker-dealer to establish procedures to review limits and types of credit extended to all customers, formulate their own ''house''' margin requirements, and review the need for instituting higher margin requirements than are required for individual securities or customer accounts, based on the Commission's supervisory experience, the resulting customer margin collection is often less than that required pursuant to FICC's margin model. *See* Proposing Release, *supra* note 14, 87 FR at 64627 n.171.

[499] As discussed above, under the final rule, the broker-dealer can use proprietary U.S. Treasury securities in limited circumstances and under strict conditions to meet a margin requirement of the U.S. Treasury securities CCA resulting from a particular customer's cleared U.S. Treasury securities transactions. *See* Note H(b)(1)(iii) of Rule 15c3–3a.

[500] *See* Note H(b)(2)(i) of Rule 15c3–3a, as adopted.

[501] *See* Proposing Release, *supra* note 14, 87 FR at 64639.

[502] *See* Note H(b)(2)(ii) of Rule 15c3–3a, as adopted.

[503] Letter from Brian Steele, Managing Director, President of DTCC Clearing Agency Services, Head of Global Business Operations, and Laura Klimpel, General Manager of FICC, Head of SIFMU Business Development, at 1–2 (Nov. 10, 2023) (''DTCC/FICC Letter II'').

[504] *Id.* at 2. The commenter stated that a U.S. Treasury securities CCA could enter into a repurchase transaction with a broker-dealer, as agent for its customers, pursuant to which the broker-dealer purchases U.S. Treasury securities using customer cash margin and holds such securities in a segregated account of the broker-dealer. *Id.*

[505] *Id.* at 5.

ability to obtain liquidity from other resources in order to satisfy the cash payment obligations that were originally due to be paid by a defaulting member, (ii) in connection with such usage, the CCA deposits into and maintains an account of the broker-dealer that generally satisfies the requirements for a special reserve account U.S. Treasury securities or cash that at all relevant times have a value of no less than the value amount of used cash, and (iii) the CCA replenishes the cash margin promptly after the liquidity need is satisfied.[506]

The objective of the conditions for including the debit in the customer reserve formula is to provide maximum protection to the cash or securities delivered to the U.S. Treasury securities CCA. The commenter provides a summary of potential protections that could be put in place to ensure that—if a U.S. Treasury securities CCA uses cash in the broker-dealer's segregated account for liquidity purposes—the cash will be protected through collateral comprising U.S. Treasury securities deposited into the account and other measures. The Commission would need to review a more detailed plan for how the cash will be used and customers protected before taking any action on any formal request. In this regard, were FICC to file proposed rule changes that provide specific details regarding the protections and how cash will be used, the Commission will consider those proposed rule changes at that time consistent with the statutory standard for approval under Section 19(b).

The third rule set—identified in paragraph (b)(2)(iii) of Note H—provided that the customer position margin be treated in accordance with rules designed to address the segregation of the broker-dealer's account at the U.S. Treasury securities CCA that holds the customer position margin and set strict limitations on the U.S. Treasury securities CCA's ability to use the margin.[507] The required rules were modeled on the requirements for a broker-dealer to include a debit with respect to margin delivered to a security-based swap clearing agency.[508] In particular, the note provided that the customer position margin needed to be treated in accordance with rules requiring that it must be held in an account of the broker-dealer at the U.S. Treasury securities CCA that is segregated from any other account of the broker-dealer at the U.S. Treasury securities CCA and that is:

- Used exclusively to clear, settle, novate, and margin U.S. Treasury securities transactions of the customers of the broker-dealer;
- Designated ''Special Clearing Account for the Exclusive Benefit of the Customers of [name of broker-dealer]'';
- Subject to a written notice of the U.S. Treasury securities CCA provided to and retained by the broker-dealer that the cash and U.S. Treasury securities in the account are being held by the U.S. Treasury securities CCA for the exclusive benefit of the customers of the broker-dealer in accordance with the regulations of the Commission and are being kept separate from any other accounts maintained by the broker-dealer or any other clearing member at the U.S. Treasury securities CCA; and
- Subject to a written contract between the broker-dealer and the U.S. Treasury securities CCA which provides that the cash and U.S. Treasury securities in the account are not available to cover claims arising from the broker-dealer or any other clearing member defaulting on an obligation to the U.S. Treasury securities CCA or subject to any other right, charge, security interest, lien, or claim of any kind in favor of the U.S. Treasury securities CCA or any person claiming through the U.S. Treasury securities CCA, except a right, charge, security interest, lien, or claim resulting from a cleared U.S. Treasury transaction of a customer of the broker-dealer effected in the account.

The objective was to protect the customer position margin that the broker-dealer deposits with the U.S. Treasury securities CCA to margin its customers' U.S. Treasury security positions by isolating it from any other assets of the broker-dealer at the U.S. Treasury securities CCA and to prevent it from being used to cover any obligation other than an obligation of the broker-dealer's customer resulting from a U.S. Treasury transaction cleared, settled, and novated in the account.[509] Further, the account designation and written notice requirements were designed to alert creditors of the broker-dealer and U.S. Treasury securities CCA that the assets in this account are not available to satisfy any claims they may have against the broker-dealer or the U.S. Treasury securities CCA. The written contract requirement was designed to limit the U.S. Treasury securities CCA's rights to use the customer position margin for any purpose other than an obligation of the broker-dealer's customers. For example, the assets in the account could not be used to cover an obligation of the broker-dealer to the U.S. Treasury securities CCA if the broker-dealer defaults on the obligation. Similarly, the assets in the account could not be used to mutualize the loss across the U.S. Treasury securities CCA's members if a member defaulted and its clearing funds were insufficient to cover the loss. The Commission did not receive comments on this aspect of the proposal and is adopting it substantially as proposed.[510]

The fourth rule set—identified in paragraph (b)(2)(iv) of Note H—provided that the customer position margin be treated in accordance with rules designed to address how the U.S. Treasury securities CCA holds the customer position margin.[511] The objective was to isolate the customer position margin and prevent it from being used to satisfy the claims any creditors may have against the U.S. Treasury securities CCA. In particular, the note provided that the customer position margin needed to be treated in accordance with rules of the U.S. Treasury securities CCA requiring that the U.S. Treasury securities CCA hold the customer position margin itself or at either a U.S. Federal Reserve Bank or a ''bank'' (as defined in section 3(a)(6) of the Exchange Act (15 U.S.C. 78c(a)(6)) that is insured by the Federal Deposit Insurance Corporation. The objective was to have the U.S. Treasury securities CCA hold the customer position margin at a safe financial institution. In addition, the rules would need to provide that the U.S. Treasury securities CCA's account at the U.S. Federal Reserve Bank or bank be:

- Segregated from any other account of the U.S. Treasury securities CCA or any other person at the U.S. Federal Reserve Bank or bank and used exclusively to hold cash and U.S. Treasury securities to meet current margin requirements of the U.S. Treasury securities CCA resulting from positions in U.S. Treasury securities of the customers of the broker-dealer

[506] *Id.* at 7–8.

[507] Proposing Release, *supra* note 14, 87 FR at 64639.

[508] *See* 17 CFR 240.15c3–3(p)(1)(iii) (defining the term ''qualified clearing agency account''); 17 CFR 240.15c3–3b, Item 15 (permitting a broker-dealer to include a debit in the security-based swap reserve formula equal to the margin required and on deposit in a qualified clearing agency account at a clearing agency).

[509] Proposing Release, *supra* note 14, 87 FR at 64639.

[510] *See* Note H(b)(2)(iii) of Rule 15c3–3a, as adopted. The rule text of this paragraph has been modified to add the phrase ''and qualified customer securities'' after the phrase ''U.S. Treasury securities'' wherever the latter appears in the paragraph to conform the rule text to the modification discussed above relating to the broker-dealer's ability to post qualified customer securities.

[511] Proposing Release, *supra* note 14, 87 FR at 64640.

members of the qualified U.S. Treasury securities CCA;

- Subject to a written notice of the U.S. Federal Reserve Bank or bank provided to and retained by the U.S. Treasury securities CCA that the cash and U.S. Treasury securities in the account are being held by the U.S. Federal Reserve Bank or bank pursuant to Rule 15c3–3 and are being kept separate from any other accounts maintained by the U.S. Treasury securities CCA or any other person at the U.S. Federal Reserve Bank or bank; and
- Subject to a written contract between the U.S. Treasury securities CCA and the U.S. Federal Reserve Bank or bank which provides that the cash and U.S. Treasury securities in the account are subject to no right, charge, security interest, lien, or claim of any kind in favor of the U.S. Federal Reserve Bank or bank or any person claiming through the U.S. Federal Reserve Bank or bank.

These conditions with respect to the account designation, written notice, and written contract would be designed to achieve the same objectives as the analogous conditions discussed above with respect to the broker-dealer's account at the U.S. Treasury securities CCA. The Commission did not receive comments on this aspect of the proposal and is adopting it substantially as proposed.[512]

The fifth rule set—identified in paragraph (b)(2)(v) of Note H—provided that the customer position margin be treated in accordance with rules of the clearing agency requiring systems, controls, policies, and procedures to return customer position margin to the broker-dealer that is no longer needed to meet a current margin requirement resulting from positions in U.S. Treasury securities of the customers of the broker-dealer no later than the close of the next business day after the day the customer position margin is no longer needed for this purpose.[513] As discussed above, the debit would be limited to customer position margin *required* and on deposit at the U.S. Treasury securities CCA. This would mean that the broker-dealer could not include in this debit item the amount of customer position margin on deposit at the U.S. Treasury securities CCA that exceeds the broker-dealer's margin requirement resulting from its customers' cleared U.S. Treasury securities positions. The objective of this condition was to effectuate the prompt return of customer position margin to the broker-dealer.

Several commenters opposed the proposed requirement to return excess collateral within one business day.[514] A commenter stated that this requirement does not apply to margin posted to other clearing agencies or DCOs and does not seem to serve any customer protection benefit.[515] The commenter stated further that FICC does not have a mechanism to push excess margin to direct participants and direct participants do not have the capability of accepting unsolicited excess margin. Rather, similar to other clearing organizations, this commenter stated that FICC regularly notifies direct participants of excess margin every time margin is calculated and then allows such direct participants to demand a return of such margin. Furthermore, this commenter stated that some direct participants prefer to leave excess margin with FICC to serve as a buffer for future margin calls. Another commenter stated that the proposed requirement was inconsistent with other cleared products and unnecessary for customer protection.[516] Finally, a commenter stated that a required automatic return would add significant operational burdens, as broker-dealer participants would need to update their systems to accept an automatic return of excess margin without a request and ensure that any such amounts are appropriately treated as customer assets.[517]

The Commission agrees with commenters that the proposed requirement may add significant operational burdens to broker-dealers if a U.S. Treasury securities CCA is required to return excess collateral to a broker-dealer no later than the close of the next business day after the day the collateral is no longer needed to meet a current margin requirement resulting from positions in U.S. Treasury securities of the customers of the broker-dealer. Moreover, because the debit is limited to margin *required* and on deposit at the U.S. Treasury securities CCA, the broker-dealer has an incentive to obtain the prompt return of excess margin collateral held by the CCA that is in the form of securities. Specifically, the amount of the excess margin would remain a credit in the Rule 15c3–3a formula with no offsetting debit because the excess margin amount is no longer required by the U.S. Treasury securities CCA. Consequently, maintaining the excess margin collateral at the U.S. Treasury CCA could increase the amount that the broker-dealer must deposit into the customer reserve account.[518]

For these reasons, the Commission is removing this aspect of the requirement from the final rule. However, the final rule retains the provision that the customer position margin is treated in accordance with rules of the clearing agency requiring systems, controls, policies, and procedures to return customer position margin to the broker-dealer that is no longer needed to meet a current margin requirement resulting from positions in U.S. Treasury securities of the customers of the broker-dealer.[519] Thus, it retains the overall objective of the proposal to effectuate the prompt return of customer position margin to the broker-dealer that is no longer needed to meet a margin requirement but leaves it to the broker-dealer and the U.S. Treasury securities CCA arrange when that amount will be returned.

d. Fourth Condition—Commission Approval of Rules of U.S. Treasury Securities CCA

The fourth condition for including customer position margin as a debit in the Rule 15c3–3a formula was set forth in paragraph (b)(3) of Note H.[520] Under

[512] *See* Note H(b)(2)(iv) of Rule 15c3–3a, as adopted. The rule text of this paragraph has been modified to add the phrase ''and qualified customer securities'' after the phrase ''U.S. Treasury securities'' wherever the latter appears in the paragraph to conform the rule text to the modification discussed above relating to the broker-dealer's ability to post qualified customer securities.

[513] Proposing Release, *supra* note 14, 87 FR at 64640.

[514] *See, e.g.,* DTCC/FICC Letter, *supra* note 33, at 31–32; ICE Letter, *supra* note 33, at 3; SIFMA/IIB Letter, *supra* note 37, at 30.

[515] *See* DTCC/FICC Letter, *supra* note 33, at 31.

[516] *See* ICE Letter, *supra* note 33, at 3–4.

[517] *See* SIFMA/IIB Letter, *supra* note 37, at 30.

[518] *See* Item 15 of the Rule 15c3–3a formula, as adopted (requiring that the debit in Item 15 of the Rule 15c3–3a formula equal the margin *required* and on deposit with a clearing agency registered with the Commission under section 17A of the Exchange Act resulting from the following types of transactions in U.S. Treasury securities in customer accounts that have been cleared, settled, and novated by the clearing agency: (1) purchases and sales of U.S. Treasury securities; and (2) U.S. Treasury securities repurchase and reverse repurchase agreements); *see also* Item 13 of the Rule 15c3–3a formula (requiring that the debit in Item 13 of the 15c3–3a reserve formula equal the margin *required* and on deposit with the OCC for all option contracts written or purchased in customer accounts).

[519] *See* Note H(b)(2)(v) to Rule 15c3–3a, as adopted. To implement the modification discussed above, the phrase ''no later than the close of the next business day after the day the cash and U.S. Treasury securities are no longer needed for this purpose'' was deleted from the rule text. In addition, the rule text of this paragraph has been modified to add the phrase ''and qualified customer securities'' after the phrase ''U.S. Treasury securities'' to conform the rule text to the modification discussed above relating to the broker-dealer's ability to post qualified customer securities.

[520] Proposing Release, *supra* note 14, 87 FR at 64640.

this condition, the Commission would need to have approved rules of the U.S. Treasury securities CCA that meet the conditions of proposed Note H and the Commission would had to have published (and not subsequently withdrawn) a notice that brokers-dealers may include a debit in the customer reserve formula when depositing customer position margin to meet a margin requirement of the U.S. Treasury securities CCA resulting from positions in U.S. Treasury securities of the customers of the broker-dealer. The Commission staff would analyze the U.S. Treasury securities CCA's approved rules and practices regarding the treatment of customer position margin and make a recommendation as to whether they adequately implement the customer protection objectives of the conditions set forth in proposed Note H. If satisfied with the staff's recommendation, the Commission would publish a positive notice. The objective was to permit the debit only after the Commission has approved the U.S. Treasury securities CCA's rules pursuant to section 19(b) of the Exchange and published the notice.[521] Any changes to those rules and practices that would undermine these customer protection objectives could result in the Commission withdrawing the notice, at which point the Commission would no longer permit the debit. The Commission did not receive comments on this aspect of the proposal and is adopting it substantially as proposed.[522]

5. PAB Reserve Computation

Finally, broker-dealers are required to perform a separate reserve computation for PAB accounts and maintain a separate reserve account with respect to that computation.[523] The Rule 15c3–3a computation provides that this separate PAB reserve computation must be performed in accordance with the Rule 15c3–3a computation for the broker-dealer's non-PAB customers, except as provided in Notes to the PAB Computation.[524] Therefore, the amendments discussed above adding a new debit in Item 15 would apply to the PAB reserve computation. Further, the Commission proposed to amend Note 9 Regarding the PAB Reserve Bank Account Computation—which permits a debit in the PAB reserve computation for clearing deposits required to be maintained at registered clearing agencies—to clarify that the conditions set forth in new Note H with respect to including a debit in the non-PAB customer reserve computation would apply to the PAB reserve computation as well.[525] The Commission did not receive comments on this aspect of the proposal and is adopting it as proposed.[526]

III. Compliance Dates

In the Proposing Release, the Commission sought input from commenters on the appropriate compliance date or implementation schedule for the proposed amendments.[527]

Commenters generally supported a staged approach to implementation and compliance. Specifically, commenters stated that as a first step, the proposed requirements related to the segregation of house and customer margin (discussed in part II.B.1), access to central clearing (discussed in part II.B.2), and Rule 15c3–3 (discussed in part II.C) should become effective, and that as a second step, the proposed requirements related to clearing eligible secondary market transactions (discussed in part II.A) should become effective thereafter. Commenters also generally supported a lengthy or substantial timeframe for implementation. These comments are discussed in detail in this part.

For example, one commenter which currently is a U.S. Treasury securities CCA stated that it would take the commenter and the U.S. securities industry as a whole substantial time to make the documentation, operational, organizational, and systems changes needed to comply with the proposal, and that the commenter would need to amend its rules, which amendments the Commission would need to approve.[528] The commenter stated that it would be advisable to adopt a phased implementation schedule, under which different requirements of the proposal become effective, beginning with the customer segregation requirement. The commenter stated that, depending on when any final rule is adopted, FICC and market participants may be able to implement the segregation requirement by 2025, giving market participants a full year after the expected implementation of T+1 to focus on these changes.[529]

Another commenter stated that a phased approach to implementation is necessary to ensure that the market can support a clearing mandate without undue costs to market participants and market liquidity or stability.[530] The commenter stated that the Commission should first adopt rules to ensure that market participants have sufficient access to clearing, including changes to the access models, the segregation of house and customer margin, and changes to Rule 15c3–3. The commenter then recommended that subsequent to the Commission's adoption of such rules and FICC's implementation of the necessary corresponding changes to its access models, which would require at a minimum two years, the Commission should provide 18 months for the implementation of a tailored clearing mandate that applies to bilateral repo transactions.[531] The commenter stated that the Commission and market participants could then observe the effects of the clearing mandate in the bilateral repo market and consider whether and how to apply the mandate to triparty repo transactions.[532]

Another commenter stated, in considering an appropriate compliance timeframe, the Commission must build in the time necessary for: (i) FICC to work with the Commission to identify changes to its rules necessary to address the issues we have identified above with respect to the Sponsored Program; (ii) FICC to propose and adopt additional rules or amendments, subject to public notice and comment, that may be

[521] *See* 15 U.S.C. 78s.

[522] *See* Note H(b)(3) to Rule 15c3–3a, as adopted. The rule text of this paragraph has been modified to add the phrase "and qualified customer securities" after the phrase "U.S. Treasury securities" to conform the rule text to the modification discussed above relating to the broker-dealer's ability to post qualified customer securities.

[523] *See* 17 CFR 240.15c3–3(a)(16) (defining the term "PAB account" to mean a proprietary securities account of a broker-dealer (which includes a foreign broker-dealer, or a foreign bank acting as a broker-dealer) other than a delivery-versus-payment account or a receipt-versus-payment account); 17 CFR 240.15c3–3(e) (requiring separate reserve accounts and reserve account computations for PAB accounts).

[524] *See* 17 CFR 240.15c3–3a, Notes 1 through 10 Regarding the PAB Reserve Bank Account Computation.

[525] Proposing Release, *supra* note 14, 87 FR at 64640.

[526] *See* Rule 15c3–3a, Note 9 Regarding the PAB Reserve Bank Account Computation.

[527] Proposing Release, *supra* note 14, 87 FR at 64641.

[528] FICC/DTCC Letter, *supra* note 33, at v. The commenter elaborated that it will take market participants substantial time to scope the transactions subject to the requirement, execute the documentation necessary to submit such transactions for central clearing, implement internal procedures and systems to monitor and ensure compliance, and establish the relevant accounts and operational integrations with a Treasury CCA. It also stated that, concurrently, the commenter will need to develop and test the systems, operations, and documentation needed to accommodate a far greater volume of transactions, create a strategy and framework to identify and monitor compliance, and establish margin segregation arrangements. *Id.* at 27–28.

[529] FICC/DTCC Letter, *supra* note 33, at v, 28.

[530] MFA Letter, *supra* note 81, at 21.

[531] *Id.* at 21; MFA Letter II, *supra* note 125, at 8.

[532] MFA Letter, *supra* note 81, at 21; *see also* MFA Letter II, *supra* note 125, at 5.

needed to address these issues; (iii) the Commission to propose and adopt amendments to its rules, subject to public notice and comment, and provide regulatory relief as needed to address the issues for funds that we have highlighted above; and (iv) FICC and industry participants to implement the extensive changes to policies and procedures, documentation, and operations (as detailed above for funds) that will be needed to comply with final rules.[533] The commenter stated that these steps will require a significant amount of time and recommended that the Commission propose a multi-year, staged, compliance schedule, including, at a minimum, that a requirement to comply with a clearing requirement should go into effect no earlier than three years after the Commission and FICC have adopted final rules and amendments, as described in (ii) and (iii).[534]

Another commenter stated that the Commission should implement any central clearing requirement in stages and at a measured pace commensurate with the size, scope and scale of the implementation program required.[535] The commenter stated that the Commission should work to determine an implementation that will be the least disruptive to the market and that accounts for the practical challenges that different industry participants may face as they prepare for a central clearing requirement, which may not be clear until participants are able to review any proposals from FICC regarding implementation. The commenter stated that staging implementation would allow the Commission to appropriately calibrate the costs and benefits of any requirement to clear eligible secondary market transactions and referenced that similarly significant changes to market structure (*i.e.,* triparty market reform and swaps clearing) were successfully phased-in over five or more years to allow adequate time for market readiness while mitigating the potential for disruption.[536]

Another commenter stated that, if adopting a clearing requirement, a measured approach to implementation is required. The commenter specified that any new requirement to clear should be introduced only after enhancements to the clearing infrastructure are achieved, FICC's readiness is assured, and at least one other covered clearing agency registered with the Commission is ready to support the market in clearing eligible secondary market transactions.[537] The commenter further stated that industry participants should have at least 18 months to engage with each CCA on the design of an appropriate clearing model thar provides the minimum level of protection it described in its comment letter. The commenter also stated a timetable for clearing requirements should only be set only once sufficient consensus has emerged around the appropriate clearing model and appropriate regulatory requirements are developed. The commenter recommended that the clearing requirement should be phased in over several years based on the volume of U.S. Treasury securities transaction activity in which a market participant engages (like the phase-in approach which was followed for regulatory initial margin requirements for uncleared OTC derivatives which took more than five years following the publication of final rules to be fully implemented). The commenter stressed the importance of phasing in the new requirements in a manner that avoids too many market participants looking to finalize documentation and go-live with clearing all on the same day.[538]

The commenter also stated that a long phase-in period is essential, as there will be a significant implementation effort needed to comply with any new requirements.[539] The commenter stated that it is difficult to estimate the potential scope of this work and the effort involved until the access models are more developed. The commenter stated that given the breadth of participation in the U.S. Treasury markets, the potential scale of the effort and time required to complete this work, implementation will take many years to complete after a final rule.[540]

An additional trade association commenter stated that its members would incur incredible costs as they establish numerous costly clearing relationships to ensure that all its transactions can be cleared as required, which will take a significant amount of time.[541] The commenter therefore recommended a compliance date of at least 30 months after the publication of any final rule in the **Federal Register**.[542] An additional commenter recognized that clearing requirements can have unintended and disruptive consequences and therefore recommended that the Commission implement the changes with respect to the segregation of house and customer margin, access models, and Rule 15c3–3 before moving forward with any expanded clearing requirements.[543]

Finally, an additional commenter supported an extensive implementation timeframe that is appropriately prioritized and sequenced due to the breadth of the proposal, the time and resources necessary for a covered clearing agency to revise its policies and procedures, and the changes necessary for market participants' compliance. The commenter referred to tri-party market reform as a successful example of the time and sequencing involved in such a significant change.[544]

The Commission agrees with commenters that a phased approach to implementation and compliance would be appropriate for these amendments. As discussed in the Proposing Release, the Commission understands that the amendments to Rule 17ad–22(e)(18)(iv)(A) will likely result in a significant increase in the volume of U.S. Treasury securities transactions submitted for central clearing, including transactions of market participants that currently may not submit such transactions for central clearing.[545] The Commission therefore stated its belief that additional changes with respect to the segregation of house and customer margin and access, as proposed in Rule 17ad–22(e)(6)(i) and (e)(18)(iv)(C), respectively, may be warranted. These changes were designed to improve risk management by and access to the U.S. Treasury securities CCA and would also serve to help manage the risks and

[533] ICI Letter, *supra* note 85, at 31.

[534] ICI Letter, *supra* note 85, at 31.

[535] SIFMA/IIB Letter, *supra* note 37, at 33.

[536] ICI Letter, *supra* note 85, at 33.

[537] SIFMA AMG Letter, *supra* note 35, at 15.

[538] SIFMA AMG Letter, *supra* note 35, at 15.

[539] SIFMA AMG Letter, *supra* note 35, at 15. For direct participants, these efforts would include obtaining information to classify their counterparties to determine who qualifies as an IDM, a hedge fund, or a leveraged account and negotiating clearing agreements with each hedge fund and leveraged account. For asset managers, these efforts would include implementation of documentation such as clearing agreements, give-up agreements, and related infrastructure. For managed funds, these efforts would include revisiting existing formation and distribution documentation, such as investment management agreements and investment guidelines, as they do not permit clearing activity or contemplate the clearing of U.S. Treasury securities. Buy-side firms will have to undertake a significant operational build to be able to settle and margin cleared transactions. The commenter, a trade association, stated that many of its members trade in blocks on behalf of multiple underlying accounts, and that the industry will have to consider and address how a mandatory requirement to clear would impact an asset manager's transaction allocation process where some accounts are required to clear and others are not. *Id.* at 15–16.

[540] SIFMA AMG Letter, *supra* note 35, at 16.

[541] AIMA Letter, *supra* note 81, at 9.

[542] AIMA Letter, *supra* note 81, at 9.

[543] CME Letter, *supra* note 81, at 8.

[544] BNY Mellon Letter, *supra* note 33, at 3.

[545] Proposing Release, *supra* note 14, 87 FR at 64632, 64637.

facilitate access that would likely result from the requirement to clear eligible secondary market transactions.[546] In addition, the Commission proposed changes to Rule 15c3–3 to facilitate implementation of the requirement to clear eligible secondary market transactions, by reducing the amount of broker-dealers cash and securities that would be needed to meet the requirements of Rule 15c3–3.[547]

The Commission continues to believe that the changes with respect to the segregation of house and customer margin, ensuring access to central clearing, and Rule 15c3–3 would help facilitate the central clearing of additional U.S. Treasury securities transactions, as will likely result when a requirement to clear eligible secondary market transactions goes into place. The Commission also agrees with the commenters, that it would be appropriate to implement those changes prior to the imposition of any clearing requirement. This would allow for the development of additional infrastructure that would support the eventual increased amount of central clearing that would occur upon the applicability of a requirement to clear eligible secondary market transactions.

To do so, the Commission is adopting a different compliance date for the amendments to Rule 17ad–22(e)(6)(i) (regarding separation of house and customer margin), 17ad–22(e)(18)(iv)(C) (regarding access), and 15c3–3 (regarding the broker-dealer customer protection rule), from the compliance date for the amendments to Rule 17ad–22(e)(18)(iv)(A) and (B) (regarding the requirements to clear eligible secondary market transactions and monitoring of the submission of such transactions). This staging would allow market participants, including U.S. Treasury securities CCAs, the opportunity to incorporate changes to their rules, systems, practices, contractual arrangements, and other documentation, prior to the applicability of a clearing requirement. It also would provide time between the implementation of structural changes to accommodate the separation of house and customer margin, the potential ability to rehypothecate margin pursuant to Rule 15c3–3, as amended, and additional access by new types of market participants, on the one hand, and the requirement for a U.S. Treasury securities CCA to require its direct participants to clear eligible secondary market transactions, on the other hand.

On the latter point, the Commission is incorporating two stages of compliance for the requirement to clear eligible secondary market transactions: the first would apply to the cash market transactions described in section (i) of the definition of an eligible secondary market transaction, and the second would apply to the repo market transactions described in section (ii) of the definition of an eligible secondary market transaction. Providing additional time for repo transactions to be centrally cleared should allow time for many market participants who are active in the repo market but do not centrally clear this volume of their transactions to plan for and implement necessary contractual arrangements and processes to manage the increase in volume of central clearing.

With respect to the changes to Rule 17ad–22(e)(6)(i) (regarding separation of house and customer margin), 17ad–22(e)(18)(iv)(C) (regarding access), and 15c3–3 (regarding the broker-dealer customer protection rule), (1) each covered clearing agency will be required to file with the Commission any proposed rule changes regarding those amendments required under Section 19(b) and/or advance notices required under Title VIII of the Dodd-Frank Act no later than 60 days following January 16, 2024, and (2) the proposed rule changes must be effective by March 31, 2025. With respect to the proposed changes to Rule 17ad–22(e)(18)(iv)(A) and (B) (regarding the requirements to clear eligible secondary market transactions and monitoring of the submission of such transactions), (1) each covered clearing agency will be required to file with the Commission any proposed rule changes regarding those amendments required under Section 19(b) and/or advance notices required under Title VIII of the Dodd-Frank Act no later than 150 days following January 16, 2024, and (2) the proposed rule changes must be effective by December 31, 2025, for cash market transactions encompassed by section (ii) of the definition of an eligible secondary market transaction, and by June 30, 2026, for repo transactions encompassed by section (i) of the definition of an eligible secondary market transactions. Compliance by the direct participants of a U.S. Treasury securities CCA with the requirement to clear eligible secondary market transactions would not be required until December 31, 2025, and June 30, 2026, respectively, for cash and repo transactions.

This staged implementation timeframe will encompass two and a half years from the time of the action set forth in this release. This amount of time is consistent with commenters who sought a staged, multi-year approach to implementation for this proposal, which, as adopted, is less extensive than what was proposed.[548] It is also consistent with the comment of the existing U.S. Treasury securities CCA that stated that it and market participants would need until at least 2025 to implement any final rule, as it allows for that timeframe. Although some commenters referred to potentially longer timeframes for implementation, whether expressly (*e.g.,* by referring to some particular length of time, such as 18 months or three years after the U.S. Treasury securities CCA has updated its rules [549]) or more generally (*e.g.,* by referring to the need for a lengthy timeline or several years to impose clearing requirements [550]), the Commission believes that this timeframe would allow the benefits of greater central clearing to be achieved sooner and therefore is adopting the staged implementation timeframe discussed in this part.[551]

In addition, one commenter also stated its belief that, given the complexity and extent of changes that will be necessary to implement the proposal, it would be advisable to engage in a consultative process regarding the implementation timeline, with that process occurring after any adoption of the proposal because it is difficult for market participants to assess how long it will take to implement a requirement when they do not yet know with clarity the scope of the final requirement.[552] The commenter specifically stated that, after any adoption of the proposal, the Commission should require U.S. Treasury CCAs to submit to the Commission a proposed rule change, pursuant to Section 19 of the Exchange Act, containing an implementation schedule by no later than 180 days after

[546] *Id.* at 64632–33.

[547] *Id.* at 64637.

[548] *See* AIMA Letter, *supra* note 81, at 9 (seeking 30 months after publication of any final rule in the **Federal Register**).

[549] *See* MFA Letter, *supra* note 81, at 21; ICI Letter, *supra* note 85, at 33.

[550] *See* SIFMA/IIB Letter, *supra* note 37, at 33; BNY Mellon Letter, *supra* note 33, at 3; SIFMA AMG Letter, *supra* note 35, at 16.

[551] In addition, with respect to the compliance date, several commenters requested the Commission to consider interactions between the proposed rule and other recent Commission rules. In determining compliance dates, the Commission considers the benefits of the rules as well as the costs of delayed compliance dates and potential overlapping compliance dates. For the reasons discussed throughout the release, to the extent that there are costs from overlapping compliance dates, the benefits of the rule justify such costs. *See infra* parts IV.A and IV.C.2.e for a discussion of the interactions of the final rule with certain other Commission rules.

[552] FICC/DTCC Letter, *supra* note 33, at v.

the publication of the final rule in the **Federal Register**. The commenter stated that this would provide market participants with the ability to comment on the timing and requirements set forth in the proposed rule change with the benefit of knowing the requirements' scope, and that the Commission and the commenter could then consider those comments in adopting a final implementation schedule. The commenter stated that this kind of deliberative and consultative approach would facilitate the adoption of a realistic timeline and thereby avoid the need for successive extensions and the attendant uncertainty and disruption such shifting timelines present.[553] However, the Commission's phased compliance timeline allows for the type of deliberation and consultation that the commenter recommends. A U.S. Treasury securities CCA will be required to submit proposed rule changes to comply with the requirements being adopted in this release, and there will be opportunity for comment on those proposals by market participants, thereby allowing for consultation about the potential impact of any such proposed rule changes.

IV. Economic Analysis

The Commission is mindful of the economic effects that may result from these amendments, including the benefits, costs, and the effects on efficiency, competition, and capital formation. Exchange Act section 3(f) requires the Commission, when it is engaged in rulemaking pursuant to the Exchange Act 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 will promote efficiency, competition, and capital formation.[554] In addition, Exchange Act section 23(a)(2) requires the Commission, when making rules pursuant to the Exchange Act, to consider among other matters the impact that any such rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.[555]

The Commission is adopting amendments to its rules that impose additional requirements for any U.S. Treasury securities CCA.[556] First, the amendments require that U.S. Treasury securities CCAs establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, establish objective, risk-based, and publicly disclosed criteria for participation, which require that the direct participants of such covered clearing agency submit for clearance and settlement all of the eligible secondary market transactions to which they are a counterparty.[557] In addition, the amendments require that such CCAs establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, identify and monitor its direct participants' required submission of transactions for clearing, including, at a minimum, policies and procedures that address any failures to submit transactions.[558] Strengthening the membership standards will help reduce contagion risk to U.S. Treasury securities CCAs and bring the benefits of central clearing to more transactions involving U.S. Treasury securities, thereby lowering the risk of disruptions to the U.S. Treasury securities market.[559]

Second, the Commission is adopting additional requirements on how U.S. Treasury securities CCAs calculate, collect, and hold margin posted on behalf of indirect participants (*i.e.,* customers) who rely on the services of a direct participant (*i.e.,* the member of the U.S. Treasury securities CCA) to access the CCA's services.[560] As discussed in more detail below, such requirements also will improve the risk management practices at U.S. Treasury securities CCAs and incentivize and facilitate additional central clearing in the U.S. Treasury securities market.

Third, the Commission is adopting amendments that will require that a U.S. Treasury securities CCA establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, ensure that it has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants, and that its board of directors reviews these policies and procedures annually.[561] Although these requirements do not prescribe specific methods for market participants to obtain indirect access to a U.S. Treasury securities CCA, they are intended to help ensure that all U.S. Treasury security CCAs review their indirect access models and ensure that they facilitate access to clearance and settlement services in a manner suited to the needs and regulatory requirements of market participants throughout the U.S. Treasury securities market, including indirect participants.

Lastly, the Commission is amending its rules to permit margin required and on deposit at a U.S. Treasury securities CCA to be included as a debit item in the customer reserve formula, subject to certain conditions.[562] As discussed further below, these amendments to its rules, in conjunction with the amendments requiring the separation of house and customer margin, should incentivize and facilitate additional central clearing in the U.S. Treasury securities market.

The discussion of the economic effects of the rule amendments begins with a discussion of the risks inherent in the clearance and settlement process and how the use of a CCP can mitigate those risks. This is followed by a baseline of current U.S. Treasury securities market practices. The economic analysis then discusses the likely economic effects of the rule amendments, as well as their effects on efficiency, competition, and capital formation. The Commission has, where practicable, attempted to quantify the economic effects expected to result from these rule amendments. In some cases, however, data needed to quantify these economic effects is not currently available. For example, prior to the proposal the reporting of data for bilaterally cleared repo transactions was not a regulatory requirement, so counterparty-specific statistics were not available and any aggregate statistics on this market segment may not have been comprehensive.[563] In the intervening period, and as discussed further below, the Department of the Treasury's Office of Financial Research (OFR) has reported the results of a pilot data collection of non-centrally cleared bilateral repo.[564] Likewise, the reporting

[553] FICC/DTCC Letter, *supra* note 33, at v.

[554] *See* 15 U.S.C. 78c(f).

[555] *See* 15 U.S.C. 78w(a)(2).

[556] *See* part II *supra.*

[557] *See* part II.A.1 and part II.A.2 *supra* for a description of the requirement to clear eligible secondary market transactions including the definition of ''eligible secondary market transaction.''

[558] *See* part II.A.4 *supra.*

[559] *See* part IV.A *infra.*

[560] *See* part II.C *supra.*

[561] *See* part II.B.2 *supra.*

[562] *See* part II.C *supra.*

[563] Samuel J. Hempel, R. Jay Kahn, Vy Nguyen, and Sharon Y. Ross, *Non-Centrally Cleared Bilateral Repo,* The OFR Blog (Aug. 24, 2022) (''Hempel et al. (2022)''), *available at https://www.financialresearch.gov/the-ofr-blog/2022/08/24/non-centrally-cleared-bilateral-repo/.*

[564] *See* part IV.B.3.b.ii *infra. See also* Samuel J. Hempel, R. Jay Kahn, Robert Mann, and Mark Paddrik, *Why Is So Much Repo Not Centrally Cleared?,* OFR Brief (May 12, 2023) (''Hempel et al. (2023)''), *available at https://www.financialresearch.gov/briefs/2023/05/12/why-*

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of U.S. Treasury securities transactions to TRACE has been until recently[565] limited to cash transactions in which at least one of the counterparties is a FINRA member, so analyses based on that data will necessarily be incomplete.

In many cases, and as noted below, the Commission is unable to quantify the economic effects of the rule amendments and in the proposal solicited comment, including estimates and data from interested parties, to help inform the estimates of the economic effects of the proposal. As discussed further below, several commenters stated the importance of further research and to better understand the potential intended and unintended impacts of the rule. Although many of the commenters calling for additional research did not provide additional data or propose how any remaining uncertainty might be resolved, as discussed below, some commenters did provide limited data on quantifiable costs.[566]

Costs and benefits will depend in part on how market participants access central clearing in order to clear eligible secondary market transactions. As some commenters have highlighted, the current clearing framework may need to be changed and extended to support the requirement to clear eligible secondary market transactions. The Commission agrees that changes to the current clearing framework are necessary and therefore is adopting as proposed Rule 17ad–22(e)(18)(iv)(C) that requires that a U.S. Treasury securities CCA establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, ensure that it has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants, which policies and procedures the U.S. Treasury securities CCA's board of directors reviews annually.

A. Broad Economic Considerations

Clearance and settlement risk is the risk that a counterparty fails to deliver a security or cash as agreed upon at the time when the security was traded. One method of reducing such risk is to require one or both counterparties to the trade to post collateral.[567] The purpose of posting collateral in financial transactions is to alleviate frictions caused by adverse selection and moral hazard.[568] The amount of collateral needed to support a set of unsettled trades, however, can depend on whether trades are cleared bilaterally or through a CCP. In cases where market participants have several outstanding buy and sell orders, central clearing reduces the total collateral required to support a given set of trades due to multilateral netting.[569] A simple example illustrates the effect. Suppose there are 3 firms trying to complete three bilateral trades among themselves. Firm A is buying $90 million in U.S. Treasury securities from Firm B, Firm B is buying $80 million in the same U.S. Treasury securities from Firm C, and Firm C is buying $100 million in the same U.S. Treasury securities from Firm A. This means that over the settlement cycle, the firms in this example would need to post collateral to cover a total of $270 million in gross obligations to complete these three trades. If these trades were centrally cleared, however, then the *net* obligations would be substantially smaller. In this example, the collateral required would no longer be that required to support $270 million in outstanding obligations, but instead would reduce to $40 million: $20 million for Firm C, and $10 million each for Firms A and B.[570] Central clearing can, in part, replace a trading network made up of a web of bilateral relationships with a simpler hub and spoke model. As each connection is a potential source of failure, a simpler system can imply less risk.

Clearance and settlement through a CCP can also make trades less ''informationally sensitive'' in the sense that the value of the trade does not depend on information about the creditworthiness of the counterparties, thereby reducing adverse selection.[571] This occurs when the trade is novated to the CCP, and the CCP becomes the buyer to every seller and the seller to every buyer. This reduces the need for investors to acquire private information about the credit risk of their counterparty. By mitigating adverse selection through the substitution of the CCP's counterparty credit risk evaluation for a market participant's own, central clearing through a CCP lowers the cost of trading by market participants and should increase their willingness to trade, thereby improving market liquidity. Reducing the information sensitivity of trades also increases the uniformity of the asset that is traded. In the absence of novation, the U.S. Treasury security is essentially bundled together with counterparty risk. That is, when buying or selling a security, if there is counterparty risk, the pricing depends not only on the security itself but also on the reliability of the counterparty to the trade. It is as if, from an economic perspective, one is ''buying'' both the security and the characteristics of the counterparty. Besides the reduction in adverse selection, reducing counterparty credit risk makes the security a more standard product. Standardization itself increases liquidity.[572]

Financial networks that incorporate a CCP can further improve the resilience

is-so-much-repo-not-centrally-cleared/. The OFR has also proposed rulemaking mandating the collection of daily transaction level data from certain financial companies on their non-centrally cleared bilateral repurchase agreement trades. *See* Office of Financial Research, *Office of Financial Research Releases Proposal to Collect Data on Certain Repo Transactions* (Jan. 5, 2023), *available at https://www.financialresearch.gov/press-releases/2023/01/05/office-of-financial-research-releases-proposal-to-collect-data-on-certain-repo-transactions/.*

[565] Reporting of additional cash transactions to TRACE, by certain U.S. and foreign banks, began on Sept. 1, 2022, but the recent nature of that change makes it difficult to draw conclusions from the limited data available. *See generally* Federal Reserve System, *Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB,* 86 FR 59716 (Oct. 28, 2021); *see also* Bd. Governors Fed. Rsrv. Sys., *Supporting Statement for the Treasury Securities and Agency Debt and Mortgage-Backed Securities Reporting Requirements,* Federalreserve.gov, *available at https://www.federalreserve.gov/reportforms/formsreview/FR%202956%20OMB%20SS.pdf* (last visited Dec. 11, 2023).

[566] *See* part IV.C.2 *infra.*

[567] An alternative method of reducing counterparty credit risk is delivery versus payment (''DVP''). Under DVP, counterparties aim to deliver securities and payment simultaneously, so that the transfer of securities happens if and only if payment has also been made.

[568] For example, if the fulfillment of a contract depends on a counterparty exerting unobservable and costly effort, collateral can be used as a commitment device by putting more of the counterparty's resources at stake in the case of nonfulfillment. *See* Bengt Holmstrom & Jean Tirole, *Financial Intermediation, Loanable Funds, and the Real Sector,* 112 Q. J. Econ. 663 (Aug. 1997); Albert J. Menkveld & Guillaume Vuillemey, *The Economics of Central Clearing,* 13 Ann. Rev. Fin. Econ. 153, 158 (2021).

[569] Darrell Duffie & Haoxiang Zhu, *Does a Central Clearing Counterparty Reduce Counterparty Risk?* 1 Rev. Asset Pricing Stud. 74 (2011), *available at https://academic.oup.com/raps/article-abstract/1/1/74/1528254.* The authors note that this benefit scales with the square root of the number of participants when the trading positions are statistically independent and identically distributed. The authors also note certain conditions that can impact netting efficiencies, *e.g.,* when cross asset netting is allowed in non-centrally cleared markets, asset specific CCPs can negatively impact netting efficiency. We also note, as discussed below, that certain aspects of client clearing models can impact netting efficiency.

[570] This example is from Duffie, *supra* note 27.

[571] *See* Gary Gorton & George Pennacchi, *Financial Intermediaries and Liquidity Creation,* 45 J. Fin. 49 (1990); *see also* Francesca Carapella & David Mills, *Information Insensitive Securities: the Benefits of Central Counterparties* (N.Y. Fed, working paper Oct. 17, 2012), *available at https://www.newyorkfed.org/medialibrary/media/research/conference/2012/MP_Workshop/Carapella_Mills_information_insensitive_securities.pdf.*

[572] *See* Ben Bernanke, *Clearing and Settlement During the Crash,* 3 Rev. Fin. Stud. 133 (1990).

of financial markets. The Bank for International Settlements stated in 2015 that the shift to central clearing had helped to mitigate the risks that emerged in non-centrally cleared markets before and during the 2007–2009 financial crisis. Further, it had reduced financial institutions' exposure to counterparty credit risk shocks through netting, margining and collateralization.[573]

Another potential benefit of central clearing is it should reduce the magnitude of, or even prevent, fire sales of assets. This mitigation of fire sale risk is achieved when a member defaults and the CCP manages the liquidation of assets. Central management of asset liquidation may mitigate suboptimal outcomes in the face of capital or margin constraints. For example, if investors believe the counterparty will sell in the case of a missed margin call, other investors may join the selloff, leading to further declines in asset prices. If market participants can pledge to not sell, then a more efficient equilibrium in which there is no fire sale could be achieved. In this way, the CCP acts as a way to select into the more efficient equilibrium by allowing members to credibly pre-commit to the coordinated liquidation of assets in the case of a missed margin call.[574]

Finally, broadening central clearing could lead to a wider group of liquidity providers, which likely would increase the reliability of access to funding during periods of market stress.[575] The reason is that novation of the trade to a central counterparty reduces one of the major reasons for not doing business with a particular counterparty: the risk that that counterparty may fail to deliver on its obligations. It also reduces one of the reasons for failing to provide liquidity, namely concerns over the credit risk of counterparties. Therefore, as a result of increased levels of central clearing and the resulting increased centralization of counterparty credit risk evaluation by a CCP and the CCP's application of consistent and transparent risk management,[576] more counterparties—who would also be potential liquidity providers—would be willing to compete to provide liquidity to buy-side investors and to each other. In addition, several academic studies following the 2008 financial crisis emphasize the role of intermediary balance sheet constraints as a cause of financial crises.[577] Moreover, losses experienced by market participants can lead to an increase in risk aversion leading those market participants to exit, creating a need for new market participants to replace them in order to provide liquidity.[578] Therefore, either because of increased risk aversion or because some friction implies that the liquidity providers who find themselves warehousing the asset can no longer do so due to trading losses, outside liquidity providers may play an important role in stabilizing the market. In addition, central clearing facilitates anonymized all-to-all trading that would enable the provision of market liquidity by investors.[579] [580]

Several commenters were generally supportive of benefits of central clearing. One commenter stated that it, ''. . . supports central clearing because, when calibrated appropriately, it has increased resiliency, liquidity and transparency in financial markets.'' [581] Another commenter stated that ''[i]f implemented thoughtfully, increased central clearing of Treasury cash and repurchase (''repo'') transactions will reduce systemic risk and meaningfully improve counterparty risk management, market liquidity, and resiliency.'' [582] Several additional commenters made similar statements.[583]

Several commenters, including some who were generally supportive of the benefits of central clearing, referenced the need to do additional study before imposing any requirement on U.S. Treasury securities CCAs for their participants to clear and settle eligible secondary market transactions. One commenter stated that the Commission should conduct detailed analysis on the costs and benefits of central clearing across market segments and participant types, as well as analyze the overall impact on Treasury market liquidity. The commenter stated that it is widely recognized within existing literature on Treasury market structure reform that further detailed study is needed in this area. The commenter also stated that increased central clearing resulting from incentives to centrally clear U.S. Treasury securities transactions would provide additional data for this analysis.[584]

In support of its claim that it is widely recognized within existing literature on Treasury market structure reform that further study is needed, the commenter cites two working papers.[585] The first citation includes a quote stating that it would be difficult to estimate the amount of liquidity savings associated with central clearing without further study.[586] However, the cited work is generally supportive of central clearing, stating that ''Without a broad central clearing mandate, the size of the Treasury market will outstrip the capacity of dealers to safely intermediate the market on their own balance sheets, raising doubts over the safe-haven status of U.S. Treasuries and concerns over the cost to taxpayers of financing growing federal deficits.'' [587]

The second citation provided by the commenter also focuses on the potential benefit of improved liquidity.[588] The working paper states that a potential mandate for wider use of central

[573] Dietrich Domanski, Leonardo Gambacorta, and Cristina Picillo, *Central clearing: trends and current issues,* BIS Q. Rev. (Dec. 2015), *available at https://www.bis.org/publ/qtrpdf/r_qt1512g.pdf.*

[574] John Chi-Fong Kuong, *Self-Fulfilling Fire Sales: Fragility of Collateralized Short-Term Debt Markets,* 34 Rev. Fin. Stud. 2910 (2021), *available at https://academic.oup.com/rfs/article/34/6/2910/5918033?login=true.*

[575] G–30 Report, *supra* note 5, at 13.

[576] *See* TMPG White Paper, *supra* note 13 (''[b]ilateral clearing involves varying risk management practices that are less uniform and less transparent to the broader market . . .''). In addition, FICC has been designated by FSOC as a systemically important financial market utility, which brings heightened risk management requirements and additional regulatory supervision by both its primary regulator and the Board of Governors. *See also* U.S. Dept. of the Treasury, Fin. Stability Oversight Council, 2012 Annual Report, App. A, *available at https://home.treasury.gov/system/files/261/2012-Annual-Report.pdf* (''FSOC 2012 Annual Report'').

[577] *See e.g.,* Markus K. Brunnermeier & Yuliy Sannikov, *A Macroeconomic Model with a Financial Sector,* 104 a.m. Econ. Rev. 379 (Feb. 2014); *see also* Zhiguo He & Arvind Krishnamurthy, *Intermediary Asset Pricing,* 103 a.m. Eco. Rev. 732 (Apr. 2013). Balance sheet constraints and the impact of losses on risk aversion both affect the ability and willingness of market participants to provide liquidity. A CCP is not similarly affected as it does not supply liquidity.

[578] *See, e.g.,* John Y. Campbell & John H. Cochrane, *By Force of Habit: A Consumption-Based Explanation of Aggregate Stock Market Behavior,* 107 J. Pol. Econ. 205 (Apr. 1999).

[579] G–30 Report, *supra* note 5, at 13. *See also* Duffie, *supra* note 27, at 4 (''Further, given broad access to a CCP, some Treasury transactions could flow directly from ultimate sellers to ultimate buyers without necessarily impinging on dealer balance sheet space.'').

[580] The market responded to the stress of 2020 through some increase in all-to-all trading. *See* MarketAxess, FIMSAC Slides, at 6 (Oct. 5, 2020), *available at https://www.sec.gov/spotlight/fixed-income-advisory-committee/mcvey-fimsac-slides-100120.pdf* Additional central clearing may have enabled a greater increase.

[581] AIMA Letter, *supra* note 81, at 2.

[582] Citadel Letter, *supra* note 81, at 1.

[583] *See* AIMA Letter, *supra* note 81, at 2; CME Group, *supra* note 81, at 2; DTCC/FICC Letter, *supra* note 33, at 1; GTS Letter, *supra* note 81, at 3; ISDA Letter, *supra* note 391, at 2; LSEG Letter, *supra* note 33, at 2; MFA Letter, *supra* note 81, at 2; ARB Trading et al. Letter, *supra* note 81, at 1; SIFMA/IIB Letter, *supra* note 37, at 1; Sunthay Letter, *supra* note 33, at 4; Tradeweb Letter, *supra* note 81, at 2; Better Markets Letter, supra note 33, at 8; ICE Letter, *supra* note 33, at 1.

[584] SIFMA/IIB Letter, *supra* note 37, at 2.

[585] SIFMA/IIB Letter, *supra* note 37, at 2 (citing working papers by Duffie, *supra* note 27, and Liang and Parkinson, *supra* note 28).

[586] *Id.* at 2.

[587] Duffie, *supra* note 27, at 1.

[588] Liang and Parkinson, *supra* note 28.

clearing for Treasury securities is the second of four complementary measures for enhancing the liquidity of U.S. Treasury markets when under stress.[589] The cited work also does not address the potential benefits of increased central clearing other than the potential for improved liquidity. Immediately following the authors' statement in favor of further study, they state that ''If such a study were to conclude that expanded clearing is not appropriate for Treasury securities, it should explain what distinguishes Treasury markets from the many other markets, such as equities and Treasury futures, for which there is a clearing mandate.'' [590]

Another commenter stated that the Commission should substantiate the benefits and potential costs of clearing through additional studies and data. The commenter stated that the Commission's proposal should be considered after the Commission has had an opportunity to gather additional data and further assess whether increased clearing is the best way to mitigate the risks confronting the U.S. Treasury market, including a more in-depth understanding of how these changes will affect the costs of transactions for institutional investors who depend on access to these markets for active portfolio management and, as a result, represent a significant source of market liquidity.[591] In addition, one commenter, which surveyed market participants as the basis of its comment, conveyed a ''strong belief that insufficient review and examination has been given to the proposal by the official sector and that such work needs to be detailed and focused to properly vet a mixture of economic, operational, legal and market challenges before the proposal is enacted.'' [592]

The Commission has reviewed the academic literature on central clearing as well as the reports published by the G–30, the TMPG, the OFR, and others [593] and does not agree with commenters that suggest that additional study should precede adoption of a requirement for U.S. Treasury securities CCAs to obligate direct participants to clear eligible secondary market transactions. Although the Commission recognizes that some of the benefits of additional central clearing of eligible secondary market transactions may be mitigated for certain transactions,[594] the Commission has consulted with other regulators regarding this proposal and believes it has performed sufficient analysis in both the Proposing Release and in this release to consider the costs and benefits arising from its proposal.

As discussed in more detail throughout this release, and especially in part IV.C *infra,* the Commission understands that the costs associated with the requirement to clear eligible secondary market transactions will vary depending on how a market participant is able to and/or chooses to access central clearing. The degree to which market participants have increased costs will depend largely on whether and how they currently access central clearing, and therefore, costs likely will vary greatly across different types of market participants. For example, for certain indirect participants whose transactions with direct participants of a U.S. Treasury securities CCA are not submitted for central clearing currently, the costs of establishing some indirect participant relationship, whether through FICC's Sponsored Service or some other client clearing model, may be high. In addition, following the initial costs, the ongoing costs of submitting transactions for central clearing, such as posting margin and paying fees to a direct participant which facilitates access, may also be high.[595]

However, benefits will accrue from the requirement to submit for clearing and settlement eligible secondary market transactions. As discussed earlier in this section and in part IV.C.1 *supra,* one of the several cited benefits of additional central clearing is the increased resiliency of centrally cleared markets. The economic costs of market disruptions can be high so market changes that decrease the probability of such events by even a small amount can result in a large expected economic benefit. Discussion of disruptions in the U.S. Treasury Securities Market over the last decade typically discuss the size of the market and interconnectedness of the U.S. Treasuries markets with other financial markets as evidence of their importance; estimates of the cost to the U.S. economy as a result of these disruptions are less common.[596] However, there is evidence that the costs of extreme financial crises can be high.[597]

In addition, the requirement for direct participants to clear such transactions will reduce risk to the U.S. Treasury securities CCA, by reducing counterparty risk and enabling additional multilateral netting and centralized default management, as discussed in part II.A.1 *supra.* Further, to the extent that implementation costs arise from changes to the CCA's rules, the CCA's implementation of the requirement will provide further opportunity to consider the costs and benefits of particular methods of implementation. Because CCAs are self-regulatory organizations, any rule changes to implement the requirement will need to be reviewed by the Commission,[598] and commenters will be able to comment on the particular

[589] *Id.*

[590] *Id.* at 3.

[591] SIFMA AMG Letter, *supra* note 37, at 2–3.

[592] SIA Partners Comment, *supra* note 52, at 8.

[593] *See, e.g.,* Duffie, *supra* note 27; Duffie and Zhu, *supra* note 569; Duffie, *infra* note 718; Duffie et al., *infra* note 718; G–30 Report, *supra* note 5; TMPG White Paper, *supra* note 13; TMPG Repo White Paper, *supra* note 75; Hempel et al. (2022), *supra* note 563; Hempel et al. (2023), *supra* note 564; Kahn & Olson, *supra* note 628; 2017 OFR Report, *infra* note 797; 2021 IAWG Report, *supra* note 4; Staffs of the U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Reserve Bank of New York, U.S. Securities and Exchange Commission, and U.S. Commodity Futures Trading Commission, *Enhancing the Resilience of the U.S. Treasury Market: 2022 Staff Progress Report* (Nov. (2023), *supra* note 564; Kahn & Olson, *supra* note 628; 2017 OFR Report, *infra* note 797; 2021 IAWG Report, *supra* note 4; Staffs of the U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Reserve Bank of New York, U.S. Securities and Exchange Commission, and U.S. Commodity Futures Trading Commission, *Enhancing the Resilience of the U.S. Treasury Market: 2022 Staff Progress Report* (Nov. 2022), *available at https://home.treasury.gov/system/files/136/2022-IAWG-Treasury-Report.pdf* (''2022 IAWG Report''); Staffs of the U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Reserve Bank of New York, U.S. Securities and Exchange Commission, and U.S. Commodity Futures Trading Commission, *Enhancing the Resilience of the U.S. Treasury Market: 2023 Staff Progress Report* (Nov. 2023), *available at https://home.treasury.gov/system/files/136/20231106_IAWG_report.pdf* (''2023 IAWG Report''); 2017 Treasury Report, *infra* note 736; Joint Staff Report, *supra* note 4.

[594] *See, e.g.,* part IV.B.5 *infra.*

[595] *See* part IV.C.2.a.ii *infra.*

[596] *See* part IV.B.6 *infra,* for a discussion of the Mar. 2020, Sept. 2019, and Oct. 2014 market disruptions. *See* SEC Staff Report on U.S. Credit Markets Interconnectedness and the Effects of the COVID–19 Economic Shock (Oct. 2020), *supra* note 280, for discussion of the interconnectedness of financial crisis and market disruptions.

[597] Barnichon et al., estimate that ''the 2007–08 financial crisis persistently lowered output by roughly 7 percentage points. This is a large number: In dollar terms, it represents a lifetime income loss in present-discounted value terms of about $70,000 for every American.'' Regis Barnichon, Christian Matthes, and Alexander Ziegenbein, *The Financial Crisis at 10: Will We Ever Recover?,* FRBSF Econ. Letter 2018–19 (Aug. 13, 2018), *available at https://www.frbsf.org/economic-research/publications/economic-letter/2018/august/financial-crisis-at-10-years-will-we-ever-recover/?utm_source=frbsf-home-economic-letter-title&utm_medium=frbsf&utm_campaign=economic-letter.* Romer and Romer (2017) study a panel of countries in the Organization for Economic Co-operation and Development and find that gross domestic product is typically about 9 percentage points lower five years after an extreme financial crisis. Christina Romer and David Romer, *New Evidence on the Aftermath of Financial Crises in Advanced Countries,* 107 a.m. Econ. Rev. 3,072 (Oct. 2017).

[598] *See* Exchange Act section 19(b) and Rule 19b–4.

changes and issues raised by such changes, including costs and benefits.

B. Baseline

The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the final rule are measured consists of the current state of the market for U.S. Treasury securities, including the repo market, current practice as it relates to the purchase and sale of U.S. Treasury securities, and the current regulatory framework. The economic analysis considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the final rule are measured.[599]

Certain commenters requested the Commission to consider interactions between the economic effects of the proposed rule and other recent Commission proposals.[600] The Commission recently adopted six of the proposed rules mentioned by commenters as potentially impacting the economic effects of the final rule,[601] namely the May 2023 SEC Form PF Amending Release,[602] Private Fund Advisers Adopting Release,[603] Beneficial Ownership Amending Release,[604] the Rule 10c–1a Adopting Release,[605] the Short Position Reporting Adopting Release,[606] and the Securitizations Conflicts Adopting Release.[607] These rules were not included as part of the baseline in the Proposing Release because they had not been adopted at that time. In response to commenters, this economic analysis considers potential economic effects arising from any overlap between the compliance period for the final amendments and these recently adopted rules.[608]

1. U.S. Treasury Securities

U.S. Treasury securities are direct obligations of the U.S. Government issued by the U.S. Department of the Treasury. After issuance in the primary market U.S. Treasury securities trade in

[599] *See, e.g., Nasdaq* v. *SEC,* 34 F.4th 1105, 1111–15 (D.C. Cir. 2022). This approach also follows SEC staff guidance on economic analysis for rulemaking. *See* SEC Staff, *Current Guidance on Economic Analysis in SEC Rulemaking* (Mar. 16, 2012), *available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf* (''The economic consequences of proposed rules (potential costs and benefits including effects on efficiency, competition, and capital formation) should be measured against a baseline, which is the best assessment of how the world would look in the absence of the proposed action.''); *id.* at 7 (''The baseline includes both the economic attributes of the relevant market and the existing regulatory structure.''). The best assessment of how the world would look in the absence of the proposed or final action typically does not include recently proposed actions, because that would improperly assume the adoption of those proposed actions.

[600] Letter from Eric Pan, Pres. & CEO, and Susan Olsen, General Counsel, Investment Company Institute at 1 (Aug. 17, 2023) (''ICI Letter 2'') (''The Commission has issued a wide range of interconnected rule proposals . . . [that] in the aggregate warrant further analysis by the Commission.''); Letter from Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, Managed Funds Association at 6 (July 21, 2023) (''MFA Letter 2'') (''the Commission should holistically examine all of the pending Proposals, consider the potential overlap between them, and . . . evaluat[e] the costs and benefits of the Proposals in light of one another.''); *see also* ARB et al. Letter, *supra* note 81, at 9 (''the Commission has simultaneously put forward multiple proposals designed to achieve [ ] objectives without considering how these various proposals interact with each other.''); *cf.* AIMA Letter II, *supra* note 115, at 4 (''Together, the Treasury Clearing Proposal and ATS Proposal render the [then-proposed amendments to the definition of dealer] unnecessary.'').

[601] Those six proposals are: Amendments to *Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and large Liquidity Fund Advisers,* Release No. IA–5950 (Jan. 26, 2022) 87 FR 9106 (Feb 17, 2022) (*see* MFA Letter 2, *supra* note 600, at 10–12); *Modernization of Beneficial Ownership Reporting,* Release Nos. 33–11030, 34–94211 (Feb. 10, 2022), 87 FR 13846 (Mar. 10, 2022) (*see* MFA Letter 2, *supra* note 600, at 14–15); *Short Position and Short Activity Reporting by Institutional Investment Managers,* Release No. 34–94313 (Feb. 25, 2022), 87 FR 14950 (Mar. 16, 2022) (*see* MFA Letter 2, *supra* note 600, at 15–16*); Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews,* Release No. IA–5955 (Feb. 9, 2022), 87 FR 16886 (Mar. 24, 2022) (*see* MFA Letter 2, *supra* note 600, *passim); Prohibition Against Conflicts of Interest in Certain Securitizations,* Release No. 33–11151 (Jan. 25, 2023), 88 FR 9678 (Feb. 14, 2023) (*see* MFA Letter 2, *supra* note 600, at 21–22); *Outsourcing by Investment Advisers,* Release No. IA–6176 (Oct. 26, 2022), 87 FR 68816 (Nov. 16, 2022) (*see* MFA Letter 2, *supra* note 600, at 17–18).

[602] *Form PF; Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting,* Release No. IA–6297 (May 3, 2023) 88 FR 38146 (June 12, 2023) (''May 2023 SEC Form PF Amending Release''). The Form PF amendments require large hedge fund advisers and all private equity fund advisers to file reports upon the occurrence of certain reporting events. The compliance dates are Dec. 11, 2023, for the event reports in Form PF sections 5 and 6, and June 11, 2024, for the remainder of the Form PF amendments.

[603] *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews,* Release No. IA–6383 (Aug. 23, 2023), 88 FR 63206 (Sept. 14, 2023) (''Private Fund Advisers Adopting Release''). The Private Fund Advisers Adopting Release includes new rules designed to protect investors who directly or indirectly invest in private funds by increasing visibility into certain practices and restricting other practices, along with amendments to the Advisers Act books and records rule and compliance rule. The amended Advisers Act compliance provision for registered investment advisers has a Nov. 13, 2023, compliance date. The compliance date is Mar. 14, 2025, for the rule's quarterly statement and audit requirements for registered investment advisers with private fund clients. For the rule's adviser-led secondaries, restricted activity, and preferential treatment requirements, the compliance date is Sept. 14, 2024, for larger advisers and Mar. 14, 2025, for smaller advisers. *See* Private Fund Advisers Adopting Release, sections IV, VI.C.1.

[604] *Modernization of Beneficial Ownership Reporting,* Release No. 33–11253 (Oct. 10, 2023), 88 FR 76896 (Nov. 7, 2023) (''Beneficial Ownership Amending Release''). Among other things, the amendments shorten the filing deadlines for beneficial ownership reports filed on Schedule 13D and Schedule 13G. The compliance dates are 90 days after publication in the **Federal Register**, for Schedule 13D amended filing deadlines; Sept. 30, 2024, for the Schedule 13G amended filing deadlines; and Dec. 18, 2024, for the structured data requirement.

[605] *Reporting of Securities Loans,* Release No. 34–98737 (Oct. 13, 2023), 88 FR 75644 (Nov. 3, 2023) (''Rule 10c–1a Adopting Release''). The securities loan reporting rule requires any person who loans a security on behalf of itself or another person to report information about securities loans to a registered national securities association (namely, FINRA) and requires FINRA to make certain information it receives available to the public. The covered persons will include market intermediaries, securities lenders, broker-dealers, and reporting agents. The final rule's compliance dates require that FINRA propose its rules within four months of the effective date of final Rule 10c–1a, or approximately May 2024, and finalize them no later than 12 months after the effective date of final Rule 10c–1a, or approximately Jan. 2025; that FINRA implement data retention and availability requirements for reporting 24 months after the effective date of final Rule 10c–1a, or approximately Jan. 2026; that covered persons report Rule 10c–1a information to FINRA starting on the first business day thereafter; and that FINRA publicly report Rule 10c–1a information within 90 calendar days thereafter, or approximately Apr. 2026. *See* Rule 10c–1a Adopting Release, section VIII, at 75691.

[606] *Short Position and Short Activity Reporting by Institutional Investment Managers,* Release No. 34–98738 (Oct. 13, 2023), 88 FR 75100 (Nov. 1, 2023) (''Short Position Reporting Adopting Release''). The new rule and related form are designed to provide greater transparency through the publication of short sale-related data to investors and other market participants. Under the new rule, institutional investment managers that meet or exceed certain specified reporting thresholds are required to report, on a monthly basis using the related form, specified short position data and short activity data for equity securities. The compliance date for the rule is 12 months after the effective date of the release, which will be approximately Jan. 2025. In addition, the Short Position Reporting Adopting Release amends the national market system plan governing CAT to require the reporting of reliance on the bona fide market making exception in the Commission's short sale rules. The compliance date for the CAT amendments is 18 months after the effective date, or approximately July 2025.

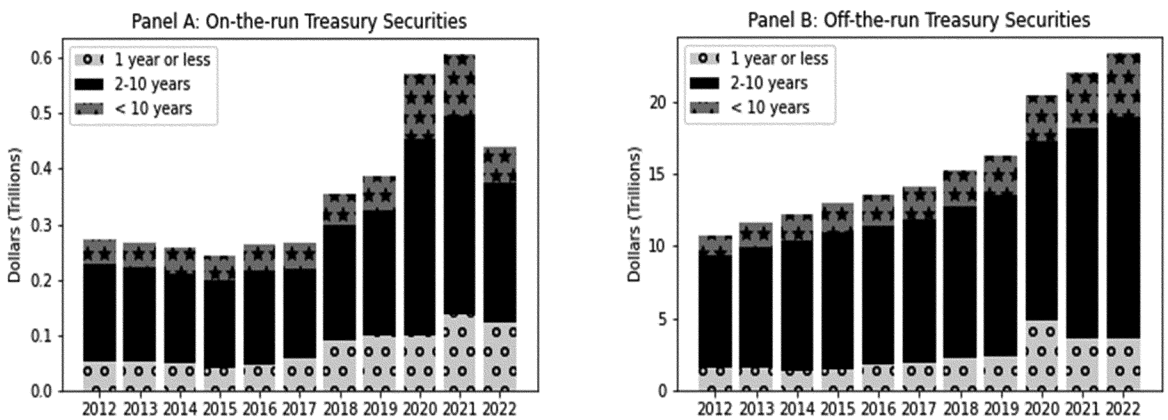
[607] *Prohibition Against Conflicts of Interest in Certain Securitizations,* Release No. 33–11254 (Nov. 27, 2023), 88 FR 85396 (Dec. 7, 2023) (''Securitizations Conflicts Adopting Release''). The new rule prohibits an underwriter, placement agent, initial purchaser, or sponsor of an asset-backed security (ABS) (including a synthetic ABS), or certain affiliates or subsidiaries of any such entity, from engaging in any transaction that would involve or result in certain material conflicts of interest. The compliance date is 18 months after publication in the **Federal Register**, or June 9, 2025.

[608] In addition, commenters indicated there could also be overlapping compliance costs between the final amendments and proposals that have not been adopted. *See, e.g.,* ICI Letter 2, *supra* note 600, at 8 n.13. To the extent those proposals are adopted, the baseline in those subsequent rulemakings will reflect the existing regulatory requirements at that time.

an active secondary market.[609] A number of types of market participants intermediate between investors in U.S. Treasury securities. These investors hold U.S. Treasury securities as a relatively riskless way of saving, as a way of placing a directional bet on interest rates, or as a means of hedging against deflation. U.S. Treasury securities can also function directly as a medium of exchange in some instances, and, as described in more detail below, as collateral for loans.

Market participants refer to the most recently issued U.S. Treasury securities as ''on-the-run,'' with earlier issues referred to as ''off-the-run''.[610] Figure 1 shows the outstanding value of on-the-run (Panel A) and off-the-run (Panel B) U.S. Treasury securities. On-the-run U.S. Treasury securities have consistently made up approximately 3% of the total value of all marketable U.S. Treasury securities during the 2012–2022 period, but, as Figure 3 shows, account for a disproportionate share of trading volume. Thus, an on-the-run security is generally far more liquid than a similar off-the-run security.

Figure 1: On-the-run and off-the-run U.S. Treasury securities (trillions)[a]



[a] Source: Calculated from U.S. Treasury Monthly Statement of the Public Debt (MSPD). *See* Dep't of the Treas., MSPD (2023), *available at* https://fiscaldata.treasury.gov/datasets/monthly-statement-public-debt/detail-of-marketable-treasury-securities-outstanding.

As of November 2023, the total market value outstanding of marketable U.S. Treasury securities held by the public was $26.3 trillion.[611] As shown in Figure 2, the value of marketable U.S. Treasury securities outstanding has increased by approximately $19 trillion since 2000. The total amount of marketable U.S. Treasury securities issued during 2022 was $17.4 trillion.[612]

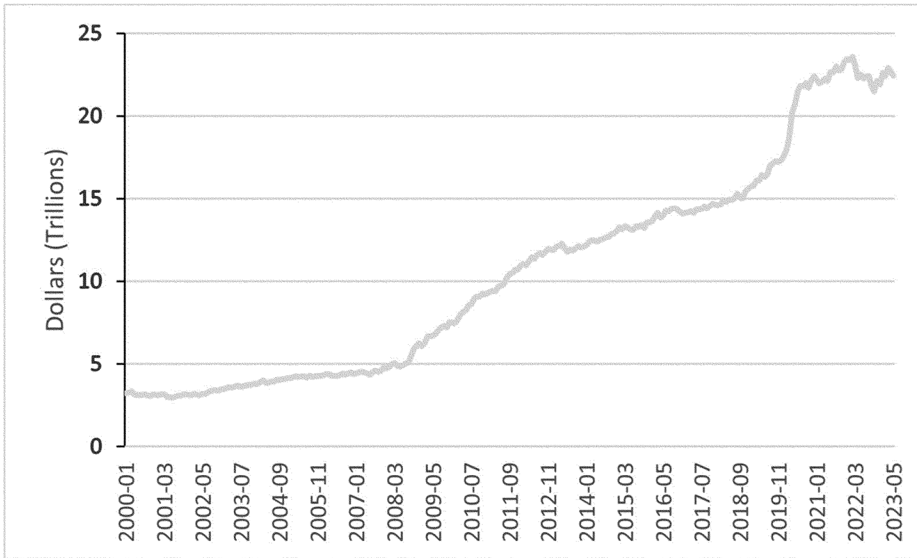
[609] There is also an active market for U.S. Treasury securities that trade on a ''when-issued'' (WI) basis. ''Based on Treasury TRACE transactions data, WI trading volume averaged $80 billion per day between July 1, 2019, and June 30, 2020, accounting for 12% of the $651 billion traded daily across all Treasury securities.'' *See* Michael Fleming, Or Shachar, and Peter Van Tassel, *Treasury Market When-Issued Trading Activity,* Liberty Street Economics Blog (Nov. 30, 2020), *available at https://libertystreeteconomics.newyorkfed.org/2020/11/treasury-market-when-issued-trading-activity/.* As discussed in the Proposing Release, *supra* note 14, 87 FR at 64615, for purposes of this rulemaking only the WI market after the auction but before issuance (WI on-the-run issues) is considered part of the secondary market for U.S. Treasury securities. Most of the WI trading in the Fleming, Shachar, and Van Tassel analysis occurred in on-the-run issues. (''WI trading that occurs up to and including the auction day (account[s] for about one-third of WI trading) and WI trading that occurs after the auction day (account[s] for about two-thirds of WI trading'').) For a discussion of how WI trading functions in the context of central clearing, *see* Kenneth D. Garbade & Jeffrey F. Ingber, *The Treasury Auction Process: Objectives, Structure, and Recent Adaptations,* 11 Current Issues Econ. & Fin. 1 (2005), *available at https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci11-2.html.*

[610] On-the-run U.S. Treasury securities are the most recently auctioned nominal coupon securities. These securities are referred to as ''on-the-run'' starting the day after they are auctioned. Nominal coupon securities pay a fixed semi-annual coupon and are currently issued at original maturities of 2, 3, 5, 7, 10, 20, and 30 years. These standard maturities are commonly referred to as ''benchmark'' securities because the yields for these securities are used as references to price a number of private market transactions.

[611] *See* SIFMA US Treasury Securities Statistics, *available at https://www.sifma.org/resources/research/us-treasury-securities-statistics/.*

[612] U.S. Treasury, *Debt Position and Activity Report* (July 31, 2023), *available at https://www.treasurydirect.gov/government/public-debt-reports/debt-position-and-activity-report/.*

Figure 2: Market Value of Marketable U.S. Treasury Securities Outstanding Over Time[a]



[a] Source: Federal Reserve Bank of Dallas, Market Value of Marketable Treasury Debt [MVMTD027MNFRBDAL], retrieved from FRED, Federal Reserve Bank of St. Louis, *available at* https://fred.stlouisfed.org/series/MVMTD027MNFRBDAL (retrieved on Aug. 7, 2023).

In the primary market, the Treasury Department auctions securities (*i.e.,* debt) to the public through a competitive bidding process and subsequently issues awarded securities to finance the Federal Government.[613] Financial institutions designated by the Federal Reserve Bank of New York as ''primary dealers'' are expected to submit competitive bids on a pro-rata basis and participate meaningfully in all U.S. Treasury auctions at reasonably competitive rates or yields.[614] The Treasury Department typically issues U.S. Treasury securities a few days after the auction and trade on the secondary market.[615] The subsequent trading of U.S. Treasury securities is defined as the secondary market. Figure 3 reports weekly trading values in the secondary market for U.S. Treasury securities. According to industry reports, 67% of the $913.2 billion in average daily trading volume of U.S. fixed income securities in 2022 was in U.S. Treasury securities.[616] As shown in Figure *3,* average weekly trading volume was approximately $3 trillion in 2022, with notable peaks in March 2020 and early 2021.[617]

[613] TMPG White Paper, *supra* note 13, at 6. The Federal Reserve Bank of New York serves as fiscal agent for the U.S. Treasury in conducting auctions of marketable U.S. Treasury debt. *See* 12 U.S.C. 391.

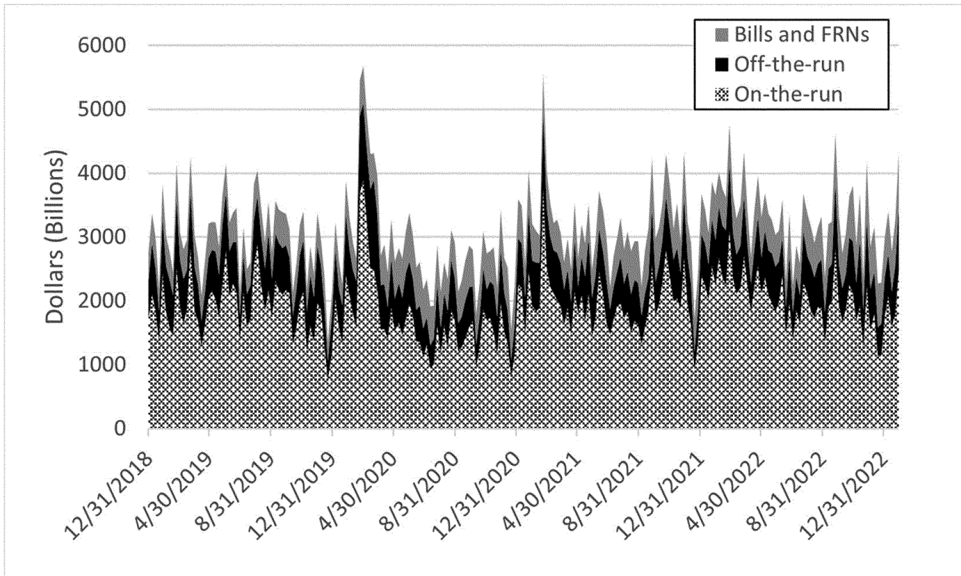
[614] *See* Federal Reserve Bank of New York, Administration of Relationships with Primary Dealers, *available at https://www.newyorkfed.org/markets/primarydealers.html.* Specifically, primary dealers are required to be either (1) a registered broker-dealer or government securities broker-dealer, which is approved as a member of the Financial Industry Regulatory Authority, Inc. and has net regulatory capital of at least $50 million, or (2) a state or federally chartered bank or savings association (or a state or federally licensed branch or agency of a foreign bank) that is subject to bank supervision and maintains at least $1 billion in Tier 1 capital. *Id.* Thus, for those primary dealers that fall into the former category, they are a subset of the broader set of registered broker-dealers or government securities broker-dealers.

[615] The Treasury Department typically announces a new security that it intends to sell several days before the auction at which it is first sold to the public. These securities begin trading after announcement before the auction and through issuance, which occurs a few days after the auction. Such trading is known generally as ''when-issued'' trading; however, in the timeframe between the announcement and the auction, such trading is known as when-issued and referred to as such by market participants, but after the auction and before issuance, the securities are typically referred to simply as on-the-run, consistent with market practice. *See* Fleming et. al. s*upra* note 609.

[616] Another 26% was Agency MBS, 4% corporate debt, with the remainder in municipal, non-agency mortgage-backed, Federal agency debt and asset-backed securities. SIFMA, *US Fixed Income Securities Statistics* (last updated Aug. 7, 2023), *available at https://www.sifma.org/resources/research/us-fixed-income-securities-statistics/.*

[617] *Id.*

Figure 3: Weekly trading volume in U.S. Treasury securities cash market[a]



[a] Source: TRACE Weekly Aggregate Statistics, *available at* https://www.finra.org/finra-data/browse-catalog/about-treasury/weekly-data. Floating Rate Notes ("FRNs") are U.S. Treasury Securities with a maturity of two years at issuance, pay interest four times each year and have an interest rate that may change over time. Treasury bills are short-dated debt with a maturity of one year or less, sold at a discount to face value, and that pay interest at maturity.

2. U.S. Treasury Repurchase Transactions

A U.S. Treasury repurchase transaction generally refers to a transaction in which one market participant sells a U.S. Treasury security to another market participant and commits to repurchase the security at a specified price on a specified later date.[618] Because one side of the transaction receives cash, and the other side receives securities, to be returned at a later date, the transaction is a sale and purchase of securities that is economically similar to borrowing cash against securities as collateral. The amount the lender pays for the security in the initial leg may be less than the market price. The difference between the market price and the price paid divided by the market price of the collateral is known as the ''haircut.'' A positive haircut implies that the loan is over-collateralized: the collateral is worth more than the cash that is loaned. A related term is ''initial margin''—the ratio of the purchase price to the market value of the collateral.

General collateral repurchases are an important variation on the above type of transaction, where one participant purchases from a class, not a specific issue, of U.S. Treasury securities.[619] U.S. Treasury repo for a specific asset is generally a bilaterally settled arrangement, whereas general collateral repurchases are usually settled with a third agent, known as a triparty agent. In bilaterally settled repo arrangements (bilateral repo), the repo buyer has the title to the specific asset in question and can sell or re-hypothecate it. In repo that is settled through a triparty agent (triparty repo), which is discussed below, the repo buyer has more limited use of the collateral. However, this collateral is often re-hypothecated within the same triparty system; namely, a buyer may use the securities purchased from the seller for its own reverse repo transaction.

As described in the Proposing Release, repurchase agreements are generally classified by the term over which they take place, either ''overnight'' or ''term.''[620] In overnight repurchase agreements, the repurchase of the security takes place the day after the initial purchase, meaning that these agreements serve, essentially, as overnight loans collateralized by U.S. Treasury securities. Term repurchase agreements, conversely, take place over a longer horizon.[621]

U.S. Treasury repo has various economic uses. First, it is analogous to secured borrowing and lending, allowing some market participants to, in effect, turn their U.S. Treasury securities

[618] *See supra* note 74.

[619] More specifically, general collateral is a set of security issues which trade in the repo market at the same or a very similar repo rate. These security issues can therefore be substituted for one another without changing the repo rate. In other words, the buyer in a general collateral repo is indifferent to which of the general collateral securities she will receive. The basket of security issues that form a particular general collateral repo market belong to the same class (*e.g.,* government bonds) or sub-class (*e.g.,* government bonds with no more than five years remaining to maturity). *See* International Capital Market Association, [*FAQ*] *8. What is General Collateral (GC)?,* ICMA ERCC Publications (Jan. 2019), *available at https://www.icmagroup.org/market-practice-and-regulatory-policy/repo-and-collateral-markets/icma-ercc-publications/frequently-asked-questions-on-repo/8-what-is-general-collateral-gc.*

[620] *See* Proposing Release, *supra* note 14, 87 FR at 64616.

[621] Overnight repurchase agreements account for 87.5% of daily transaction volume. *See* Figure 5 and the associated discussion for more details. In addition to term repo agreements with fixed maturity dates, there exist term repurchase agreements with embedded options that lead to an uncertain maturity date. For example, ''callable'' repos include an option for the lender to call back debt (*i.e.,* resell securities) at its discretion. ''Open'' repos have no defined term but rather allow either party to close out at the contract at any date after initiation of the agreement.

into cash positions, and others to temporarily invest cash that is not in use in a way that mitigates exposure to, for example, the counterparty risk of a depository institution. Bilateral repo can allow market participants to effectively price interest rate expectations into bonds, and to arbitrage differences in the market prices of closely related U.S. Treasury securities, because it provides financing for U.S. Treasury security purchases and facilitates short sales.

Repos also play a role in monetary policy. The Federal Reserve operates a reverse repurchase facility in which it receives cash from eligible market participants in exchange for collateral consisting of U.S. Treasury securities. The interest rate on these repurchase agreements is the overnight reverse repurchase offer rate set by the Federal Reserve to aid implementation of monetary policy by firming up the floor for the effective Federal funds rate.[622]

There is some evidence of dealer concentration in repo markets. In a December 2019 report, the BIS reported that as repo rates rose above the interest rate on excess reserves in mid-2018, the four largest U.S. banks appeared to have turned into the marginal lender in repo markets.[623] However, in 2021 the Federal Reserve Bank of New York economists reported that the secured funding portion of the repo market is competitive.[624] Using data on centrally cleared U.S Treasury repo transactions and all triparty settled transactions, the New York Fed economists filtered the data using the same filters used in the construction of SOFR in order to eliminate transactions likely driven by considerations other than secured funding and then reported measures of dealer concentration.[625] The authors report that the top 5 (10) dealers comprise 44.2 (63.6) percent of repo selling (cash-lending) activity and 40.2 (56.7) percent of repo purchasing (cash-borrowing) activity and conclude that the centrally cleared and triparty portion of the repo market is less concentrated than might appear from the BIS study.[626]

The market for repos is dominated by large, sophisticated institutions, at least as compared to the cash market. The institutions that participate in the market for repos are also those for whom access to central clearing may be the least costly economically. Relatedly, although difficult to quantify precisely, the number of participants is one or more orders of magnitude greater in the cash market as compared with the repo market: *e.g.,* tens of thousands as opposed to thousands. As Figure 4 shows, the U.S. Treasury securities repurchase market is large; throughout 2020 and through May of 2021, daily transaction volume of repo that was either centrally cleared or settled on the triparty platform ranged between $1.4 and $2.1 trillion per day. Since May 2021, the daily volume has increased considerably—as high as $4.6 trillion per day—coinciding with the growth in the Federal Reserve's overnight reverse repurchase operations. Figure 4 further splits these totals into three categories based on 3 of the 4 repo market components discussed in part IV.B.3.b *supra:* non-centrally cleared triparty, FICC DVP Service, and FICC GCF Repo Service.[627] Despite steadily increasing volumes of centrally cleared repurchase transactions, due in part to the development of services to enable acceptance of more types of repurchase transactions at the covered clearing agency, the Commission understands that the volume of bilateral repurchase transactions that are cleared and settled directly between the two counterparties remains substantial, representing approximately half of all bilateral repurchase transactions in 2021.[628]

[622] *See* Federal Reserve Bank of New York, *Monetary Policy Implementation, available at https://www.newyorkfed.org/markets/domestic-market-operations/monetary-policy-implementation.*

[623] *See* Fernando Avalos, Torsten Ehlers and Egemen Eren, *September stress in dollar repo markets: passing or structural?,* BIS Q. Rev. (Dec. 2019), *available at https://www.bis.org/publ/qtrpdf/r_qt1912v.htm.* Up to July 28, 2021, interest was paid at an IORR (interest on required reserves) rate and at an IOER (interest on excess reserves) rate. The IORR rate was paid on balances maintained to satisfy reserve balance requirements, and the IOER rate was paid on excess balances. Effective Mar. 24, 2020, the Board amended Regulation D to set all reserve requirement ratios for transaction accounts to 0%, eliminating all reserve requirements. To account for those changes, the Board approved a final rule amending Regulation D to replace references to an IORR rate and to an IOER rate with references to a single IORB (interest rate on required balance) rate. *See* Board of Governors of the Federal Reserve, *Interest on Reserve Balances (IORB) Frequently Asked Questions* (July 29, 2021), *available at https://www.federalreserve.gov/monetarypolicy/iorb-faqs.htm.*

[624] Adam Copeland, R. Jay Kahn, Antoine Martin, Matthew McCormick, William Riordan, Kevin Clark, and Tim Wessel, *How Competitive are U.S. Treasury Repo Markets?,* Federal Reserve Bank of New York Liberty Street Economics (Feb. 18, 2021), *available at https://libertystreeteconomics.newyorkfed.org/2021/02/how-competitive-are-us-treasury-repo-markets/#:~:text=In%20contrast%2C%20the%20GCF%20Repo,both%20sides%20of%20the%20market.*

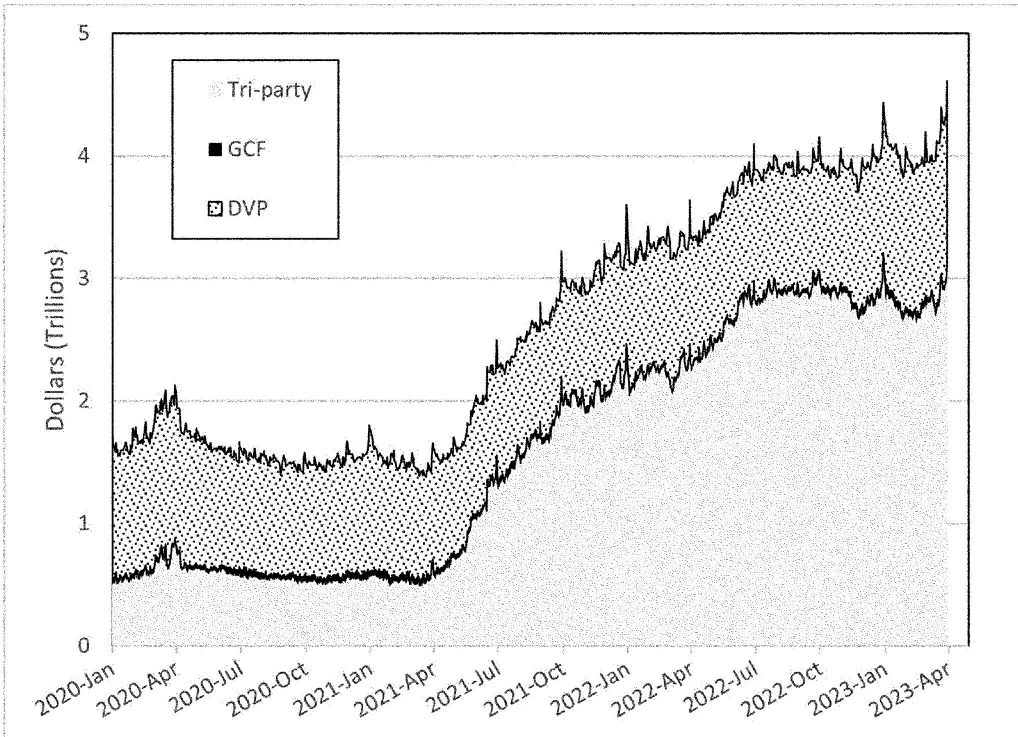
[625] Among other filters, transactions to which the Federal Reserve is a counterparty are excluded. *See Additional Information about Reference Rates Administered by the New York Fed,* Federal Reserve Bank of New York (Jan. 24, 2022), *available at https://www.newyorkfed.org/markets/reference-rates/additional-information-about-reference-rates#treasury_repo_data_exclusions.*

[626] *See supra* note 623. The New York Fed makes available data on top 3 dealer concentration (*see Tri-Party/GCF Repo,* Federal Reserve Bank of New York, *available at https://www.newyorkfed.org/data-and-statistics/data-visualization/tri-party-repo#interactive/concentration (last visited Dec. 12, 2023)*) in the tri-party/GCF repo segment; however, the New York Fed's statistics treat its own Overnight Reverse Repo Facility as a dealer. Since the use of this facility has grown from zero to $2.2 trillion since 2021 Q1, the New York Fed's data on the concentration of the top 3 ''dealers'' is difficult to interpret and is not included here.

[627] Figure 4 does not include bilateral repo transactions—including most inter-affiliate transactions—that are not settled on the tri-party platform or centrally cleared through FICC for which comprehensive data is not currently available. Trades resulting from the Federal Reserve Bank of New York's standing repo facility and reverse repo facility are cleared and settled on the tri-party platform and are included in Figure 4. *See* Federal Reserve Bank of New York, *FAQs: Standing Repo Facility* (July 26, 2023), *available at https://www.newyorkfed.org/markets/repo-agreement-ops-faq* and Federal Reserve Bank of New York, *FAQs: Reverse Repurchase Agreement Operations* (July 26, 2023), *available at https://www.newyorkfed.org/markets/rrp_faq.*

[628] *See* R. Jay Kahn & Luke M. Olson, *Who Participates in Cleared Repo?,* OFR Brief Series (July 8, 2021), *available at https://www.financialresearch.gov/briefs/files/OFRBr_21-01_Repo.pdf.*

Figure 4: Daily U.S. Treasury Repurchase Transaction Volume[a]



[a] Figure 4 includes only transactions that are settled on the triparty platform or bilateral repo that is centrally cleared. Source: Office of Financial Research Short-term Funding Monitor – Data Sets, U.S. Repo Markets Data Release, refreshed daily, *available at* https://www.financialresearch.gov/short-term-funding-monitor/datasets/repo/. *See also* IAWG Report, *supra* note 4, at 29.

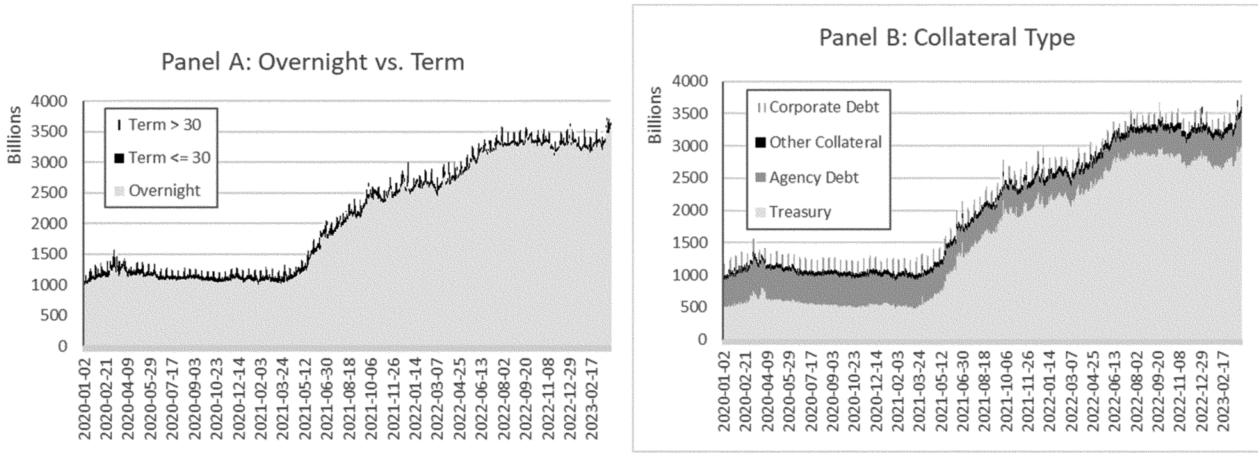
The triparty segment of the U.S. Treasury securities repurchase agreement market is large, with an average of approximately $575 billion of daily trading volume in 2020, and has taken on a substantially larger role since the beginning of 2021, peaking at approximately $3.1 trillion in transaction volume in the March of 2023.[629] Of this, overnight repos is the largest segment, making up 92% on average of daily transaction volume since 2020, as shown in Figure 5. Although different types of securities are used as collateral in triparty repos, over 70% of daily volume of triparty repo since 2020 are transactions with U.S. Treasury securities as collateral.[630] The remainder are agency securities, referring to mortgage-backed securities issued by U.S government agencies and government sponsored enterprises, and various other securities including corporate bonds, non-U.S. sovereign debt, equity, municipal debt, and commercial paper.[631]

[629] *See* Figure 4.

[630] *See* Figure 5.

[631] *See* Mark E. Paddrik, Carlos A. Ramırez, & Matthew J. McCormick, *The Dynamics of the U.S. Overnight Triparty Repo Market* (FEDS Notes, Aug. 2, 2021), *available at https://www.federalreserve.gov/econres/notes/feds-notes/the-dynamics-of-the-us-overnight-triparty-repomarket-20210802.htm.*

Figure 5: Triparty Repurchase Agreement Trading Volume, Splits[a]



[a] Office of Financial Research Short-term Funding Monitor – Data Sets, U.S. Repo Markets Data Release, refreshed daily, *available at* https://www.financialresearch.gov/short-term-funding-monitor/datasets/repo/.

3. Clearance and Settlement of U.S. Treasury Security Transactions

The secondary market includes the ''cash market,'' for outright purchases and sales of securities, and the repo market, where one participant sells a U.S. Treasury security to another participant and commits to repurchase the security at a specified price on a specified later date.[632] These rule amendments and new rules apply to the secondary market for U.S. Treasury securities.

a. Cash Market

The cash market has two main components: the interdealer market and the dealer-to-customer market. In the interdealer market, dealers primarily trade with each other and with principal trading firms (''PTFs''), which trade as principals for their own accounts. In the dealer-to-customer market, dealers trade with their customers.

i. Interdealer

The majority of trading in the interdealer market in on-the-run U.S. Treasury securities occurs on trading platforms operated by IDBs, as described in part II.A.2.b.ii, *supra*.[633] These IDBs are generally direct participants of a U.S. Treasury securities CCA and stand as counterparties to both sides of each trade on their platforms.[634]

The majority of trades in the interdealer markets are trades in ''on-the-run'' issues. The majority of interdealer trading for off-the-run U.S. Treasury securities occurs via bilateral transactions through traditional voice-assisted brokers and electronic trading platforms offering various protocols to bring together buyers and sellers, although some interdealer trading in off-the-run U.S. Treasury securities does occur on IDBs that anonymously bring together buyers and sellers.[635]

Most IDBs are FICC direct participants, and the trades between an IDB, which is a FICC direct participant, and another FICC direct participant are submitted for central clearing to FICC, which, as discussed below, is currently the only U.S. Treasury securities CCA. Direct participants of FICC are generally either dealers (both bank-affiliated and independent) or banks. FICC's current rules generally require that FICC direct participants submit for clearing all trades with other FICC direct participants.[636] However, FICC's rules do not require that a trade between a FICC direct participant and a party that is not a FICC direct participant be submitted for clearing. Therefore, for trades on IDBs between a party that is not a FICC direct participant (which, on an IDB, is generally a PTF) and a dealer that is a FICC direct participant—which results in two separate transactions, between the IDB and the dealer, on the one hand, and between the IDB and the PTF, on the other hand—the transaction between the dealer and the IDB would be centrally cleared. But the transaction between a PTF which is not a FICC member and the IDB, on the other side, would not be centrally cleared and instead would be settled bilaterally with the IDB, often through a clearing agent acting on behalf of the non-FICC direct participant.[637]

[632] *See* 2021 IAWG Report, *supra* note 4, at 3. The secondary market also includes the market for U.S. Treasury futures, which trade electronically on the Chicago Board of Trade, a designated contract market operated by the Chicago Mercantile Exchange (''CME'') Group, and centrally cleared by CME Clearing. U.S. Treasury futures are generally regulated by the U.S. Commodity Futures Trading Commission.

[633] Joint Staff Report, *supra* note 4, at 11, 35–36.

[634] 2021 IAWG Report, *supra* note 4, at 21.

[635] Joint Staff Report, *supra* note 4, at 35.

[636] FICC Rule 2A section 7(e) (requirement that FICC Netting Members submit to FICC all of its eligible trades with other Netting Members); FICC Rule 18 section 2 (similar requirement with regard to Repo transactions), *supra* note 19.

[637] *See* TMPG White Paper, *supra* note 13, at Figures 5A and 5B (providing graphical description of this type of clearing).

Estimates from the first half of 2017 further suggest that only 13 percent of the cash transactions in the U.S. Treasury securities market are centrally cleared. These estimates suggest that another 19 percent of transactions in this market are subject to so-called hybrid clearing in which one leg of a transaction facilitated by an IDB platform is centrally cleared and the other leg of the transaction is cleared bilaterally.[638]

Until the mid-2000s, most inter-dealer trading occurred between primary dealers who were FICC members and thus was centrally cleared.[639] Today, PTFs actively buy and sell large volumes of U.S. Treasury securities on an intraday basis using high-speed and other algorithmic trading strategies.[640] PTFs are not generally FICC members and, as such, their trades are often not centrally cleared. Moreover, PTFs compose a substantial portion of trading volume, averaging about 20% of overall U.S. Treasury cash market volume and accounting for around 50–60% of IDB volume in outright purchases and sales of U.S. Treasury securities.[641] Primary dealers, who are FICC members and who transact the 40–50% of IDB volume not accounted for by PTFs, are required by Federal Reserve Bank of New York policy to centrally clear their U.S. Treasury securities primary market cash activity.[642]

As Tables 1 and 2 below show, during the 6-month period ending in June 2023 trading volume of on-the-run U.S. Treasury securities was approximately two and half times that of off-the-run U.S. Treasury securities. Over half (57.9%) of on-the-run U.S. Treasury security trading volume and approximately one quarter (22.9%) of off-the-run U.S. Treasury security trading volume occurred on ATSs (which are also IDBs) and non-ATS IDBs.[643] Of the on-the-run U.S. Treasury security trading volume that occurred on ATS IDBs and non-ATS IDBs, 34.0% were dealer trades, 18.4% were PTF trades, and the remainder were customer trades. For off-the-run trading in U.S. Treasury securities, the comparable figures are 19.0% dealer trades, 1.2% PTF trades, and the remainder are customer trades. In contrast to trades that take place on an ATS or a non-ATS IDB, 42.0% of on-the-run U.S. Treasury security transactions and 77.1% of off-the-run U.S. Treasury security transactions are traded bilaterally. The majority of these (78.5% of on-the-run and 84.3% of off-the-run) are dealer-to-customer trades.

Bilaterally cleared trades make up 87% of total trading in the secondary U.S. Treasury securities market, making them the most prevalent trade type in the market.[644] These trades include at least one party that is not a netting member of the single U.S. Treasury securities CCA. The bilateral clearing process comes with risks. After the trade is executed, the principals to the trade face counterparty credit risk, in the event that either party fails to deliver on its obligations.[645]

TABLE 1—ON-THE-RUN U.S. TREASURY SECURITIES TRADING VOLUME

	Number of venues	Average weekly volume ($M)	Volume share (%)
ATSs	16	874,284	49.4
Customer trades	12	38,338	2.2
Dealer trades	16	510,296	28.8
PTF trades	7	325,649	18.4
Non-ATS Interdealer Brokers	24	151,353	8.5
Customer trades	22	59,639	3.4
Dealer trades	23	91,714	5.2
Bilateral dealer-to-dealer trades	283	159,760	9.0
Bilateral dealer-to-customer trades	521	584,832	33.0

[638] *See* 2021 IAWG Report, *supra* note 4, at 30; *see also* TMPG White Paper, *supra* note 13, at 12. The figures are estimated using FR 2004 data covering the first half of 2017 and are based on various assumptions: (a) primary dealers account for all dealer activity, (b) 5% of dealers' trading not through an IDB is with another dealer, (c) the shares of dealer and non-dealer activity in the IDB market for coupon securities equal the weighted averages of the shares reported in the Oct. 15 report (that is, 41.5% and 58.5%, respectively), (d) only dealers trade bills, FRNs, and TIPS in the IDB market, and (e) the likelihood of dealer and non-dealers trading with one another in the IDB market solely reflects their shares of overall volume. Commission staff understands that these assumptions may be less appropriate for more recent time periods (*e.g.,* PTFs are responsible for a growing share of IDB activity).

[639] *See* G–30 Report, *supra* note 5; 2021 IAWG Report, *supra* note 4, at 5–6; TMPG White Paper, *supra* note 13, at 6.

[640] *See* Joint Staff Report, *supra* note 4, at 1, 8, 32, 35–36, 39.

[641] *See* James Collin Harkrader & Michael Puglia, *Principal Trading Firm Activity in Treasury Cash Markets* (FEDS Notes, Aug. 2020) (''Harkrader and Puglia FEDS Notes''), *available at https://www.federalreserve.gov/econres/notes/feds-notes/principal-trading-firm-activity-in-treasury-cash-markets-20200804.htm.*

[642] *See* Federal Reserve Bank of New York, Administration of Relationships with Primary Dealers, *available at https://www.newyorkfed.org/markets/primarydealers.html.*

[643] The term ''IDB'' typically refers only to IDBs that are also ATSs. The entities referred to as IDBs here are encompassed in the ATSs category in the tables set forth in this section because of the way that such IDBs are categorized in TRACE. Specifically, the ''ATS'' category in TRACE encompasses these IDBs. By contrast, the non-ATS IDBs category in TRACE encompasses the voice-based or other non-anonymous methods of bringing together buyers and sellers, which are also sometimes referred to as interdealer brokers by market participants.

[644] TMPG White Paper, *supra* note 13, at 12. This figure is estimated from 2017H1 data and includes approximately 19% hybrid clearing. As reported by TMPG, the estimates are based on various assumptions: (a) primary dealers account for all dealer activity, (b) 5% of dealers' trading not through an IDB is with another dealer, (c) the shares of dealer and non-dealer activity in the IDB market for coupon securities equal the weighted averages of the shares reported in the Oct. 15 report (that is, 41.5% and 58.5%, respectively), (d) only dealers trade bills, FRNs, and TIPS in the IDB market, and (e) the likelihood of dealer and non-dealers trading with one another in the IDB market solely reflects their shares of overall volume. Commission staff understands that these assumptions may be less appropriate for more recent time periods (*e.g.,* PTFs are responsible for a growing share of IDB activity).

[645] TMPG White Paper, *supra* note 13, at 13.

TABLE 1—ON-THE-RUN U.S. TREASURY SECURITIES TRADING VOLUME—Continued

	Number of venues	Average weekly volume ($M)	Volume share (%)
Total	....	1,770,229	100.0

This table reports trading volume and volume share for ATSs,[a] Non-ATS interdealer brokers, bilateral dealer-to-dealer transactions, bilateral dealer-to-customer, and bilateral dealer-to-PTF transactions for on-the-run U.S. Treasury Securities. On-the-run U.S. Treasury Securities are the most recently issued nominal coupon securities and Treasury Inflation Protected Securities (TIPS). Nominal coupon securities pay a fixed semi-annual coupon and are currently issued at original maturities of 2, 3, 5, 7, 10, 20, and 30 years. Treasury Bills and Floating Rate Notes are excluded. Volume is the average weekly dollar volume in par value (in millions of dollars) over the six-month period, from Jan. 1, 2023, to June 30, 2023.[b] Number of Venues is the number of different trading venues in each category and the number of distinct MPIDs for bilateral transactions.[c] Volume Share (%) is the measure of the dollar volume as a percent of total dollar volume.[d] The volumes of ATSs and non-ATS interdealer brokers are broken out by Customer trades, Dealer trades, and PTF trades within each group.[e] Data is based on the regulatory version of TRACE for U.S. Treasury Securities from Jan. 1, 2023, to June 30, 2023. Bilateral trades are a catchall classification that may include trades conducted via bilateral negotiation, as well as trades conducted electronically via platforms not registered with FINRA as an ATS.

[a] This analysis is necessarily limited to transactions reported to TRACE, which may not be all transactions in U.S. Treasury securities. Transactions that take place on non-FINRA member ATSs or between two non-FINRA members are not reported to TRACE. Entities in the ATS TRACE category encompass the IDBs described in the preamble of this release. By contrast, the non-ATS IDB category in TRACE encompasses the voice-based or other non-anonymous methods of bringing together buyers and sellers. PTFs that are FINRA members are included as dealers while PTFs refer to PTFs that are not FINRA members. See Proposing Release note 43 and referencing text.

[b] FINRA reports volume as par volume, where par volume is the volume measured by the face value of the bond, in dollars. *See* relevant weekly volume files, *available at https://www.finra.org/filing-reporting/trace/data/trace-treasury-aggregates.*

[c] Dealers are counted using the number of distinct MPIDs.

[d] Total dollar volume (in par value) is calculated as the sum of dollar volume for ATSs, non-ATS interdealer brokers, bilateral dealer-to-dealer transactions, and bilateral dealer-to-customer transactions.

[e] We identify ATS trades and non-ATS interdealer broker trades using MPID. The regulatory version of TRACE for U.S. Treasury securities includes an identifier for customer and interdealer trades. Furthermore, we use MPID for non-FINRA member subscriber counterparties in the regulatory version of TRACE for U.S. Treasury securities to identify PTF trades on ATSs.

TABLE 2—OFF-THE-RUN U.S. TREASURY SECURITIES TRADING VOLUME

	Number of venues	Average weekly volume ($M)	Volume share (%)
ATSs	13	126,489	18.0
Customer trades	9	10,713	1.5
Dealer trades	13	107,304	15.2
PTF trades	5	8,472	1.2
Non-ATS Interdealer Brokers	24	34,796	4.9
Customer trades	19	7,967	1.1
Dealer trades	22	26,829	3.8
Bilateral dealer-to-dealer trades	568	85,178	12.1
Bilateral dealer-to-customer trades	732	458,070	65.0
Total	....	704,533	100.0

This table reports trading volume and volume share for ATSs,[a] non-ATS interdealer brokers, bilateral dealer-to-dealer transactions, bilateral dealer-to-customer, and bilateral dealer-to-PTF transactions for off-the-run U.S. Treasury Securities. Off-the-run or ''seasoned'' U.S. Treasury Securities include TIPS, STRIPS, and nominal coupon securities issues that preceded the current on-the-run nominal coupon securities. Number of Venues is the number of different trading venues in each category and the number of distinct MPIDs for bilateral transactions. Volume is the average weekly dollar volume in par value (in millions of dollars) over the six-month period, from Jan. 1, 2023, to June 30, 2023. Volume Share (%) is the measure of the dollar volume as a percent of the total dollar volume. The volumes of ATSs and non-ATS interdealer brokers are broken out by Customer trades, Dealer trades, and PTF trades within each group.[b] Data is based on the regulatory version of TRACE for U.S. Treasury Securities from Jan. 1, 2023, to June 30, 2023. Bilateral trades are a catchall classification that may include trades conducted via bilateral negotiation, as well as trades conducted electronically via platforms not registered with FINRA as an ATS.

[a] The analysis based on TRACE is necessarily limited to transactions reported to TRACE, which may not be all transactions in government securities. Transactions that take place on non-FINRA member ATSs or between two non-FINRA members are not reported to TRACE. The analysis based on TRACE is necessarily limited to transactions reported to TRACE, which may not be all transactions in government securities. Transactions that take place on non-FINRA member ATSs or between two non-FINRA members are not reported to TRACE. Entities in the ATS TRACE category encompass the IDBs described in the preamble of this release. By contrast, the non-ATS IDB category in TRACE encompasses the voice-based or other non-anonymous methods of bringing together buyers and sellers. PTFs that are FINRA members are included as dealers while PTFs refer to PTFs that are not FINRA members. See Proposing Release note 43 and referencing text.

[b] We identify ATS trades and non-ATS interdealer broker trades using MPID in the regulatory version of TRACE for U.S. Treasury securities. The regulatory version of TRACE for U.S. Treasury securities includes an identifier for customer and interdealer trades. Furthermore, we use MPID for non-FINRA member subscriber counterparties in the regulatory version of TRACE for U.S. Treasury Securities to identify PTF trades on ATSs.

ii. Dealer-to-Customer

Dealer-to-customer trading generally involves ''off-the-run'' issues more often than the interdealer market and typically is conducted via voice or electronically (*i.e.,* electronic ''request for quote'' systems referred to in Tables 1 and 2, *supra* as non-ATS IDBs).[646] Trading in the dealer-to-customer cash market is generally—and has historically been—conducted through bilateral transactions. Customers have not traditionally traded directly with other end users.[647] Rather, non-dealers primarily trade with dealers, and dealers use the interdealer market as a source of orders and trading interest to

[646] G–30 Report, *supra* note 5, at 1; TMPG White Paper, *supra* note 13, at 1–2.

[647] *See* Exchange Act Release No. 90019 (Sept. 28, 2020), 85 FR 87106, 87108 (Dec. 30, 2020).

help facilitate their trading with customers in the dealer-to-customer market. Generally, trades in the dealer-to-customer market are not centrally cleared.[648]

In cash U.S. Treasury security transactions that are bilaterally cleared, the process generally begins with participants initiating the trade by an electronic or voice trading platform, and both parties booking the details of the trade in their internal systems and confirming the details of the trade with one another. Once the details are confirmed, each party then sends messages to its clearing or settlement agents to initiate the clearing process. Different types of institutions use different clearing and settlement agents, with buy-side firms typically using custodial banks, dealers using clearing banks, and hedge funds and PTFs using prime brokers.

b. U.S. Treasury Repo Market

Depending on clearing and settlement practices, the U.S. Treasury repo market consists of four main components: (1) non-centrally cleared, settled bilaterally, (2) centrally cleared, settled bilaterally, (3) non-centrally cleared, settled on a triparty platform, and (4) centrally cleared, settled on a triparty platform. The Office of Financial Research has collected transaction level data for centrally cleared repo transactions since October 2019, and the New York Fed collects data on triparty repo transactions through its supervisory role. However, as discussed in part II.A.2.a *supra,* the lack of reporting of non-centrally cleared bilateral repo makes estimating the size of this segment of the repo market difficult.

i. Non-Centrally Cleared Bilateral Repo

For non-centrally cleared bilateral U.S. Treasury repos, the parties agree to the terms and settle the trades between themselves, without involving a CCP or other third-party. As mentioned above, FICC's rules require its direct participants to submit for central clearing all eligible trades with other direct participants. Therefore, non-centrally cleared bilateral U.S. Treasury repos may involve at least one party that is not a FICC direct participant (*e.g.,* a hedge fund or PTF); alternatively, or additionally, such repos may also involve a transaction type that FICC does not accept for clearing.

In January of 2022, the Federal Reserve Bank of New York updated its primary dealer statistics to capture the segments of the repo market used by primary dealers. On average during the first three quarters of 2022, the non-centrally cleared bilateral market made up $1.19 trillion of primary dealer reverse repo (60% of the total) and $0.94 trillion of primary dealer repo (37% of the total).[649] At more than $2 trillion in total exposure, this would make non-centrally cleared bilateral repo the largest segment of the repo market in gross exposure by primary dealers.

The Office of Financial Research (OFR) conducted a pilot collection of data on non-centrally cleared bilateral repurchase agreement trades spanning nine dealers over three reporting dates in June 2022.[650] Using that pilot data collection, the OFR finds that with regard to rates, counterparty types, and collateral, pilot participants' activity in the non-centrally cleared bilateral repo segment roughly mirrors their activity in the centrally cleared bilateral segment.[651] However, as discussed in part IV.B.5 *infra,* haircuts in this segment differ from those in the centrally cleared segments.[652]

ii. Centrally Cleared Bilateral Repo

For centrally cleared bilateral U.S. Treasury repos, for parties that are FICC direct participants, each party submits agreed-upon trade details to FICC for central clearing, and those trades are settled delivery versus payment using the members' clearing banks and/or Fedwire Securities Service. Market participants that are not direct participants of FICC may access central clearing through a customer model, such as the Sponsored Service or the Prime Broker/Correspondent clearing models.[653] Although a U.S. Treasury repo transaction generally encompasses both the start leg and the end leg of a U.S. Treasury repo, currently the only U.S. Treasury securities CCA does not provide central clearing for the start leg of certain transactions.[654] Central clearing of U.S. Treasury repo is further discussed below.

Data on the extent of central clearing in the U.S. Treasury securities market is limited. As discussed previously, the Commission believes that approximately half of bilateral repo trades are centrally cleared.[655]

iii. Non-Centrally Cleared Repo Settled on a Triparty Platform

For non-centrally cleared triparty U.S. Treasury repos, repo buyers (cash lenders (*e.g.,* money market funds)) provide financing to repo sellers (cash borrowers (*e.g.,* dealers)). The parties agree to the terms of a trade and arrange for a clearing bank to facilitate settlement. Like non-centrally cleared bilateral repos, at least one party to the transaction is not a FICC member. While the clearing bank provides a triparty platform to help facilitate the movement of cash and securities among accounts of counterparties to the transaction, it does not itself become a counterparty to the transactions and does not guarantee either counterparty's performance of its obligations. Collateral posted to the triparty platform generally cannot be repledged outside the platform, thereby protecting against settlement fails.[656]

iv. Centrally Cleared Repo Settled on a Triparty Platform

For centrally cleared U.S. Treasury triparty repos, the parties are FICC members that submit agreed-upon trade details to FICC for central clearing through FICC's General Collateral Finance (''GCF'') Repo Service. Unlike centrally cleared bilateral repos, these triparty repos are settled on the clearing bank's triparty platform. Like centrally cleared bilateral repos, centrally cleared triparty repos are novated to FICC, and FICC acts as a CCP for these transactions, including by collecting margin pursuant to its margin methodology for such transactions. Until recently, centrally cleared triparty repos were only conducted through the GCF Repo Service between two direct members of FICC. However, in September 2021, FICC introduced its Sponsored General Collateral Service (''Sponsored GC Service''), which enables centrally cleared triparty repos between a sponsored member and its sponsoring member.[657] The Sponsored GC Service accepts general collateral in a number of generic CUSIPs, and though U.S. Treasury securities are among the

[648] G–30 Report, *supra* note 5, at 1; 2021 IAWG Report, *supra* note 4, at 3; TMPG White Paper, *supra* note 13, at 6.

[649] *See* Hempel et al. (2022), *supra* note 563.

[650] The OFR has a proposed rulemaking that mandates the collection of daily transaction level data from certain financial companies on their non-centrally cleared bilateral repurchase agreement trades. *See supra* note 564.

[651] *See* Hempel et al. (2023), *supra* note 564, at 1.

[652] *Id.* at 3.

[653] *See* Proposing Release, *supra* note 14, 87 FR at 64616.

[654] FICC Rule 11, section 2, *supra* note 19.

[655] *See* part IV.B.3.b.i, *supra. See also* note 75, *supra.*

[656] *See generally* Reference Guide to U.S. Repo and Securities Lending Markets (Nov. 9, 2015), *available at https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17_Reference-Guide-to-U.S.-Repo-and-Securities-Lending-Markets.pdf.*

[657] Exchange Act Release No. 92808 (Aug. 30, 2021), 86 FR 49580 (Sept. 3, 2021). Currently, the Bank of New York Mellon operates the triparty platform that facilitates trades conducted via the GCF Repo Service and Sponsored GC Service.

general collateral types acceptable in the Sponsored GC Service, other types of collateral including agency and mortgage backed securities are acceptable for use as collateral as well.[658] Each type of eligible collateral for the Sponsored GC Service is assigned its own generic CUSIP number, and security types are not mixed.[659]

v. Inter-Affiliate Repo

Current FICC rules require the submission of transactions of a netting member's ''Covered Affiliate'' with another FICC netting member where a Covered Affiliate is defined as an affiliate of a netting member that: (1) is not itself a netting member; (2) is not a foreign person; and (3) is a broker-dealer, bank, trust company, and/or FCM, if that transaction is with another netting member or a Covered Affiliate of another netting member.[660] FICC rules do not require the submission of transactions between (1) a netting member and an affiliate or (2) between a netting member's affiliates.

The Commission understands that inter-affiliate repo transactions represent an important tool to transfer liquidity and risk within an affiliated group. These transactions may serve different purposes, including, but not limited to, providing U.S. Treasury securities for delivery when an affiliate has taken a long or short position in U.S. Treasury securities as a hedge against other exposures, allowing the movement of U.S. Treasury securities to allow them to be posted as margin on an affiliate's transaction, ensuring that U.S. Treasury securities can serve as a liquidity buffer for an affiliated bank,[661] or to meet liquidity composition targets. To get the U.S. Treasury securities to the appropriate entity with an affiliated group, the affiliate often enters into repos or reverse repos with a direct participant of a U.S. Treasury securities CCA.

Using assets and liabilities data reported by the five largest U.S. broker-dealers in their 2022 annual audited financial statements, the Commission observed that the value of repo and reverse repo from inter-affiliate transactions ranges from 25–75% of total repo and reverse repo reported at the end of year.

4. Central Clearing in the U.S. Treasury Securities Market

Currently, FICC is the sole provider of clearance and settlement services for U.S. Treasury securities.[662] On July 18, 2012, FSOC designated the FICC as a systemically important financial market utility under Title VIII of the U.S. Dodd-Frank Act. FSOC assigned this designation on the basis that a failure or a disruption to FICC could increase the risk of significant liquidity problems spreading among financial institutions or markets and thereby threaten the stability of the financial system in the United States.

Should a trade be centrally cleared, the CCP receives a notice of the executed trade from both parties, and after comparison (*i.e.,* matching of the trade details), the CCP guarantees and novates the contract, where novation refers to the process by which the CCP becomes the counterparty to both the buyer and seller in the original trade. Once the trading day ends and all trades have been reported to the CCP (*i.e.,* end of T+0), the CCP determines its net obligations to each CCP participant for each security and communicates the resulting settlement obligations to the counterparties. The participants then have the obligation to settle their portion of the trade on T+1. Once this information is communicated, the participants send instructions to their settlement agents. In contrast to the bilateral case, central clearing reduces the credit risk that both parties are exposed to throughout the trade. While at execution both CCP members hold the usual counterparty credit risk to one another, this risk is transformed, generally within minutes of trade execution, when the trade details are sent to the CCP and the CCP guarantees and novates the trade. Consequently, both parties to the trade now hold centrally cleared credit risk, and the CCP has counterparty risk to both members.

Direct membership in FICC typically consists of banks and registered dealers, who must meet specified membership criteria.[663] In other markets such as U.S. equity markets, not all active participants are direct members of the clearing agency. For this reason, it is likely that under the requirement to clear eligible secondary market transactions, some market participants will access clearing indirectly. At FICC, the indirect clearing models are its Sponsored Program and a prime broker/correspondent clearing program.[664] As of August 14, 2023, FICC has 208 direct members.[665]

Centrally cleared institutional triparty (''CCIT'') membership is a limited direct membership for entities who buy repo using FICC's GCF Repo Service that settles using triparty settlement.[666] In 2017, FICC developed the CCIT Service to allow repo cash providers to access central clearing as limited-purpose members without the sponsorship or intermediation of a direct participant.[667] These entities pledge to FICC the purchased securities under their repos in order to secure their obligation to perform under the transaction. As of July 27, 2023, there were 7 CCIT members, all of which were affiliated with a single investment firm.[668]

FICC interacts solely with the Sponsoring Member/direct participant as agent for purposes of the Sponsoring Member's clients/Sponsored Members' obligations to and from FICC. Sponsoring Members also guarantee to FICC the payment and performance obligations of their Sponsored Members.[669] Sponsoring Members can

[658] *See generally* DTCC Sponsored General Collateral Service (''DTCC SGCS''), *available at https://www.dtcc.com/-/media/Files/Downloads/Clearing-Services/FICC/GOV/SponsoredGC-FS-INTL.pdf (last visited Dec. 11, 2023).*

[659] *Id.*

[660] GSD Rule 11, Section 3 (along with Rule 1 for the definition of a Covered Affiliate), *supra* note 19.

[661] A liquidity buffer generally refers to liquid assets that a banking organization manages to enable it to meet expected and unexpected cash flows and collateral needs without adversely affecting the banking organization's daily operations. *See generally* FRB, FDIC, & OCC, *Q&As on Statement Regarding the Use of Capital and Liquidity Buffers* (Mar. 17, 2020), *available at https://www.fdic.gov/news/financial-institution-letters/2020/fil20020a.pdf.*

[662] *See* part I, *supra.*

[663] The Commission believes that not all market participants likely would satisfy a covered clearing agency's stringent membership criteria. *See* 17 CFR 17ad–22(e)(18); FICC Rule 2A, *supra* note 19. Even among those that do, legal operational or other considerations may preclude many market participants from becoming direct members of a CCP that clears and settles government securities transactions.

[664] *See, e.g.,* FICC Rules, 8, 18, 3A (providing for prime brokerage and correspondent clearing, as well as sponsored membership), *supra* note 19.

[665] *See* FICC Member Directories, *available at https://www.dtcc.com/client-center/ficc-gov-directories (last visited Dec. 12, 2023)* (This includes all members who make use of Netting, Repurchase Netting, and/or GCF services.).

[666] DTCC, CCIT Service, *available at https://www.dtcc.com/clearing-services/ficc-gov/centrally-cleared-institutional-triparty.*

[667] The Commission has not yet approved registered investment companies to participate in CCIT. *See Order Granting Approval of Proposed Rule Change to Establish the Centrally Cleared Institutional Triparty Service and Make Other Changes,* Exchange Act Release No. 80574, File No. SR–FICC–2017–005, 82 FR 21439, 21440 n.11 (May 2, 2017).

[668] DTCC, FICC-Gov Member Directory (July 27, 2023), *available at https://www.dtcc.com/client-center/-/media/Files/Downloads/client-center/FICC/FICC-GSD-Member-Directory-CCIT.xlsx.*

[669] *See* Exchange Act Release No. 51896 (June 21, 2005), 70 FR 36981 (June 27, 2005); *see also* FICC Rule 3A, *supra* note 19. For general information and statistics regarding the Sponsored Service, *see* DTCC, Sponsored Service, *available at https://www.dtcc.com/clearing-services/ficc-gov/sponsored-membership,* as well as part IV.B.7.d.i *infra.* The Sponsored Service also allows the submission of cash transactions; however, at this

Continued

be either bank direct participants of FICC that meet certain capital and other requirements or any other FICC direct participant that meets what FICC determines to be the appropriate financial resource requirements; in practice, Sponsoring Members include both banks and broker-dealers.[670] Sponsored Members have to be ''qualified institutional buyers'' as defined by Rule 144A under the Securities Act of 1933, as amended, or otherwise meet the financial standards necessary to be a ''qualified institutional buyer,'' and currently, Sponsored Members generally consist of hedge funds, money market funds, other asset managers, and smaller banks.[671]

The Sponsored Service allows eligible direct participants (Sponsoring Members) to (i) sponsor their clients into a limited form of FICC membership (Sponsored Members) and then (ii) submit certain eligible client securities transactions for central clearing. The requirement to clear eligible secondary market transactions could affect Sponsored Members. FICC interacts solely with the Sponsoring Member/direct participant as agent. Sponsoring Members guarantee to FICC the payment and performance obligations of its Sponsored Members.[672] Following FICC's expansion in 2021 of its Sponsored Service to allow Sponsored Members to clear triparty repos through the program,[673] there are now approximately 350 Sponsoring Members and approximately 2,200 Sponsored Members [674] with access to central clearing. During the 12-month period ending on August 15, 2023, the total dollar value of Sponsored Members' daily repo and reverse repo activity ranged from a high of $771.7 billion on June 30, 2023, to a low of $265.8 billion on September 14, 2022.[675]

Among the various types of financial firms that are Sponsored Members are (i) over 1,400 funds, including a number of hedge funds, many money market funds, other mutual funds, and a smaller number of exchange-traded funds (''ETFs''); [676] (ii) banks, including a small number of national, regional Federal Home Loan Banks, and international banks; and (iii) other asset managers including a few insurance companies.[677]

From a direct participant's perspective, clearing a U.S. Treasury securities transaction at FICC between that participant and its non-participant counterparty (*i.e.,* a dealer-to-client trade) need not result in a separate collection of margin for each transaction. Transactions between direct participants are novated by FICC, and, by virtue of multilateral netting, all of a member's positions are netted into a single payment obligation—either to or from the CCP. In contrast, in a dealer-to-client trade, there is no transaction between two direct participants that FICC membership rules would require to be novated to the CCP, and as a result, FICC does not provide any guaranty of settlement or otherwise risk manage this trade.[678] In other words, as one recent publication explained, ''if a dealer were to buy a security from its own customer and submit this transaction to FICC, there would be no effect on the dealer's net position at, obligations to, or guarantees from FICC.'' [679] Indeed, except for its sponsored program, because FICC nets all trades at a dealer before calculating margin, as at present, customer trades with their own dealers generate no margin requirement and are not collateralized at the CCP.

Sponsored Members participating in FICC's Sponsored Service are indirect members of FICC, and upon novation of their U.S. Treasury transactions, FICC becomes obligated to such Sponsored Members.[680] FICC requires that its Sponsoring Members provide margin on a gross basis for its Sponsored Member positions.[681] In FICC's correspondent clearing and prime brokerage clearing models, the client of the netting member does not have a legal relationship with FICC.[682] FICC only has CCP obligation to the correspondent clearer or prime broker itself, as applicable, who is a FICC member.

Certain aspects of FICC's Sponsored Service are worth noting, as they may have an effect on some market participants' willingness to participate in the service. For example, once a trade is novated, FICC makes delivery of cash or securities to the Sponsoring Member as agent for the Sponsored Member.[683] Therefore, market participants may consider the ability of their Sponsoring Member to make delivery to them in situations in which the Sponsoring Member is in default, when determining whether to use the Sponsored Service. In addition, if a Sponsoring Member defaults, FICC continues to guarantee any novated sponsored trades and may determine whether to close out a sponsored trade and/or to permit the Sponsored Member to settle the trade.[684] This may lead a potential sponsored member to decline to enter a sponsoring relationship unless it was willing to trade bilaterally with those sponsoring firms. The Commission understands that some Sponsoring Members also may limit which market participant's trades they are willing to sponsor based on firm type. Sponsored triparty repo is a relatively recent addition.[685] Volumes of sponsored repo

time, the service is generally used only for U.S. Treasury repo transactions.

[670] *See* FICC Rule 3A, section 2(a) and (b), *supra* note 19; DTCC, *FICC GSD Member Directory* (Oct. 31, 2023), *available at https://www.dtcc.com/-/media/Files/Downloads/client-center/FICC/Mem-GOV-by-name.xlsx* (identifying Sponsoring Members as those with Omnibus accounts).

[671] *See* FICC Rule 3A, section 3(a), *supra* note 19; FICC Sponsored Membership Listing, *available at https://www.dtcc.com/client-center/ficc-gov-directories.*

[672] *See* FICC's GSD Rule 3A, *supra* note 663. Sponsored Members have to be Securities Act Rule 144A ''qualified institutional buyers,'' or otherwise meet the financial standards necessary to be a ''qualified institutional buyer.'' *See id.,* Rule 3A, section 3(a).

[673] *See* Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving a Proposed Rule Change to Expand Sponsoring Member Eligibility in the Government Securities Division Rulebook and Make Other Changes, Exchange Act Release No. 85470 (Mar. 29, 2019).

[674] In its 2022 annual report, DTCC reported that FICC's sponsored service expanded during the year to more than 35 sponsoring members. DTCC 2022 Annual Report, *supra* note 737, at 29. *See also supra* note 668.

[675] This information was available from DTCC on the 1 year version of the FICC Sponsored Activity chart as of Aug. 15, 2023. DTCC, Sponsored Membership (last updated Dec. 1, 2023), *available at https://www.dtcc.com/charts/membership.*

[676] For various persons, direct participation in FICC may not be an alternative to the Sponsored Membership program. For example, ''[a] subset of market participants, such as certain money market funds, face legal obstacles to joining FICC because they are prohibited from mutualizing losses from other clearing members in the way that FICC rules currently require.'' Marta Chaffee and Sam-Schulhofer-Wohl, *infra* note 678, at 2.

[677] FICC Membership Listing, *supra* note 670.

[678] *See* Marta Chaffee and Sam-Schulhofer-Wohl, *Is a Treasury Clearing Mandate the Path to Increased Central Clearing?,* Chicago Fed Insights, *https://www.chicagofed.org/publications/blogs/chicago-fed-insights/2021/treasury-clearing-mandate (June 23, 2021)* (explaining that this conclusion follows from that fact that ''FICC nets members' trades for their own accounts against trades by the members' customers, so the dealer's and customer's sides of the trade would cancel out in the netting process.'').

[679] *Id.*

[680] FICC–GSD Rule 3A sections 3 (membership) and 7 (novation), *supra* note 19.

[681] FICC Rule 3A, section 10(c), *supra* note 19. *See also* The Depository Trust and Clearing Corporation (DTCC), *Making the U.S. Treasury Market Safer for All Participants: How FICC's Open Access Model Promotes Central Clearing* (white paper, Oct. 2021), *available at https://www.dtcc.com/-/media/Files/Downloads/WhitePapers/Making-the-Treasury-Market-Safer-for-all-Participants.pdf* (''DTCC October 2021 White Paper'') at 5–6.

[682] FICC Rule 8, *supra* note 19. *See* DTCC October 2021 White Paper, *supra* note 681, at 5, which reports that $80 billion plus of activity are observed clearing and settling daily through FICC's correspondent clearing and prime broker clearing models.

[683] FICC Rule 3A, sections 8 and 9, *supra* note 19.

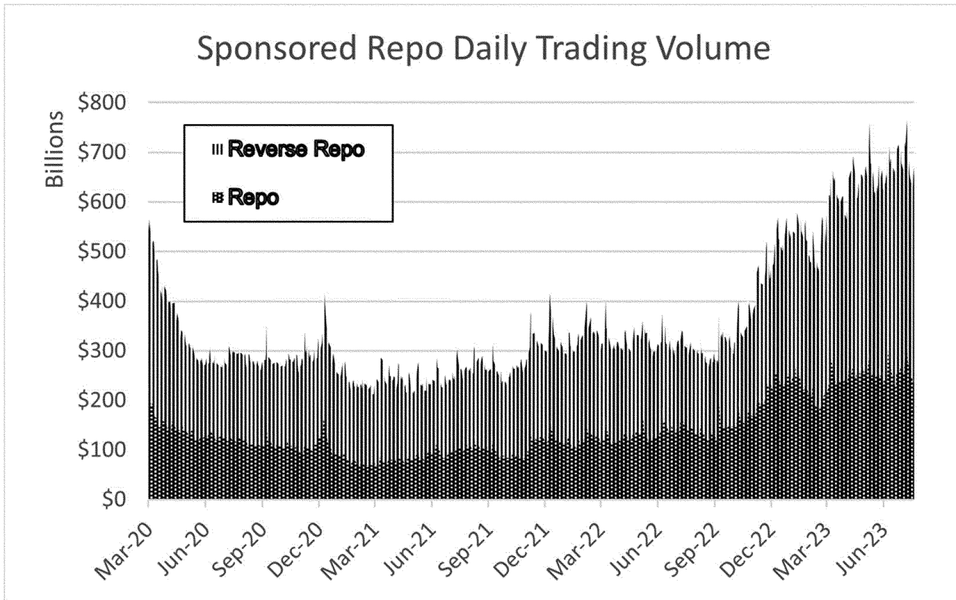
[684] FICC Rule 3, section 14(c), *supra* note 19.

[685] *See generally* DTCC SGCS, *supra* note 658.

fluctuate, but they appear to be substantial as Figure 6 shows.

In addition, the Commission understands that it is common practice for sponsoring members to only offer clearing services for transactions in which the sponsor is the counterparty to the sponsored member. This bundling of execution and central clearing sponsor services means that should a non-FICC member wish to centrally clear a U.S. Treasury transaction, it is limited in the counterparties with which it can trade to those FICC direct members with which it has an existing sponsoring member relationship.

Figure 6: Sponsored Repo Daily Trading Volume[a]



[a] DTCC, *Sponsored Membership* (last updated Dec. 4, 2023), *available at* https://www.dtcc.com/charts/membership

In order for a CCP to perform as the guarantor of trades that have been novated to it, the CCP must have resources available to absorb the costs of clearing member non-performance. FICC is required by Commission rule to have policies and procedures reasonably designed to maintain financial resources at the minimum to enable it to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the participant family that would potentially cause the largest aggregate credit exposure in extreme but plausible market conditions.[686] A CCP's plan to deal with a clearing member default is referred to as its default waterfall. The default waterfall provides an identification of resources that the CCP will use in attempting to recoup losses from clearing member defaults. The FICC waterfall comprises the defaulting clearing member's contribution (*i.e.,* margin, as well as any other resources the member has on deposit such as excess margin, the proceeds from liquidating the member's portfolio, and any amounts available from cross-guaranty agreements), the corporate contribution to the clearing fund, followed by non-defaulting clearing members' margin.[687]

In addition, with respect to liquidity risk, the Commission's rules require FICC to have policies and procedures reasonably designed to meet a ''cover-1'' standard and hold qualifying liquid resources sufficient to complete its settlement obligations in the event of the default of the largest member and its affiliates.[688] For example, if a clearing member has a net long position in a security that has not yet settled, the CCP must have the cash available to complete the purchase. The securities can be subsequently liquidated and any losses that may result would be covered by the resources in the default waterfall. The first liquidity source that FICC would use in the event of a member default is the cash portion of the clearing fund.[689] Second, FICC can pledge securities in the clearing fund as a source of cash, including securities that would have otherwise been delivered to the defaulting member.[690] Should additional liquid resources be required FICC could make use of the CCLF.[691]

The CCLF is a rules-based arrangement in which FICC members are obligated to participate as a condition of their membership. Should FICC declare a CCLF event, each member would be obligated to enter into repurchase agreements with FICC up to

[686] 17 CFR 240.17ad–22(e)(4)(iii).

[687] FICC Rule 4, sections 6 and 7, *supra* note 19.

[688] Specifically, the Commission's rules require FICC to have policies and procedures reasonably designed to maintain sufficient liquid resources at the minimum in all relevant currencies to effect same-day and, where appropriate, intraday and multiday settlement of payment obligations with a high degree of confidence under a wide range of foreseeable stress scenarios that includes, but is not limited to, the default of the participant family that would generate the largest aggregate payment obligation for the covered clearing agency in extreme but plausible market conditions, and to hold qualifying liquid resources sufficient to meet that requirement. *See* 17 CFR 240.17ad–22(e)(7)(i) and (ii).

[689] FICC Rule 4, sections 5 and 6, *supra* note 19.

[690] *Id.*

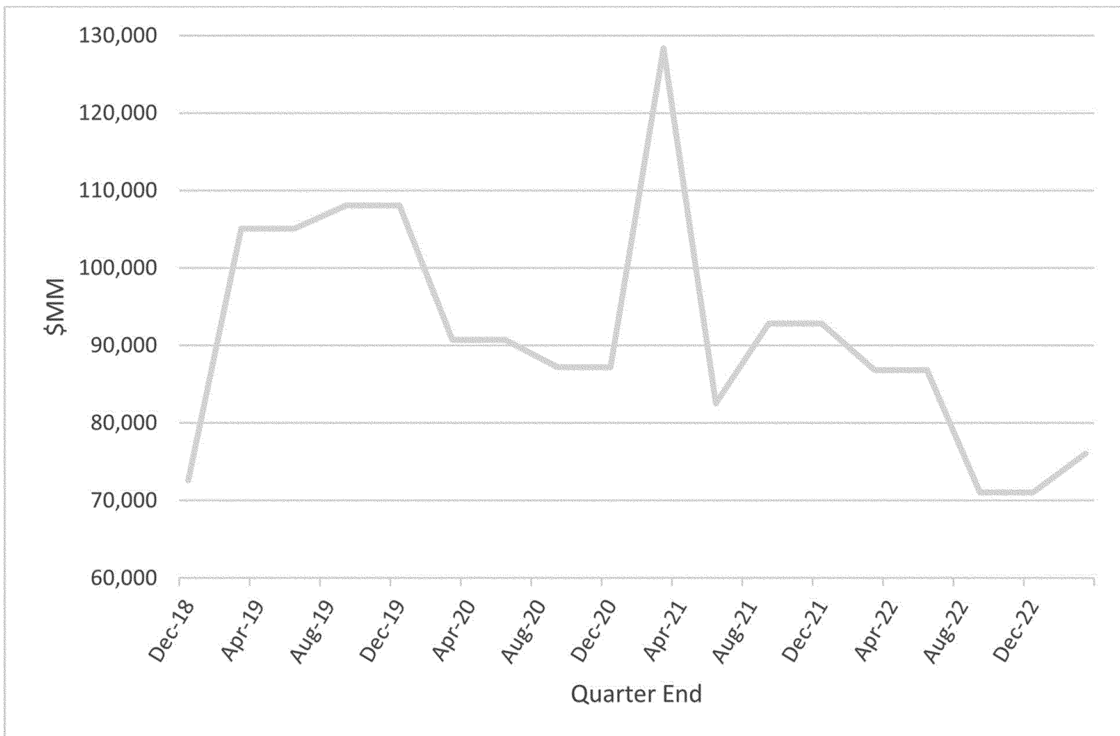
[691] FICC Rule 22A, section 2a, *supra* note 19.

a member-specific limit.[692] The CCLF is not prefunded, and it is separate from FICC's margin requirements. Each FICC member is required, by FICC's rules, to attest that its CCLF requirement has been incorporated into its liquidity planning and related operational plans at least annually and in the event of any changes to such Member's CCLF requirement.[693] Thus, the members are obligated to have such resources lined up, which can be costly.[694]

The CCLF provides a mechanism for FICC to enter into repurchase transactions based on the clearing activity of the defaulted participant. Specifically, in the event that FICC declares a CCLF event, FICC's members would be required to hold and fund their deliveries to the defaulting member, up to a predetermined capped dollar amount, by entering into repurchase transactions with FICC until FICC completes the associated closeout.[695] The aggregate size of the CCLF is the historical cover-1 liquidity requirement (*i.e.,* the largest liquidity need generated by an Affiliated Family during the preceding six-month period) plus a liquidity buffer (*i.e.,* the greater of 20 percent of the historical cover-1 liquidity requirement or $15 billion).[696]

The first $15 billion of the total amount of the CCLF is shared, on a scaled basis, across all members. Any remaining amount is allocated to members who present liquidity needs greater than $15 billion, using a liquidity tier structure based on frequency of liquidity created across liquidity tiers in $5 billion increments.[697] The size of the CCLF and each member's share is reset every 6 months or as appropriate.[698] Figure 7 provides data on the aggregate amount of the CCLF from 2018 quarter 4 through 2023 quarter 1. The aggregate size of the CCLF was over $76 billion in 2023 quarter 1.

Figure 7: Aggregate CCLF ($MM) at Quarter End[a]



[a] Calculated using data from CPMI-IOSCO Quantitative Disclosure Results [quarterly] (for FICC), Disclosure Reference 7.1.6, *available at* https://www.dtcc.com/legal/policy-and-compliance.

[692] These repurchase agreements may continue for up to 30 days. *See* FICC Rule 22A, section 2a(a)(L), *supra* note 19.

[693] FICC Rule 22A, section 2a(d), *supra* note 19.

[694] *See* Independent Dealer & Trader Association, *White Paper on the Repo Market Affecting U.S. Treasury and Agency MBS* 8 (Dec. 6, 2019), *available at https://static1.squarespace.com/static/5ad0d0abda02bc52f0ad4922/t/5dea7fb6af08dd44e68f48cc/1575649207172/IDTA+-+White+Paper+%2812.6.19%29-c2.pdf* (''In light of the fact that a significant component of a firm's CCLF obligation is based on its overnight liquidity exposures at FICC, middle-market dealers immediately took to reducing their reliance on overnight liquidity. Some middle-market dealers reduced the size of their portfolio and extended liquidity terms in place of overnight funding, adding to both financing and opportunity costs. Others have incorporated liquidity plans for which commitment and administration fees materially added to the cost of doing business.'').

[695] *See generally* FICC Rule 22A, section 2a(b), *supra* note 19. For details on the process, *see* Order Approving a Proposed Rule Change to Implement the Capped Contingency Liquidity Facility in the Government Securities Division Rulebook, Exchange Act Release No. 82090 (Nov. 15, 2017), 82 FR 52457 (Nov. 21, 2017).

[696] FICC Rule 1 (definitions of Aggregate Total Amount and Liquidity Buffer) and 22A, section 2, *supra* note 19.

[697] FICC Rule 22A, section 2a(b)(iii), (iv), and (v), *supra* note 663. *See also* Exchange Act Release No. 82090, *supra* note 695, 82 FR at 55429–30.

[698] FICC Rule 22A, section 2a(b)(ii), (iii), (iv), and (v), *supra* note 19.

5. Margin Practices in U.S. Treasury Secondary Markets

As described above, posting of margin is one way to manage the risk of settlement in cash trades. Indeed, for trades that are centrally cleared, the CCP collects margin on an intraday basis, typically twice per day.[699] Varying bespoke arrangements appear to characterize current margining practices in the bilateral, non-centrally cleared cash market.[700] A recent publication stated that competitive pressures in the bilaterally settled market for repo transactions has exerted downward pressure on haircuts, sometimes to zero.[701] The Commission understands that most non-centrally cleared bilateral repo trades go unmargined.[702] For non-centrally cleared repo including that which is settled using the triparty platform, haircuts serve as a counterparty credit risk mitigant. The median haircut on U.S. Treasury collateral for non-centrally cleared bilateral repo that is settled on the triparty platform has been 2% since at least 2010.[703]

In a study of non-centrally cleared bilateral repo trade data collected in its June 2022 pilot study, the OFR reports that 74% of all volume is transacted at zero haircut.[704] The report also suggests that this finding is in part due to the use of netted packages, in which a dealer will conduct both a repo and a reverse repo with the same counterparty and the same tenor but over different pieces of Treasury collateral.[705] The report also provides evidence that haircuts reflect not only the riskiness of the collateral but also the relative credit risk of the counterparties. For example, haircuts on Treasury repo where dealers are selling repo to hedge fund customers are usually zero or negative, while haircuts where dealers buying repo from hedge funds are usually zero or positive.[706]

The reduction of haircuts, which serve as the primary counterparty credit risk mitigant in non-centrally cleared and bilaterally settled repos, could result in greater exposure to potential counterparty default risk in non-centrally cleared repos. Such arrangements (in both cash and repo) may not take into account the value of margin in protecting against systemic events, because they are designed to be optimal for the counterparties rather than the larger financial market.

For centrally cleared cash U.S. Treasury transactions, however, FICC rules dictate that margin must be posted based on the net positions of all members with the clearing agency.[707] Positions in securities with longer maturities—for example, 20+ year U.S. Treasury bonds—require more margin to be posted because they are more sensitive to interest rate changes. Required margin is also larger for short positions, and it rises with volatility in the U.S. Treasury securities market.[708] For example, during the first quarter of 2020, a period which includes the U.S. Treasury securities market disruption of March 2020, total initial margin required was 9.4% higher than the previous quarter and the average total variation margin paid was 72% higher.[709]

FICC Rules set forth the various components of a member's margin requirements.[710] The largest component is a Value-at-Risk (VaR) charge, which is calculated both intraday and end-of-day and reflects potential price volatility of unsettled positions. FICC typically calculates VaR using ten years of historical data; for securities without the requisite amount of data, FICC instead employs a haircut approach, where the required margin is some percentage of the traded security's value. Other components of FICC's margin requirements include a liquidity adjustment charge, which is levied against members who have large, concentrated positions in particular securities that FICC determines to be difficult to liquidate, and special charges that can be levied in response to changes in aggregate market conditions (such as increases in market-wide volatility).

In the market for bilaterally cleared repo, margin typically comes in the form of haircuts. For example, if a repo buyer is providing $100 of cash in return for $102 of securities from the repo seller, then the haircut would be $2. The difference between the value of the securities sold and the initial price paid, which is essentially a form of initial margin, protects the buyer by making it more costly for the seller to fail to repurchase the securities as agreed at the end of the repo, while also protecting the buyer against the risk that short-term volatility erodes the value of the purchased securities.[711] The difference between the cash provided and the value of the securities is known colloquially as a ''haircut.'' Triparty repo also features overcollateralization, where the haircut is again negotiated bilaterally between the two counterparties.[712] Data from the Federal Reserve Bank of New York show that a 2% haircut is the norm in the Triparty/GCF repo market, though there are occasionally some deviations from the norm.[713] Money market funds also generally require margin of 2%, which is generally the case for other investment companies as well.[714] Outside of money market funds and

[699] TMPG White Paper, *supra* note 13, at 3.

[700] *Id.* at 3. Non-centrally cleared cash trades are negotiated and settled bilaterally, and the Commission has little direct insight into the arrangements market participants use to manage their counterparty exposure. The TMPG observes in the White Paper that non-centrally cleared trades are ''. . . not margined in a uniform or transparent manner, thereby creating uncertainty about counterparties' exposure to credit and market risk.'' *Id.*

[701] G–30 Report, *supra* note 5, at 13.

[702] TMPG White Paper, *supra* note 13, at 3 (''Margining has not been a common practice for regularly settling bilaterally cleared transactions. . .'').

[703] *See Tri-Party/GCF Repo,* Federal Reserve Bank of New York, *available at https://www.newyorkfed.org/data-and-statistics/data-visualization/tri-party-repo/index.html#interactive/margins.*

[704] *See* Hempel et al. (2023), *supra* note 564, at 3 and 7–9.

[705] *Id.*

[706] *Id.* at 7.

[707] *See* Part IV.B.3.4, *supra* for a discussion of how FICC requires for margining of sponsored positions.

[708] *See* FICC Rule 4, section 1b, *supra* note 19. FICC's margin requirements are discussed in more detail below. A key component of the margin requirement is a Value-at-Risk charge, where the calculated margin requirement is based in part on the historical volatility of the traded security. Securities that are more sensitive to interest rates should have higher VaR, all else equal.

[709] *See CPMI IOSCO Quantitative Disclosure Results for 2020Q1 and 2019Q4,* items 6.1.1 and 6.6.1, *available at https://www.dtcc.com/legal/policy-and-compliance.*

[710] FICC Rule 4, section 1b, *supra* note 19.

[711] With respect to registered investment company lenders seeking to rely on Rule 5b–3 under the 1940 Act, the value of the collateral received under a repo must be at least equal to the resale price, reduced by the transaction costs (including loss of interest) that the investment company reasonably could expect to incur if the cash borrower defaults. *See* Rule 5b–3(a); (c)(1).

[712] Although triparty repo transactions are settled through a clearing bank, the terms of the transactions are bilaterally negotiated. Although haircuts vary by collateral type, the variance of haircuts is small for U.S. Treasury repo compared to other collateral types. *See* Paddrik et al., *supra* note 631.

[713] For data on the median, 10th, and 90th percentiles of overcollateralization in Triparty repo, *see Tri-Party/GCF Repo,* Federal Reserve Bank of New York, *available at https://www.newyorkfed.org/data-and-statistics/data-visualization/tri-party-repo.* The median level of overcollateralization has been 2% for the entire period from May 2010 through July 2023. The 10th and 90th percentiles are also typically 2%, although the 10th percentile has occasionally fallen to as low as zero—notably, in the summer of 2011, briefly in Sept. 2012, and in the period from Sept. of 2022 through early Jan. of 2023—while the 90th percentile has occasionally spiked to as high as 5%—specifically in Jan. 2017 and again in Apr. of the same year.

[714] *See* Viktoria Baklanova, Isaac Kuznits, Trevor Tatum, *Primer: Money Market Funds and the Repo Market* (Feb. 18, 2021), *available at https://www.sec.gov/files/mmfs-and-the-repo-market-021721.pdf* (''MMF Primer'').

other investment companies, due to the lack of reporting requirements for bilateral repo, the Commission lacks good insight into margin practices of participants in the market for bilaterally cleared repo. Anecdotally, the Commission understands that—as with the cash market—some participants may not be required to post any margin.[715]

While positive haircuts protect the repo buyer, the bilaterally cleared repo market generally does not feature the same level of protection for the repo seller. Indeed, one of the main benefits of the bilateral market to repo buyers is that it allows them to resell the securities purchased in the start leg of the repo. As a result, repo sellers are exposed to settlement risk and must manage that risk as they see fit. In the triparty repo market, securities purchased as part of a repo transaction remain in the custody of the clearing bank and cannot be reused by the repo buyer except as collateral in another triparty repurchase agreement, reducing settlement risk for the repo seller.

Unlike bilaterally cleared and triparty repo the counterparties to a centrally cleared repo transaction must post cash margin to the CCP twice per day, as they do with trades in the cash market. Repo sellers may be required to post more margin than repo buyers, similar to how in the bilaterally cleared market repo sellers post margin through haircuts while repo buyers do not.

6. Disruptions in the U.S. Treasury Securities Market

There have been significant disruptions in the U.S. Treasury securities market in recent years. Although different in their scope and magnitude, these events all generally involved dramatic increases in market price volatility and/or sharp decreases in available liquidity.[716] U.S. Treasury securities are generally not information sensitive in that their payoff is fixed in nominal terms. Moreover, there is little evidence that information on inflation risk or expectations could have driven the volatility observed in these episodes, raising the possibility that the volatility originated in a buy-sell imbalance, as opposed to fundamental factors. While a market failure could be the origin of price volatility, the forward-looking nature of markets can compound liquidity-driven price movements. The fear of being unable to exit a position can lead to a ''rush to the exits,'' leading to yet greater price swings. Because U.S. Treasury securities are standardized, they generally benefit from a deep, ready market for transactions. Investors count on the ability to move between cash and U.S. Treasury securities seamlessly.[717] This makes events that reduce liquidity in these markets especially striking and destabilizing to the overall market. Moreover, since the Proposal, regulators and others have noted the persistence of illiquidity and the mitigating effect of greater central clearing.[718]

a. COVID–19 Shock of March 2020

The market for U.S. Treasury securities experienced significant disruptions in March 2020, characterized by a spike in volume, whose origins may have been multiple but included high levels of selling by foreign banks and by hedge funds.[719] For example, hedge funds, one of the principal sellers of U.S Treasury futures, hedge their short futures position by establishing a long position in the cash market, creating a ''cash-futures basis trade.'' [720] The cash position of this trade is often highly levered, using the repo market for financing. In March, as the U.S. Treasury securities market came under stress and as repo rates increased in some segments of the repo market, the economics of the cash-futures basis trade worsened and various funds found it necessary to unwind at least a portion of their positions. This unwinding of positions resulted in more outright sales of U.S. Treasury securities in the cash market, adding further stress through a feedback loop.[721]

During this period, bid-ask spreads increased by a factor of 5, and market depth on inter-dealer brokers decreased by a factor of 10. The price of 30-year U.S. Treasury securities fell by 10% in one two-day period. Arbitrage relations appeared to break down throughout the market.[722] This may, as discussed above, have led to the winding down of the cash-futures basis trade, for example, adding to further stress.[723] There also appeared to be large-scale selling from foreign investors, including official institutions, to address their domestic currency and liquidity needs.[724]

Duffie and Liang and Parkinson, among others, have tied these patterns to underlying U.S. Treasury securities market structure, in which intermediation capacity may be reduced relative to the size of the market and ultimate buyers and sellers may have difficulty locating each other. These authors discuss ways in which central clearing could have reduced these problems, mitigating the large price swings due to illiquidity in the market just when it was most needed.[725] One view of central clearing is that it may facilitate all-to-all trading, thus helping

[715] *See* G–30 Report, *supra* note 5, at 13 (noting that minimum margin requirements ''. . . would stop competitive pressures from driving haircuts down (sometimes to zero), which reportedly has been the case in recent years.'').

[716] *See* 2021 IAWG Report, *supra* note 4, for further discussion of these and other disruptions. *See also* Remarks by Under Secretary for Domestic finance Nellie Liang at the 2022 Treasury Market Conference, *available at https://home.treasury.gov/news/press-releases/jy1110.* Under Secretary Liang points out that continued liquidity concerns are linked to higher volatility since the COVID–19 shock of Mar. 2020.

[717] U.S. Treasury securities are often used as substitutes for cash. There is anecdotal evidence that during Mar. 2020, some market participants refused U.S. Treasury securities collateral in favor of cash.

[718] *See* Remarks by Under Secretary for Domestic Finance Nellie Liang at the 2022 Treasury Market Conference *available at https://home.treasury.gov/news/press-releases/jy1110,* Enhancing The Resilience of the U.S. Treasury Market: 2022 Staff Progress Report (Nov 10, 2022), *available at https://home.treasury.gov/system/files/136/2022-IAWG-Treasury-Report.pdf*), and Darrel Duffie, *Resilience redux in the US Treasury market,* Jackson Hole Symposium (Sept. 2, 2023), *available at https://www.kansascityfed.org/Jackson%20Hole/documents/9780/JH-2023BW.pdf. See also* Darrell Duffie, Michael Fleming, Frank Keane, Claire Nelson, Or Shachar, and Peter Van Tassel, *B.6.aa,* Internal SEC seminar (July 2023), *available at https://www.sec.gov/comments/s7-23-22/s72322-260739-614102.pdf.*

[719] *See* SEC Staff Report on U.S. Credit Markets Interconnectedness and the Effects of the COVID–19 Economic Shock (Oct. 2020), *available at https://www.sec.gov/files/US-Credit-Markets_COVID-19_Report.pdf.*

[720] *See* Ayelen Banegas, Phillip J. Monin, and Lubomir Petrasek, *Sizing hedge funds' Treasury market activities and holdings* (FEDS Notes Oct. 6, 2021), *available at https://www.federalreserve.gov/econres/notes/feds-notes/sizing-hedge-funds-treasury-market-activities-and-holdings-20211006.html.*

[721] *See supra* note 719, at 4. In addition, a similar dynamic was observed in the risk parity trades, where hedge funds lever up (through the repo markets) lower volatility fixed-income positions (*e.g.,* government bonds) to create a risk-equalized portfolio across asset classes. *See also id.*

[722] Duffie, *supra* note 27.

[723] *See generally* Ayelen Banegas et al., *supra* note 720; *see also* Daniel Barth & R. Jay Kahn, *Hedge Funds and the Treasury Cash-Futures Disconnect* (Apr. 1, 2021), *available at https://www.financialresearch.gov/working-papers/2021/04/01/hedge-funds-and-the-treasury-cash-futures-disconnect/;* Mathias S. Kruttli, Phillip J. Monin, Lubomir Petrasek, & Sumudu W. Watugala, *Hedge Fund Treasury Trading and Funding Fragility: Evidence from the COVID–19 Crisis* (working paper Fin. and Econ. Disc. Series 2021–038), Fed. Res. Bd (Apr. 2021), *available at https://www.federalreserve.gov/econres/feds/files/2021038pap.pdf.*

[724] *See* Colin R. Weiss, *Foreign Demand for U.S. Treasury Securities during the Pandemic* (FEDS Notes, Jan. 28, 2022), *available at https://www.federalreserve.gov/econres/notes/feds-notes/foreign-demand-for-us-treasury-securities-during-the-pandemic-20220128.htm.*

[725] Duffie, *supra* note 27; Nellie Liang & Pat Parkinson, *Enhancing Liquidity of the U.S. Treasury Market Under Stress* (Hutchins Ctr. Working Paper No. 72, 2020), *available at https://www.brookings.edu/wp-content/uploads/2020/12/WP72_Liang-Parkinson.pdf* (''Liang & Parkinson'').

ultimate buyers and sellers find each other.[726] More buyers and sellers of U.S. Treasury securities could potentially act as additional sources of liquidity in a market with central clearing.

b. September 2019 Repo Market Disruptions

The repo market experienced a substantial disruption starting September 16, 2019, when overnight repo rates began to rise, and on September 17, 2019, when the rise in repo rates accelerated dramatically. During the episode, the Secured Overnight Financing Rate (SOFR)—a measure of the average cost of overnight repo borrowing (*e.g.,* the implied cost of borrowing by selling overnight repo)—spiked by 300 basis points to over 5% in the course of 2 days. There was also a wide dispersion around this average; some trades occurred at rates as high as 9%. On top of this, the spread between the 1st and 99th percentile rates increased substantially from its average earlier in 2019 of approximately 25 basis points to approximately 675 basis points during the disruption. The disruption spilled over into the other markets, with the Effective Federal Funds Rate (EFFR) rising above the Federal Reserve target by 5 basis points.

The disruption occurred amidst two events: first, a large withdrawal of reserves from the banking system to service corporate tax payments due September 16; and second, the settlement of U.S. Treasury securities auctions. Altogether, the tax payments led approximately $120 billion to flow away from bank reserves, bringing them down to their lowest level in 5 years.[727] Moreover, the auction settlement raised the supply of U.S. Treasury securities outstanding, which was accompanied by an increased demand for cash to fund purchases of these securities. The need for cash reserves played a role in what appears to be an unwillingness of banks to lend to one another at very high rates. Less tangibly, market expectations could have played a role; it is possible that the spike in rates could have been interpreted as a signal for a future need of cash reserves, leading banks to conserve cash regardless of what appeared to be strong economic incentives to do otherwise.

While the need for the banking system to replace reserves with cash may be part of the explanation, in a well-operating market high rates for overnight borrowing collateralized by U.S. Treasury securities (*i.e.,* the implied cost of borrowing by selling overnight repo) would have attracted other market participants. Ultimately, as it did in March 2020, the Federal Reserve injected reserves into the system—the economic equivalent of lending to banks. The overnight repo operations totaled $75 billion on September 17, 2019. Besides directly providing cash, this perhaps signaled the Fed's willingness and ability to lend as needed to restore rates to levels that would occur in the absence of market frictions. In such a setting, a potential benefit of enhanced clearing for U.S. Treasury repo and cash is its ability to reduce those market frictions directly, without official sector intervention.

c. October 2014 Flash Rally

In March 2020 U.S. Treasury securities' prices fell, whereas in September 2019 the rate for lending increased. Both events were associated with an increase in the cost of borrowing (*i.e.,* the implied cost of borrowing by selling overnight repo). The events of October 15, 2014, were different in form: in this instance, yields on U.S. Treasury bonds fell quickly and dramatically, leading to large increases in prices, without any clear explanation. The intraday range for the 10-year bond was 37 basis points, one of the largest on record, and far outside the typical historical distribution.[728] October 15, 2014, featured the release of somewhat weaker-than-expected U.S. retail sales data at 8:30 a.m. ET. While the data appeared to prompt the initial decline in interest rates, the reaction was far larger than would have been expected given the modest surprise in the data. Suggestive of some connection is that the dollar amount of standing quotes in the central limit order books on cash and futures trading platforms—a measure of the quantity of liquidity that is commonly referred to as ''market depth''—fell dramatically in the hour before the event window.

A sudden rise in price does not at first appear as potentially disruptive as a decline. However, it appears that levered market participants had taken short positions in anticipation of an increase in yields. Any further increase in price would have forced these participants to cover their positions. Indeed, hedge funds became net buyers of U.S. Treasury securities on the morning of October 15, 2014. The decline in liquidity may have led to a further concern of an inability to exit positions. In particular, although the share of trading volume attributed to PTFs on October 15 does not stand out as unusual relative to the prior period,[729] PTFs significantly reduced the dollar amounts of standing quotes in central limit order books,[730] leading to greater pressure on the system. This withdrawal of liquidity appears to have been motivated by an attempt to manage risk. Lastly, though broker-dealers increased their trading volume, they provided less liquidity to the order books by widening their spreads and in some cases withdrawing for brief periods from the offer side of the book.[731]

This disruption showed that market liquidity provision had become more short-term in nature, some liquidity providers were backed by less capital, and liquidity was more vulnerable to shocks as a result of the change in the composition of liquidity providers. In addition, electronic trading permitted rapid increases in orders that removed liquidity. These vulnerabilities are similar to ones observed during the March 2020 events.[732] As in the previously described episodes, the price swings illustrate the apparent difficulty for outside capital at accessing the market. Improved market functioning could have allowed economic incentives to help stabilize the system: end-users of U.S. Treasury securities could have reacted to the unusually high prices by selling. However, such participants would have needed access to pricing and to the ability to trade.

7. Affected Parties

a. Covered Clearing Agencies for U.S. Treasury Securities: FICC

Although the requirement to clear eligible secondary market transactions would apply to all U.S. Treasury securities CCAs, FICC's Government Securities Division, as noted previously, is the sole provider of clearance and settlement services for U.S. Treasury securities. FICC is a wholly owned subsidiary of The Depository Trust & Clearing Corporation (DTCC); DTCC is a private corporation whose common shares are owned by fee-paying participants in DTCC's clearing agency

[726] *See* Duffie, *supra* note 27.

[727] *See* Sriya Anbil, Alyssa Anderson, and Zeynep Senyuz, *What Happened in Money Markets in September 2019?* (FEDS Notes, Feb. 27, 2020), *available at https://www.federalreserve.gov/econres/notes/feds-notes/what-happened-in-money-markets-in-september-2019-20200227.htm.*

[728] *See generally* Joint Staff Report, *supra* note 4.

[729] *See* Joint Staff Report, *supra* note 4, at 21.

[730] *See* 2021 IAWG Report, *supra* note 4, at 18.

[731] *See id.*

[732] *See id.*

subsidiaries, including FICC.[733] In 2022 and 2021, FICC's total clearing revenue was approximately $312.8 million and $310.0 million, respectively, and its net income was approximately $4.6 million and $13.4 million, respectively.[734]

The G–30 Report estimated that ''roughly 20 percent of commitments to settle U.S. Treasury security trades are cleared through FICC.'' [735] Although various analyses have noted the increased volume of secondary market U.S. Treasury transactions that are not centrally cleared,[736] the dollar value of transactions FICC clears remains substantial. In 2022, FICC's GSD processed $1.512 quadrillion in DVP transactions of U.S. Government securities.[737] In March 2020, clearing dollar volume in U.S. Treasury securities at FICC rose ''to over $6 trillion daily, an almost 43 percent increase over the usual daily average of $4.2 trillion cleared [at that time].'' [738]

There are differences between the degree of central clearing in the cash and the repo markets. Based on 2017 data, the TMPG estimated that 13 percent of cash U.S. Treasury securities transactions are centrally cleared; 68 percent are bilaterally cleared; and 19 percent involve hybrid clearing, in which only one leg of a transaction on an IDB platform is centrally cleared.[739] A Federal Reserve staff analysis of primary dealer repo and reverse repo transactions during the first half of 2022 found ''that approximately 20 percent of all repo and 30 percent of reverse repo is centrally cleared via FICC.'' [740] Measured by dollar volume, repos, according to DTCC, are the largest component of the government fixed-income market.[741] In mid-July 2021, according to Finadium and based on DTCC data, FICC processed $1.15 trillion in repo, or roughly 25 percent of the $4.4 trillion U.S. repo market at that time.[742] For all of 2022, DTCC reported that FICC processed $235 trillion through its GCF Repo Service.[743]

b. Direct Participants at U.S. Treasury Securities CCAs: FICC Netting Members

The requirement to clear eligible secondary market transactions would directly affect market participants that are direct participants in a U.S. Treasury securities CCA, which currently means only direct participants at FICC's GSD. FICC direct participants are also referred to as FICC Netting Members. As previously discussed, FICC Netting Members are the only FICC members eligible to become a counterparty to FICC to a U.S. Treasury securities transaction, including repo and reverse repo trades. As of August 14, 2023, FICC's GSD had 208 Netting Members of which 192 were participants in FICC's repo netting service.[744] FICC Netting Members generally consist of bank-affiliated dealers and registered broker-dealers. These dealers include all 24 financial institutions currently designated by the Federal Reserve Bank of New York (N.Y. Fed) as ''primary dealers.'' [745] In 2022, the average daily trading dollar value in U.S. Treasury securities by primary dealers was $614.3 billion.[746] The relative significance of dealer trading in the cash market for U.S. Treasury securities is shown in Figure 8.

[733] *See generally* Notice of No Objection to Advance Notices, Exchange Act Rel. No. 74142 (Jan. 27, 2015), 80 FR 5188 (Jan. 30, 2015) (not objecting to a proposal that DTCC's new common share ownership formula will be based solely on fees paid to its subsidiary clearing agencies).

[734] FICC, Consolidated Financial Statements as of and for the Years Ended Dec. 31, 2022 and 2021, *available at https://www.dtcc.com/-/media/Files/Downloads/legal/financials/2023/DTCC-Annual-Financial-Statements-2022-and-2021.pdf.*

[735] G–30 Report, *supra* note 5, at 11.

[736] *See, e.g.,* 2021 IAWG Report, *supra* note 4, at 5–6 (citing TMPG White Paper); U.S. Department of the Treasury, A Financial System That Creates Economic Opportunities Capital Markets (Oct. 2017), *available at https://home.treasury.gov/system/files/136/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf* (''2017 Treasury Report''), at 81; Joint Staff Report, *supra* note 4, at 36–37.

[737] Performance Dashboard, DTCC 2022 Annual Report, at 44, *available at https://www.dtcc.com/about/-/media/Files/Downloads/Annual-Report-2022/DTCC2022AR-PRINT.pdf.* FICC's GSD also process U.S. Government securities that are not U.S. Treasury securities but the dollar amount processed of such securities is believed to be nominal by comparison to that of U.S. Treasury securities.

[738] DTCC May 2021 White Paper, *supra note 307, at 3.*

[739] *See* 2021 IAWG Report, *supra* note 4, at 30; *see also* TMPG White Paper, *supra* note 13, at 12.

[740] *See* Sebastian Infante et al., *supra* note 75 (''Form FR2004 data only cover activities of primary dealers. Therefore, any estimate based on that data is likely to underestimate the total size of the repo market. Discussions with market participants suggest that the nonprimary dealer's market share is smaller than that attributed to the primary dealers, but growing.''). The authors also show that all cleared bilateral repo and reverse repo have U.S. Treasury securities and TIPS as collateral (the authors' Figure 4); Viktoria Baklanova, Adam Copeland, and Rebecca McCaughrin, Reference Guide to U.S. Repo and Securities Lending Markets, N.Y. Fed. Staff Report No. 740, at 11 (rev. Dec. 2015), *available at https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr740.pdf.*

[741] DTCC, *A Guide to Clearance and Settlement, Chapter 8: Settling Debt Instruments, available at https://www.dtcc.com/clearance-settlement-guide/#/chapterEight (last visited Dec. 12, 2023).*

[742] Finadium, Building Out Industry Data for New Industry Needs 9 (2021), *available at https://finadium.com/wp-content/pdfs/finadium-dtcc-building-out-repo-data.pdf.*

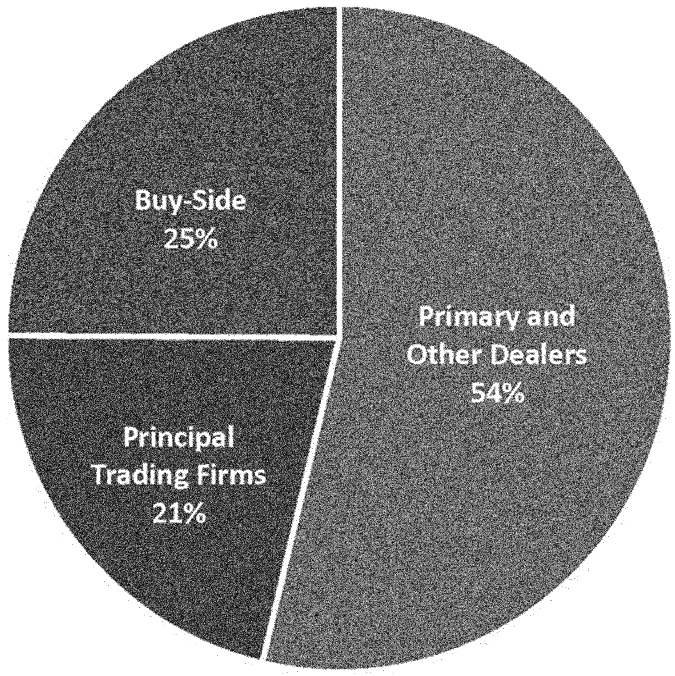
[743] DTCC 2022 Annual Report, *supra* note 737, at 44.

[744] DTCC, *FICC GSD Member Directory* (Oct. 31, 2023), *available at https://www.dtcc.com/-/media/Files/Downloads/client-center/FICC/Mem-GOV-by-name.xlsx* (107 Netting Members participated in FICC's GCF service).

[745] Primary dealers are counterparties to the N.Y. Fed in its implementation of monetary policy and expected to participate meaningfully in all U.S. Treasury securities auctions for new issuances of U.S. Treasury securities. US Dept of the Treasury, Primary Dealers, *available at https://home.treasury.gov/policy-issues/financing-the-government/quarterly-refunding/primary-dealers.* For a current list of primary dealers *see* List of Primary Dealers, Federal Reserve Bank of New York, *available at https://www.newyorkfed.org/markets/primarydealers.*

[746] SIFMA, *2023 Capital Markets Fact Book,* at 56 (July 2023) *available at https://www.sifma.org/wp-content/uploads/2022/07/2023-SIFMA-Capital-Markets-Factbook.pdf* (SIMFA's term primary dealers refers to N.Y. Fed prime brokers). *Id.* The dollar value of trading in U.S. Treasury securities by primary dealers has a combined average annual growth rate of 1.7% for the 10-year period ending in 2022.

Figure 8 Share of U.S. Treasury Securities Cash Market Activity for All Securities by Participant Type



Source: FINRA TRACE. This figure plots shares of trading volume by participant type for the entire U.S. Treasury securities cash market from April 1, 2019, to Dec. 31, 2019. Figure from Harkrader and Puglia FEDS Notes, *supra* note 641. Note: "Buy-side share is assumed to capture institutions such as hedge funds and investment firms but may also include other financial institutions such as banks." *Id.*

As previously discussed, the total notional transactions amount in the repo market is larger than that of the cash U.S. Treasury securities market. In 2021, average aggregate daily primary dealer outstanding total repo positions were $4.3 trillion consisting of $2.5 trillion in repo (75% of which is collateralized by U.S. Treasury securities) and $1.8 trillion in reverse repo (89% of which is collateralized by U.S. Treasury securities).[747] As of December 31, 2021, the repo market as a whole was valued at approximately $5.8 trillion.[748] Although a large portion of this activity is cleared by FICC, a large portion is also not centrally cleared. For 2021, DTCC reported that ''FICC matches, nets, settles and risk manages repo transactions valued at more than $3T daily.'' [749] During the first half of 2022, Federal Reserve staff estimated that a ''large fraction of primary dealers' repo (38 percent) and reverse repo (60 percent) activity is in the uncleared bilateral segment.'' [750] *See* Figure 9. Although these statistics include all collateral types, for the subset of the repo market that includes a primary dealer on one side, the Commission has more detailed data. As Figures 10 and 11 show, the vast majority of uncleared bilateral and triparty primary dealer repo and reverse repo collateral consists of U.S. Treasury securities (including TIPS). The largest remaining components of repo (approximately 40 percent) and reverse repo activity (approximately 8 percent) are not centrally cleared but settle on the triparty platform.[751] This is labeled ''Tri-Party (excluding GCF)'' in Figure 9, and the degree to which Treasury collateral is used in these transactions is displayed in Figure 11. The final and by far the smallest component of repo and reverse repo activity (amounting to about 2% of activity) is triparty repo using FICC's Sponsored GC service.[752]

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[747] SIFMA Research, *US Repo Markets: A Chart Book,* at 6, 7, and 8 (Feb. 2022), *available at https://www.sifma.org/wp-content/uploads/2022/02/SIFMA-Research-US-Repo-Markets-Chart-Book-2022.pdf.* Because these are figures for primary dealer repo and reverse repo, they need not be equal. In the aggregate, however, repo must equal reverse repo.

[748] The Financial Accounts of the United States, L.207, line 1 (Federal Funds and Security Repurchase Agreements) *available at https://www.federalreserve.gov/releases/z1/20220310/html/l207.htm.* This number includes federal funds and security repurchase agreements (for all collateral types). Federal funds outstanding on Dec. 31, 2021, was $49B. *Effective Federal Funds Rate,* Federal Reserve Bank of New York, *available at https://www.newyorkfed.org/markets/reference-rates/effr.* The comparable figures for Dec. 31, 2022, were $6.6T and $67B. The Financial Accounts of the United States, L.207, line 1 (Federal Funds and Security Repurchase Agreements), *available at https://www.federalreserve.gov/releases/z1/20230608/html/l207.htm* and *Effective Federal Funds Rate,* Federal Reserve Bank of New York, *available at https://www.newyorkfed.org/markets/reference-rates/effr.*

[749] DTCC 2021 Annual Report, *supra* note 737, at 32.

[750] Sebastian Infante et al., *supra* note 75.

[751] While the concentration among the top three dealers in the U.S. Treasury securities (excluding Strips) tri-party repo market ranged between 22% and 50% between 2011 and 2020, between Jan. 2021 and Nov. 2022, the percentage of the volume in this market attributable to the top three dealers grew from 33.8 percent to 77.6% before falling to 67.7% by July 2023. NY Fed, Data & Statistics, *Visualization Tri-Party/GCF Repo, available at https://www.newyorkfed.org/data-and-statistics/data-visualization/tri-party-repo/index.html-interactive/concentration.*

[752] *Id.*

Figure 9 Repo Clearing 2021 – 2022

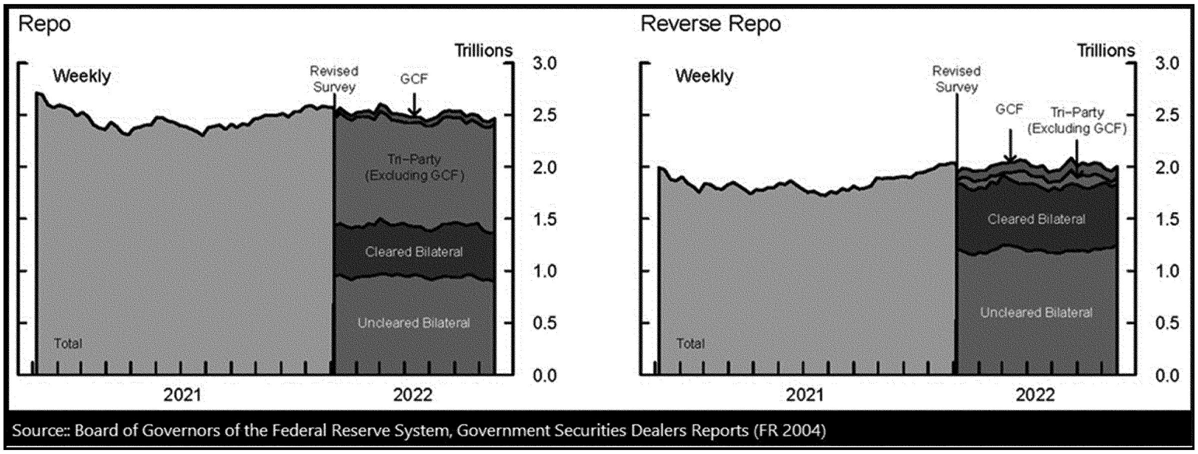
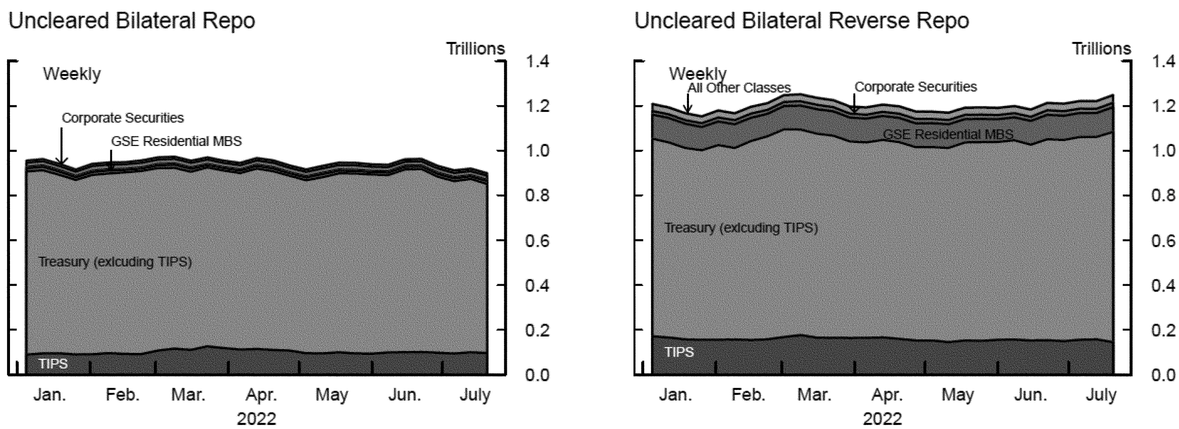
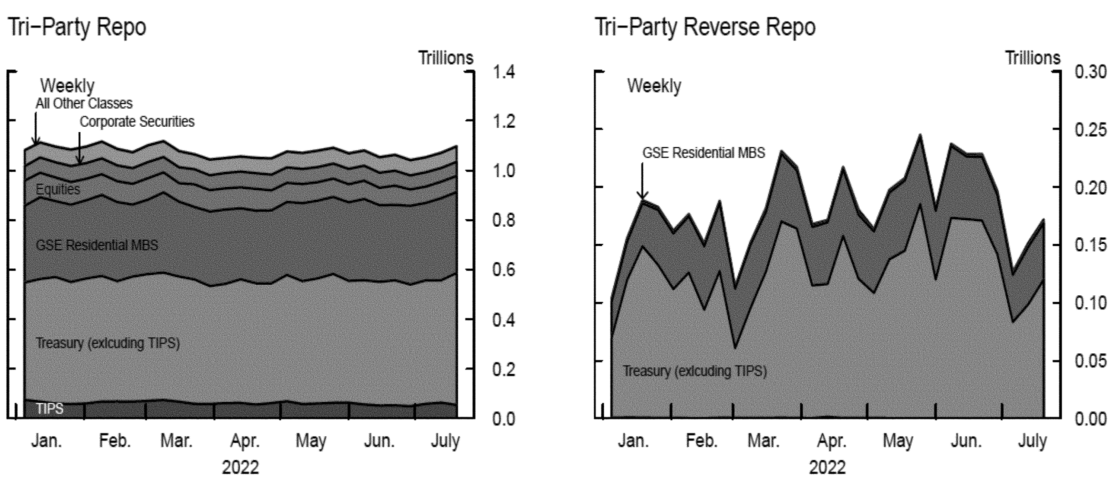


Figure 10 Uncleared Bilateral Repo and Reverse Repo Collateral 2022



Source: Board of Governors of the Federal Reserve System, Government Securities Dealers Reports (FR 2004)

Figure 11 Tri-party Repo and Reverse Repo Collateral 2022



Source: Board of Governors of the Federal Reserve System, Government Securities Dealers Reports (FR 2004)

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c. Interdealer Brokers

Interdealer brokers [753] and the trading platforms they operate play a significant role in the markets for U.S. Treasury securities. As previously discussed, an IDB will generally provide a trading facility for multiple buyers and sellers for U.S. Treasury securities to enter orders at specified prices and sizes and have these orders displayed anonymously to all users. When a trade is executed, the IDB then books two trades, with the IDB functioning as the principal to each respective counterparty, thereby protecting the anonymity of each party, but taking on credit risk from each of them. Although there is no legal requirement for an IDB to be a FICC direct participant/Netting Member, most IDBs are FICC Netting Members.[754] Under FICC's existing rules, if an IDB's customer in a U.S. Treasury security transaction is not a FICC member, the IDB's transaction with that customer need not be centrally cleared and may be bilaterally cleared. As discussed in the Proposing Release and in parts II.A.1 and II.A.2.b.ii *infra,* each transaction at an IDB is split into two pieces: a leg between the buyer and the IDB and a leg between the IDB and the seller.[755] If the buyer or seller is a dealer, the respective leg is centrally cleared. Transaction legs involving PTFs are generally not cleared and settled bilaterally.

TMPG estimates that ''roughly three-quarters of IDB trades clear bilaterally.'' [756] To help visualize the significance of the role played by IDBs in the centrally cleared market, and given existing data limitations, Table 3, adapted from a table prepared by the TMPG in 2019, presents five clearing and settlement case types that cover the vast majority of secondary market cash trades. The table uses Federal Reserve data collected from primary dealers in the first half of 2017 to estimate the daily volume (dollar and share percentage) attributable to each clearing and settlement case type.

TABLE 3—ESTIMATED SECONDARY CASH MARKET PRIMARY DEALER DAILY TRADING DOLLAR (BILLIONS) AND PERCENTAGE VOLUME BY CLEARING AND SETTLEMENT TYPE

Clearing and settlement type	$ Volume billions	Non-IDB share	IDB share	Overall percentage
Bilateral clearing, no IDB	$289	95%		54.3
Central clearing, no IDB	15	5%		2.9
Central clearing, with IDB	52		22.9%	9.8
Bilateral clearing, with IDB	73		31.9%	13.6
Bilateral/central clearing, with IDB	103		45.3%	19.4
Totals:	531	$304 (57.2%)	$228 (42.8%)	100

Source: TMPG White Paper, *supra* note 13, adapted from a table at p. 12.

Table 3 Notes: Figures are estimated using the Federal Reserves' Form FR2004 data for the first half of 2017 and are based on the following assumptions: a) primary dealers account for all dealer activity, b) 5% of dealers' trading not through an IDB is with another dealer, c) the shares of dealer and non-dealer activity in the IDB market for coupon securities equal the weighted averages of the shares reported in the Oct. 15 report (that is, 41.5% and 58.5%, respectively), d) only dealers trade bills, FRNs, and TIPS in the IDB market, and e) the likelihood of dealer and non-dealers trading with one another in the IDB market solely reflects their shares of overall volume. The table presents estimates because precise information is not available on the size of the market or on how activity breaks down by the method of clearing and settlement.

d. Other Market Participants

As discussed previously, FICC netting members are generally registered broker-dealers or banks. Some institutional participants that are not FICC Netting Members/FICC direct participants are able to centrally clear repos through FICC's Sponsored Service.[757]

In addition to Sponsored Members, various types of direct and indirect market participants hold significant amounts of U.S. Treasury securities and repo, and potentially purchase and sell U.S. Treasury securities in the secondary cash and repo markets. To the extent that these persons engage in secondary market transactions, we expect their trading may be affected by increased central clearing resulting from the adoption of the requirement to clear eligible secondary market transactions.

Other key market participants, some of which are direct participants and some of which are sponsored members that may be affected by the rule include:

i. Broker-Dealers That Are Not Direct Participants/FICC Netting Members

Broker-dealers perform a number of functions in the U.S. securities markets including making markets in securities, brokering securities transactions, dealing securities, executing securities transactions, clearing and settling securities transactions, and maintaining custody of securities for investors. Some broker-dealers may perform multiple functions whereas others may perform a single function.[758]

Based on 2022 annual FOCUS filings, third quarter 2023 FOCUS filings, and FICC list of netting members,[759] there are 3,215 broker-dealers that are not also FICC netting members. Broker-dealers that are not FICC netting members are typically much smaller than those that are. Average assets of all broker-dealers is approximately $2.4 billion while the average of non-FICC netting member broker-dealers is approximately $276 million.

ii. Hedge Funds, Family Offices, and Separately Managed Accounts

Hedge funds are active participants in the secondary market for U.S. Treasury

[753] As noted previously, IDB is not used to encompass platforms that provide voice-based or other non-anonymous methods of bringing together buyers and sellers of U.S. Treasury securities. IDB instead refers to electronic platforms providing anonymous methods of bringing together buyers and sellers.

[754] *See generally* TMPG White Paper, *supra* note 13. The TMPG White Paper assumes throughout that IDBs are CCP direct members (*e.g.,* ''More specifically, the IDB platforms themselves and a number of platform participants continue to clear and settle through the CCP.'' *Id.* at 2).

[755] *See supra* note 14, 87 FR at 64615.

[756] TMPG White Paper, *supra* note 13, at 2.

[757] FICC's Sponsored Member program also allows the submission of cash transactions; however, as previously noted, the service is generally used only for U.S. Treasury repo transactions at this time.

[758] Using Form BD data from Sept. 2022, the Commission has previously stated that 27% of Form BD filers are U.S. Government Securities Brokers and 10% are U.S. Government Securities Dealers. *See* Cybersecurity Risk Management Rule for Broker-Dealers, Clearing Agencies, Major Security-Based Swap Participants, the Municipal Securities Rulemaking Board, National Securities Associations, National Securities Exchanges, Security-Based Swap Data Repositories, Security-Based Swap Dealers, and Transfer Agents, Exchange Act Release No. 97142 (Oct. 25, 2022) 87 FR 64610, at 64650–1.

[759] *See supra* note 744.

securities and their trading activities may be a cause of price movements in the U.S. Treasury securities market.[760] Hedge funds can use U.S. Treasury securities, for example, in order to borrow cash (*i.e.,* sell repo) to take leveraged positions in other markets, or to execute trading strategies. As of December 31, 2022, approximately 21 percent of Form PF filers [761] that are qualifying hedge funds reported U.S. Treasury securities holdings totaling $1.70 trillion in notional exposure in the cash market and $2.13 trillion in notional exposure to repos.[762]

Family offices are entities established by families to manage family wealth.[763] A recent survey of family offices [764] found that of 385 participating family offices around the world, almost half (46%) are based in North America. Average family office AUM for North American families was $1 billion.

Similarly, Separately Managed Accounts (SMAs) are also portfolios of assets managed by an investment adviser, usually targeted towards institutional investors and wealthy individual investors. Because of the end investor's risk tolerance, SMAs can also pursue high-risk, leveraged strategies.

iii. Registered Investment Companies (RICs) Including Money Market Funds, Other Mutual Funds, and ETFs

RICs, mainly money market funds, mutual funds, and ETFs, are large holders of U.S. Treasury securities.[765] At the end of the first quarter of 2023, money market funds held $1.0 trillion of U.S. Treasury securities ($185 billion in T-Bills and $856 billion in other U.S. Treasury securities).[766] Mutual funds held an additional $1.4 trillion of other U.S. Treasury securities ($14 billion of T-Bills and $1.4 trillion of other U.S. Treasury securities) while exchange-traded funds held an additional $452.4 billion in U.S. Treasury securities.[767] The degree to which these entities would be affected depends on the extent to which their trading is likely to take place in the secondary market.[768]

RICs are also active participants in the repo market with money market funds being active cash investors in U.S. Treasury repo. According to data filed with the Commission, money market funds' investments in U.S. Treasury repo, both bilateral and triparty, amounted to approximately $2.46 trillion in June 2023. Moreover, as shown in Figure 12, money market fund U.S. Treasury repo volume has grown from approximately $200 billion monthly in 2011 with the vast majority of the most recent year's growth attributed to investments in the Federal Reserve's repo facility.[769]

[760] Ron Alquist & Ram Yamarthy, *Hedge Funds and Treasury Market Price Impact: Evidence from Direct Exposures* (OFR working paper 22–05, Aug. 23, 2022) (''find[ing] economically significant and consistent evidence that changes in aggregate hedge fund [Treasury] exposures are related to Treasury yield changes [and] . . . that particular strategy groups and lower-levered hedge funds display a larger estimated price impact on Treasuries.''), *available at https://www.financialresearch.gov/working-papers/files/OFRwp-22-05-hedge-funds-and-treasury-market-price-impact.pdf. See also* note 720, *supra.*

[761] Qualifying hedge funds refers to those hedge funds that have a net asset value (individually or in combination with any feeder funds, parallel funds and/or dependent parallel managed accounts) of at least $500 million as of the last day of any month in the fiscal quarter immediately preceding its most recently completed fiscal quarter. *See* Form PF (Glossary of Terms). Although the Proposal would cover any hedge fund, smaller funds' holdings are not reflected in these statistics because of Form PF's minimum $150 million reporting threshold. An adviser must file Form PF if (1) it is registered (or required to register) with the Commission as an investment adviser, including if it also is registered (or required to register) with CFTC as a commodity pool operator or commodity trading adviser, (2) it manages one or more private funds, and (3) the adviser and its related persons, collectively had at least $150 million in private fund assets under management as of the last day of its most recently completed fiscal year. *See* Form PF General Instruction No. 1, *available at https://www.sec.gov/files/formpf.pdf.*

[762] Division of Investment Management Analytics Office, Private Funds Statistics Fourth Calendar Quarter 2022, Table 46 at 39 (July 22, 2022), *available at https://www.sec.gov/files/investment/private-funds-statistics-2022-q4-accessible.pdf.*

[763] ''Historically, most family offices have not been registered as investment advisers under the Advisers Act because of the 'private adviser exemption' provided under the Advisers Act to firms that advice fewer than fifteen clients and meet certain other conditions.'' SEC Staff, *Family Office: A Small Entity Compliance Guide* (Nov. 21, 2011), *available at https://www.sec.gov/rules/final/2011/ia-3220-secg.htm.*

[764] Campden Wealth & The Royal Bank of Canada, *The North America Family Office Report 2021, available at https://www.rbcwealthmanagement.com/_assets/documents/cmp/the-north-america-family-office-report-2021-final-ua.pdf.*

[765] As of Mar. 2022, investment companies were the third largest holder of U.S. Treasury securities holding just under $3.6 trillion. Viktoria Baklanova, Isaac Kuznits, Trevor Tatum, *Money Market Funds in the Treasury Market* (Sept. 1, 2022), *available at https://www.sec.gov/files/mmfs-treasury-market-090122.pdf* (''MMFs in the Treasury Market''), at 3 (citing to Financial Accounts of the United States as of Mar. 2022). The other large (over 5%) holders are: ''other'' holders (including hedge funds) 30%, the Federal Reserve (23 percent), pension funds (14%), and U.S. banks and state and local governments (each holding 6%). *See id.* at 2 (figure 5).

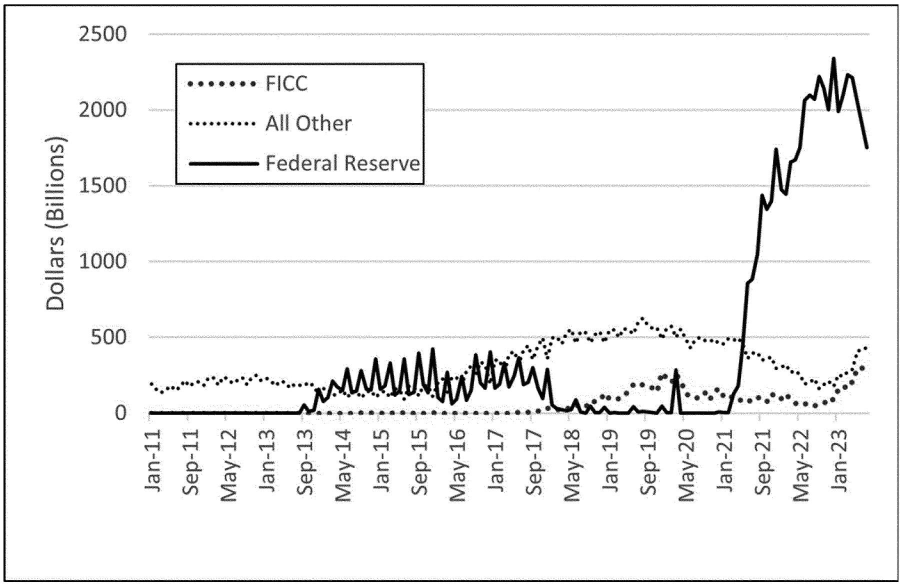
[766] Federal Reserve Statistical Release, *Z.1 Financial Accounts of the U.S, Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts,* at 119 (L210 Treasury Securities—lines 42–49) (''Financial Accounts of the U.S.''), *available at https://www.federalreserve.gov/releases/z1/20220609/z1.pdf.*

[767] *Id.* at 119 (L210 Treasury Securities—lines 45–47 and 49). Filings of Form N–MFP by money market funds show that, as of May 31, 2023, these funds invested approximately $2.8 trillion in Treasury repos. In addition, mutual funds invested $27 billion in repurchase agreements, including those backed by Treasury securities. *See supra* note 118 and referencing text.

[768] For example, an analysis of money market fund portfolios' turnover of U.S. Treasury securities by the Commission staff indicates only limited secondary market trading activity. Estimates based on monthly filings of Form N–MFP suggest that, on average, money market funds hold around 70% of U.S. Treasury securities to the next month with around 6% of U.S. Treasury securities holdings disposed of before maturity. The remaining approximately 23% of holdings mature during the month. MMFs in the Treasury Market, *supra* note 765, at 3. These estimates suggest that the final rule's effect on money market fund cash market transactions in U.S. Treasury securities will be very limited relative the final rule's effects on money market funds' repo activities which could be more significant.

[769] *Id.* at 4. The Commission understands the credit rating agencies consider concentration of counterparty credit risk as one factor in determining their rating of money market funds which may drive money market funds to seek diversification of counterparties for the repo transactions.

Figure 12: Total Monthly Repo Volume by Money Market Funds by Counterparty Type Monthly Repo Volume (01/2011 - 07/2023)



Source: SEC Form N-MFP as summarized by OFR, *available at* https://www.financialresearch.gov/money-market-funds/us-mmfs-investments-in-the-repo-market/.

For RICs, holdings of U.S. Treasury securities play an important role in managing liquidity risk stemming from potential redemptions. Given their highly liquid nature, U.S. Treasury securities can be used to raise cash to meet redemptions. For example, a survey conducted by an industry group showed that in the first quarter of 2020 mutual funds had net sales of $128 billion in Treasury and agency bonds, mainly to meet redemption requests at the onset of the Covid-19 pandemic.[770]

In addition to reliance on Treasury securities as sources of liquidity, RICs use Treasury securities as another source of liquidity by selling repo. Also, RICs accept Treasury securities as collateral in their securities lending programs established as an additional source of income for the fund shareholders. In July of 2023, the Commission adopted amendments to certain rules that govern money market funds, that among other things, increased daily and weekly liquid asset minimums.[771] As direct obligations of the U.S. Government, including U.S. Treasury securities, are included in the definition of both daily and weekly liquid assets,[772] to the extent that money market funds currently fall below the minimums, their holdings of U.S. Treasuries may increase.

iv. Principal Trading Firms (PTFs)

The role and importance of PTFs providing liquidity in the U.S. Treasury securities market have been the subject of a number of analyses and reports in recent years.[773] For example, using FINRA's Regulatory TRACE data in connection with a recent rulemaking proposal, we identified 174 market participants who were active in the U.S. Treasury securities market in July 2021 and were not members of FINRA.[774] [775] We "found that these participants accounted for approximately 19 percent

[770] *See* Shelly Antoniewicz & Sean Collins, *Setting the Record Straight on Bond Mutual Funds' Sales of Treasuries,* ICI Viewpoints (Feb. 24, 2022), *available at https://www.ici.org/viewpoints/22-view-bondfund-survey-2.*

[771] *See* Money Market Fund Reforms; Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N–CSR and Form N–1A, Investment Advisors Act Release No. 6344 (Aug. 3, 2023), 88 FR 51404 ("Money Market Reforms Adopting Release").

[772] *See supra* note 771, at 51431.

[773] *See, e.g.,* G–30 Report, *supra* note 5, at 1; Joint Staff Report, *supra* note 4, at 3–4, 36, 55 ("PTFs now account for more than half of the trading activity in the futures and electronically brokered interdealer cash markets."); Harkrader and Puglia FEDS Notes, *supra* note 641; Doug Brain, Michiel De Pooter, Dobrislav Dobrev, Michael Fleming, Pete Johansson, Collin Jones, Frank Keane, Michael Puglia, Liza Reiderman, Tony Rodrigues, and Or Shachar, *Unlocking the Treasury Market Through TRACE* (FEDS Notes, Sept. 28, 2018), *available at https://www.federalreserve.gov/econres/notes/feds-notes/unlocking-the-treasury-market-through-trace-20180928.htm. See also* Peter Ryan and Robert Toomey, *Improving Capacity and Resiliency in US Treasury Markets: Part III (Nov.* 15, 2021), *available at https://www.sifma.org/resources/news/improving-capacity-and-resiliency-in-us-treasury-markets-part-3/.* (While in the interdealer cash market, U.S. Treasury securities are often cleared and settled through FICC, "dealer trades with principal trading firms ("PTFs")—a very large share of this market—are generally cleared bilaterally because most PTFs are not members of the FICC."). *See also* 2021 IAWG Report, *supra* note 4, at 21 ("on February 25, 2021, a large shift in investor sentiment triggered very high trading volumes [ ] that temporarily overwhelmed the intermediation capacity of the Treasury market. Some market participants observed that the stresses on February 25, 2021, were exacerbated by lack of elasticity in liquidity supply resulting from activity limits that IDB platforms impose on some firms, especially PTFs that do not participate in central clearing.").

[774] Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer, Exchange Act Rel. No. 94524 (Mar. 28, 2022), 87 FR 23054, 23072, and 23080 (Apr. 18, 2022) ("Because regulatory TRACE data pertaining to Treasury securities reported by certain ATSs contains the identity of non-FINRA member trading parties, we are able to analyze PTFs' importance in the U.S. Treasury market during July 2021 and summarize the number and type of market participants by monthly trading volume . . . ."). "Although FNRA membership is not synonymous with dealer registration status, the Commission believes that many of the market participants who are not FINRA members are also likely not registered as government securities dealers." *Id.* at 23072 n. 167.

[775] In Aug. 2023, the SEC adopted amendments to an exemption from the requirement for certain broker-dealers to join a national securities association. The amendments will, among other effects, enhance the oversight of participants in Treasury markets and the transparency of the market by requiring certain broker-dealers significantly involved in the proprietary trading of Treasury securities to become FINRA members and report their Treasury transactions to TRACE. *See* Exemption for Certain Exchange Members, Exchange Act Release No. 98202 (Sept. 7, 2023), 88 FR 61850 ("Exemption for Certain Exchange Members Release").

of the aggregate U.S. Treasury security trading volume, with PTFs representing the highest volumes of trading among these participants.'' [776] We explained that in our analysis:

> PTFs had by far the highest volumes among identified non-FINRA member participants in the U.S. Treasury market, and the largest PTFs had trading volumes that were roughly comparable to the volumes of the largest dealers. A Federal Reserve staff analysis found that PTFs were particularly active in the interdealer segment of the U.S. Treasury market in 2019, accounting for 61 percent of the volume on [electronic] interdealer broker platforms. . . .[777]

Based on this Federal Reserve study and assuming that all PTFs are not FICC members and that PTF trading on IDB electronic platforms during the final three quarters 2019 was a reasonable proxy for the average daily current volume of such trading today by PTFs, the requirement to clear eligible secondary market transactions would subject as much as approximately $116.51 billion per day in PTF trades on electronic/automated IDBs to central clearing.[778]

v. State and Local Governments

According to the United States Census Bureau's 2017 Census of Governments data, there were over 90,000 local governments in the United States, including county, city, municipality, township, and special purpose governments as well as nearly 13,000 independent school district governments.[779] These state and local governments are significant holders of U.S. Treasury securities. As of March 2023, state and local governments held approximately $1.6 trillion in U.S. Treasury securities [780] as part of their budgetary and short-term investment duties.

vi. Private Pensions Funds and Insurance Companies.

Insurance companies and pension funds also have significant positions in U.S. Treasury securities. As of March 2023, private pension funds and insurance companies are large holders of U.S. Treasury securities, holding $479.3 billion and $405.9 billion respectively.[781]

e. Triparty Agent: Bank of New York Mellon [782]

Although triparty repo transactions are bilaterally negotiated, they are settled through BNY Mellon, which currently plays a central role in the triparty repo market as the sole triparty agent.[783] Besides providing collateral valuation, margining, and management services, BNY Mellon also provides back-office support to both parties by settling transactions on its books and confirming that the terms of the repo are met. Additionally, the clearing bank acts as custodian for the securities held as collateral and allocates collateral to trades at the close of the business day. As discussed previously, FICC recently introduced the Sponsored GC Service that extends FICC's GCF repo service to allow for the clearing of triparty repo.[784]

An expansion of central clearing under the requirement to clear eligible secondary market transactions could affect BNY Mellon's triparty business. It is, however, unclear whether increased central clearing would increase or decrease the amount of repo traded that makes use of triparty agent's services previously described.

f. Custodian Banks/Fedwire Securities Service (FSS)

Currently, custodian banks handle much of the trading activity for long-only buy-side clients in the U.S. Treasury securities cash and repo markets. When an asset buyer and seller engage bilaterally as principals in a collateralized securities transaction, a repo for example, a custodian bank will often provide various services to support the transaction. Custodian services include transaction settlement verification, verifying the amount of the relevant credit exposure, calculating required initial and variation margin, and making margin calls. In a triparty repo transaction that is not centrally cleared, a custodian performs a clearing function by settling the transaction on its own books without a corresponding transfer of securities on the books of a central securities depository.[785]

FSS, operated by the Federal Reserve Bank system, provides issuance, maintenance, transfer and settlement services for all marketable U.S. Treasury securities to its 3,800 participants.[786] For example, FSS offers the ability to transfer securities and funds to settle secondary-market trades, to facilitate the pledging of collateral used to secure obligations, and to facilitate repo transactions.[787]

C. Analysis of Benefits, Costs, and Impact on Efficiency, Competition, and Capital Formation

1. Benefits

The amendments being adopted will likely yield benefits associated with increased levels of central clearing in the secondary market for U.S. Treasury securities. The Commission previously has stated that ''the centralization of clearance and settlement activities at covered clearing agencies allows market participants to reduce costs, increase operational efficiency, and manage risks more effectively.'' [788] These benefits could be particularly significant in times of market stress, as CCPs will mitigate the potential for a single market participant's failure to destabilize other market participants, destabilize the financial system more broadly, and/or reduce the effects of misinformation and rumors.[789] A CCP also will address concerns about counterparty risk by substituting the creditworthiness and

[776] *Id.* at 23072.

[777] *Id.* at 23080. Harkrader and Puglia FEDS Notes, *supra* note 641. *See also* Doug Brain et al. *supra* note 773. Harkrader and Puglia used FINRA TRACE data on the trading volume shares of different participant types on IDB platforms for nominal coupon securities from April 1, 2019, to Dec. 31, 2019. They identified $191 billion of average daily dollar volume on electronic/automated IDB platforms during the period. They also noted data limitations, which they estimated amounted to ''a very small fraction of total activity.'' *Id.*

[778] Harkrader and Puglia FEDS Notes, *supra* note 641, at table 1 (61% of $191 billion = $116.51 billion).

[779] *2017 Census of Governments—Organization, Table 2: Local Governments by Type and State: 2017 & Table 9: Public School System by Types of Organization and State: 2017,* U.S. Census Bureau, *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

[780] Financial Accounts of the U.S., *supra* note 766 (Line 19).

[781] *Id.* (Lines 29, 32, and 35).

[782] Paddrik et al., *supra* note 631(''The Federal Reserve Board, through the Federal Reserve Bank of New York (FRBNY), supervises triparty custodian banks and, on a mandatory basis pursuant to its supervisory authority, collects transaction-level data at the daily frequency.'').

[783] J.P. Morgan Chase previously served as a custodian in the triparty space but largely exited the market in 2019. *Id.* at 2–3.

[784] Exchange Act Release No. 92808 (Aug. 30, 2021), 86 FR 49580 (Sept. 3, 2021). Currently, the Bank of New York Mellon operates the triparty platform that facilitates trades conducted via the GCF Repo Service and Sponsored GC Service.

[785] The Clearing House, *The Custody Services of Banks* (July 2016), *available at https://www.davispolk.com/sites/default/files/20160728_tch_white_paper_the_custody_services_of_banks.pdf.*

[786] *See Fedwire Securities Service* (''FSS brochure''), FRBservices.org, *https://www.frbservices.org/binaries/content/assets/crsocms/financial-services/securities/securities-product-sheet.pdf.* The Federal Reserve Banks offer highly competitive transaction, per-issue and monthly maintenance prices. Account maintenance fees are waived for accounts holding only U.S. Treasury securities and for certain accounts used to pledge securities to the U.S. Treasury and Federal Reserve Banks. Fees for services are set by the Federal Reserve Banks. *See Fedwire Securities Service 2023 Fee Schedules, FRBservices.org, https://www.frbservices.org/resources/fees/securities-2023.*

[787] FSS brochure, *supra* note 786.

[788] *See* CCA Standards Proposing Release, *supra* note 8, 79 FR at 29587.

[789] *See, e.g.,* Liffe Order, supra note 7, 74 FR at 140.

liquidity of the CCP for the creditworthiness and liquidity of counterparties.[790] However, the Commission has also recognized that this centralization of activity at clearing agencies makes risk management at such entities a critical function.[791]

Commenter(s) agreed that certain benefits of increased central clearing—increasing liquidity, resilience, and intermediation capacity—exist but disagree that these benefits have been ''sufficiently proven'' to outweigh the potential costs.[792] As discussed in part IV.A, *supra,* improvements to market resilience imply potentially large expected benefits as the cost of financial market crises can be high. As discussed in part IV.C.2, *infra,* the Commission acknowledges the costs associated with the rule but believes that some of the costs incurred by market participants are commensurate with the risks and particular attributes of the market participants' transactions. It further believes that the overall benefits of increased clearing U.S. Treasury Securities transactions discussed below, including improvements to market resiliency, justify the costs.

Bilateral clearing arrangements do not allow for multilateral netting of obligations, which reduce end-of-day settlement obligations.[793] Larger gross settlement obligations, which increase with leverage, increase operational risks and subsequently the possibility of settlement fails. Central clearing of transactions nets down gross exposures across participants, which reduces firms' exposures while positions are open, and typically reduces the magnitude of cash and securities flows required at settlement.[794] These reductions, particularly in cash and securities flow ''would reduce liquidity risks associated with those settlements and counterparty credit risks associated with failures to deliver on the contractual settlement date,'' not only for CCP members but for the CCP itself.[795]

It has been suggested that wider central clearing could have lowered dealers' daily settlement obligations in the cash market by up to 60 percent in the run-up to and aftermath of the March 2020 U.S. Treasury securities market disruption and reduced settlement obligations by up to 70 percent during the disruption itself.[796] The reduction in exposure is not limited to the cash market; it has been estimated that the introduction of central clearing for dealer-to-client repos would have reduced dealer exposures from U.S. Treasury repos by over 80% (from $66.5 billion to $12.8 billion) in 2015.[797]

The benefits of multilateral netting flowing from central clearing can improve market safety by lowering exposure to settlement failures.[798] Multilateral netting can also reduce the regulatory capital required to support a given level of intermediation activity [799] and could also enhance capacity to make markets during normal times and stress events because existing bank capital and leverage requirements recognize the risk-reducing effects of multilateral netting of trades that CCP clearing accomplishes.[800] By reducing the level of margin required to support a given total level of trading activity, central clearing may reduce total risk to the system. Financial crises are sometimes precipitated by margin calls following a period of increased volatility. If a market participant holds offsetting positions, then margin calls that might occur could be avoided. Because financial markets are forward-looking, reducing the anticipation of margin calls on other market participants can avoid costly ''bank-run'' type dynamics.[801]

Some benefits associated with capital reductions are particularly relevant for overnight and term repo. In the case of financing activity in U.S. Treasury securities market—U.S. Treasury repo—the entire notional value of the position has to be recorded on a dealer's balance sheet as soon as the start leg of the repo settles, and unless the dealer faces the same legal counterparty with respect to an offsetting financing trade of the same tenor, the dealer will not be able to net such balance sheet impact against any other position. The grossing up of the dealer's balance sheet in this manner can have implications with respect to the amount of capital the dealer is required to reserve against such activity. When transactions are cleared through a CCP, dealers can offset their centrally cleared repo positions of the same tenor, and thereby free up their capital to increase funding capacity to the market.[802] According to research that Finadium conducted among repo dealers, netting can compress High Quality Liquid Asset (HQLA) bilateral trading books by 60% to 80%.[803]

Cash and repo trades cleared and settled outside of a CCP may not be subject to the same level of uniform and transparent risk management associated with central clearing.[804] By contrast, FICC is subject to the Commission's risk management requirements addressing financial, operational, and legal risk management, which include, among other things, margin requirements commensurate with the risks and particular attributes of each relevant product, portfolio, and market.[805] As the Commission believes that the amendments being adopted will incentivize and facilitate additional central clearing in the U.S. Treasury securities market, risk management should improve. To offset the risks it faces as a central counterparty, the CCP requires its members to post margin,

[790] *Id.*

[791] *Id.*

[792] SIFMA/IIB Letter, *supra* note 37, at 1–2.

[793] *See* part IV.A *supra* for a discussion of central clearing and the mitigation of clearance and settlement risks. However, bilateral clearing does allow for balance sheet netting under certain conditions and for margining of net positions that may include multiple asset classes.

[794] *See* 2021 IAWG Report, *supra* note 4, at 30.

[795] *See* G–30 Report, *supra* note 5; *see also* PIFS Paper, *supra* note 76 at 28–31.

[796] *Id. See also* Michael Fleming & Frank Keane, *Netting Efficiencies of Marketwide Central Clearing* (Staff Report No. Staff Report No. 964), Federal Reserve Bank Of New York (Apr. 2021) (''Fleming & Keane (2021''), *available at https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr964.pdf.*

[797] PIFS Paper, *supra* note 76, at 29 (citing OFFICE OF FINANCIAL RESEARCH, *Benefits and Risks of Central Clearing in the Repo Market,* 5–6 (Mar. 9, 2017) (''2017 OFR Report''), *available at https://www.financialresearch.gov/briefs/files/OFRBr_2017_04_CCP-for-Repos.pdf*).

[798] Duffie, *supra* note 27, at 15.

[799] *See* part IV.A *supra* for an example of how multilateral netting can reduce margin required to support a given level of trading activity.

[800] *See* 2021 IAWG Report, *supra* note 4, at 30; Liang & Parkinson, *supra* note 725, at 9; Duffie, *supra* note 27, at 16–17. It is important to note that this netting may offset any potentially higher liquidity charges faced by major participants from clearing at the CCP. *See* Duffie, *supra* note 27, at 17 (''To the contrary, the netting of most purchases against sales at a CCP would lower the overall liquidity requirements of dealers, assuming that dealers continue to intermediate the market effectively.'').

[801] *See* Menkveld and Vuillemey *supra* note 568.

[802] The positive impact on dealer's ability to increase funding capacity will be offset, in part, by the direct and indirect costs of central clearing. *See id.* and part IV.C.2 *infra.* One commenter, although not supporting all aspects of the requirement to clear eligible secondary market transaction, agreed that a clearing mandate applied to bilateral repo transactions would be beneficial, pointing to the balance sheet efficiency resulting from repo clearing. *See* MFA Letter, *supra* note 81, at 13.

[803] Finadium LLC, *Netting Rules for Repo, Securities Lending and Prime Brokerage* (Sept. 2014), *available at https://finadium.com/finadium-report-desc/netting-rules-for-repo-securities-lending-and-prime-brokerage/.* Assets are considered to be HQLA if they can be easily and immediately converted into cash at little or no loss of value. The test of whether liquid assets are of ''high quality'' is that, by way of sale or repo, their liquidity-generating capacity is assumed to remain intact even in period of severe idiosyncratic and market stress. *See* Liquidity Coverage Ratio Standards LCR30.2, LCR 30.3 (Basel Comm. On Banking Supervision 2019), *available at https://www.bis.org/basel_framework/chapter/LCR/30.htm?tldate=20191231&inforce=20191215.*

[804] *See* TMPG Repo White Paper, *supra* note 75.

[805] G–30 Report, *supra* note 5, at 13; 17 CFR 240.17ad–22(e)(6).

and the CCP actively monitors the positions its members hold. Moreover, in the event that the posted margin is not enough to cover losses from default, the CCP has a loss-sharing procedure that mutualizes loss among its members.

By lowering counterparty risk, central clearing also allows for the ''unbundling'' of counterparty risk from other characteristics of the asset that is being traded. This unbundling makes the financial market for Treasury securities more competitive.[806]

The Commission also believes that these amendments will help avoid a potential disorderly default by a member of any U.S. Treasury securities CCA. Defaults in bilaterally settled transactions are likely to be disorganized and subject to variable default management techniques, often subject to bilaterally negotiated contracts with potentially limited uniformity. Independent management of bilateral credit risk creates uncertainty about the levels of exposure across market participants and may make runs more likely; any loss stemming from closing out the position of a defaulting counterparty is a loss to the non-defaulting counterparty and hence a reduction in its capital in many scenarios.[807]

Increased use of central clearing should enhance regulatory visibility in the critically important U.S. Treasury securities market. Specifically, central clearing increases the transparency of settlement risk to regulators and market participants and, in particular, allows the CCP to identify concentrated positions and crowded trades, adjusting margin requirements accordingly, which should help avoid significant risk to the CCP and to the system as a whole.[808]

As discussed further below, the Commission is unable to quantify certain economic benefits of these amendments. The Commission solicited comment, including estimates and data from interested parties, that would help inform the estimates of the economic effects of the amendments but received only limited data, discussed further in part IV.C.2.a *infra,* that could be used to improve these estimates.

[806] ''One of the conditions for a perfectly competitive market is that [market participants] are happy to [buy or sell] from any of the many [sellers or buyers] of the [asset]. No [buyer or seller] of the [asset] has any particular advantage . . .'' David M. Kreps, ''A Course in Microeconomic Theory'' Princeton University Press (1990), at 264 (describing the conditions of a perfectly competitive market.) When the transaction is novated to the CCP, market participants substitute the default risk of the CCP for that of the original counterparty.

[807] *See* TMPG White Paper, *supra* note 13, at 32.

[808] Duffie, *supra* note 27, at 15; DTCC October 2021 White Paper, *supra* note 681, at 1; 2021 IAWG Report, *supra* note 4.

a. U.S. Treasury Securities CCA Membership Requirements

The Commission is amending Rule 17ad–22(e)(18) to require any covered clearing agency that provides central counterparty services for transactions in U.S. Treasury securities to establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, require that direct participants of a covered clearing agency submit all eligible secondary market U.S. Treasury securities transactions in which they enter for clearing at a covered clearing agency.[809] As previously explained in part II.A.2 *supra,* as proposed an eligible secondary market transaction in U.S. Treasury securities was defined to include: (1) repurchase agreements and reverse repurchase agreements in which one of the counterparties is a direct participant; (2) any purchases and sales entered into by a direct participant that is an interdealer broker, meaning if the direct participant of the covered clearing agency brings together multiple buyers and sellers using a trading facility (such as a limit order book) and is a counterparty to both the buyer and seller in two separate transactions; (3) any purchases and sales of U.S. Treasury securities between a direct participant and a counterparty that is either a registered broker-dealer, government securities dealer, or government securities broker; a hedge fund;[810] or an account at a registered broker-dealer, government securities dealer, or government securities broker where such account may borrow an amount in excess of one-half of the net value of the account or may have gross notional exposure of the transactions in the account that is more than twice the net value of the account.[811] However, any transaction (both cash transactions and repos) where the counterparty to

[809] *See* part II.A.1 *supra.*

[810] For the purpose of the proposed rule, a hedge fund is defined as any private fund (other than a securitized asset fund): (a) with respect to which one or more investment advisers (or related persons of investment advisers) may be paid a performance fee or allocation calculated by taking into account unrealized gains (other than a fee or allocation the calculation of which may take into account unrealized gains solely for the purpose of reducing such fee or allocation to reflect net unrealized losses); (b) that may borrow an amount in excess of one-half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or (c) that may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration). This definition of a hedge fund is consistent with the Commission's definition of a hedge fund in Form PF. *See* Proposing Release, *supra* note 14 at 64623.

[811] *Id.*

the direct participant of the CCA is a central bank, sovereign entity, international financial institution, or a natural person would be excluded from the definition of an eligible secondary market transaction.

In a change from the proposal, the Commission is modifying the definition of an eligible secondary market transaction in Rule 17ad–22(a) to conditionally exclude inter-affiliate transactions.[812] Specifically, the Commission is excluding from that definition any repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities entered into between a direct participant and an affiliated counterparty, provided that the affiliated counterparty submit for clearance and settlement all other repurchase or reverse repurchase agreements collateralized by U.S. Treasury securities to which the affiliated counterparty is a party.[813]

As discussed in part II.A.2.a.vi, *supra,* inter-affiliate transactions are used to transfer liquidity and risk within an affiliated group. These transactions may serve different purposes, including, but not limited to, providing U.S. Treasury securities for delivery when an affiliate has taken a long or short position in U.S. Treasury securities as a hedge against other exposures, allowing the movement of U.S. Treasury securities to allow them to be posted as margin on an affiliate's transaction, ensuring that U.S. Treasury securities can serve as a liquidity buffer for an affiliated bank,[814] or to meet liquidity composition targets. To get the U.S. Treasury securities to the appropriate entity with an affiliated group, the affiliate often enters into repos or reverse repos with a direct participant of a U.S. Treasury securities CCA.

As discussed above, one commenter stated that requiring inter-affiliate transactions to be centrally cleared would impose additional costs with limited benefits.[815] While the costs of clearing inter-affiliate transactions may be similar to those of other transactions, the Commission agrees with the commenter that the potential benefits of clearing these transactions is likely to be less. For example, the commenter noted that a direct participant's affiliate's credit risk is already part of the group-wide financial risks to which the Treasury CCP is exposed, and central clearing of inter-affiliate transactions is unlikely to meaningfully impact the risk

[812] *See* part IV.B.3.b.v *supra.*

[813] *See* part II.A.2.a *supra.*

[814] *See supra* note 238.

[815] SIFMA/IIB Letter, *supra* note 37, at 21–22.

profile.[816] As discussed above, in certain circumstances, the counterparty credit risk posed by inter-affiliate transactions may be less than other transactions.[817] However, affiliated entities are separate legal entities and, generally, are not legally responsible for each other's contractual obligations therefore while there may be a benefit of reducing counterparty credit risk by centrally clearing such transactions, the benefit is likely to be less.

In additional changes from the proposal and for the reasons discussed above, the Commission is adding additional exclusions to the definition of an eligible secondary market transaction for any repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities in which one counterparty is a state or local government, a covered clearing agency providing central counterparty services, a derivatives clearing organization (*see* 7 U.S.C. 7a–1 and 17 CFR 39.3), or is regulated as a central counterparty in its home jurisdiction.[818] In the absence of the exclusion, these types of entities may not be able to transact with netting members of a CCA, reducing the available counterparties with which they could transact and likely resulting in adverse impacts on the prices that are available to them.

The amendment to Rule 17ad–22(e)(18) will increase the fraction of secondary market U.S. Treasury securities transactions required to be submitted for clearing at a covered clearing agency. The Commission believes that this should result in achieving the benefits associated with an increased level of central clearing discussed in this section.

i. Scope of the Requirement To Clear Eligible Secondary Market Transactions

A significant share of both cash and repo transactions in U.S. Treasury securities, including those of direct participants in a covered clearing agency, are not currently centrally cleared.[819] The Commission believes that covered clearing agency members not centrally clearing cash or repo transactions in U.S. Treasury securities create contagion risk to CCAs clearing and settling such transactions, as well as to the market as a whole, and that this contagion risk can be ameliorated by centrally clearing such transactions.

Currently, FICC, the only U.S. Treasury securities CCA, requires its direct participants to submit for central clearing their cash and repo transactions in U.S. Treasury securities with other members.[820] However, FICC's rules do not require its direct participants, such as IDBs, to submit either cash or repo transactions [821] with persons who are not FICC members for central clearing.

The expanded scope of the requirement to clear eligible secondary market transactions should reduce instances of ''hybrid'' clearing, where FICC lacks visibility on the bilaterally cleared component of a trade. As discussed in the Proposing Release, trades cleared and settled outside of a CCP may not be subject to the same level of risk management associated with central clearing, which includes requirements for margin determined by a publicly disclosed method that applies objectively and uniformly to all members of the CCP, loss mutualization, and liquidity risk management.[822] The requirement to clear eligible secondary market transactions should not only result in the consistent and transparent application of risk management requirements to trades that are now bilaterally cleared but also increase the CCA's awareness of those trades, which it now lacks.[823]

The definition of an eligible secondary market transaction applies to all types of transactions that are of a type currently accepted for clearing at a U.S. Treasury securities CCA; it does not impose a requirement on a U.S. Treasury securities CCA to offer additional products for clearing. One commenter specifically agreed that the proposal should apply to the types of transactions that are eligible for clearing at a U.S. Treasury securities CCA, as those eligibility criteria evolve over time. The commenter stated that such an approach would ensure that the requirement would not inadvertently give rise to risk or undue costs by forcing into central clearing transaction types that have not gone through a methodical risk analysis or for which the costs may outweigh the benefits, while at the same time, it would allow the requirement to evolve as U.S. Treasury securities CCAs, their direct participants, and regulators identify transaction types that would benefit from central clearing.[824]

ii. Application of the Requirement To Clear Eligible Repo Transactions

The requirement to clear eligible secondary market transactions requires that all direct participants of a U.S. Treasury securities CCA submit for clearing all eligible secondary market transactions that are repurchase agreements or reverse repurchase agreements. As discussed in part IV.B.5 *supra,* risk management practices in the bilateral clearance and settlement of repos are not uniform across market participants and are less transparent than analogous practices under central clearing.[825] Many commenters supported the definition of an eligible secondary market transaction as it relates to repo and reverse repo transactions.[826] These commenters encouraged a broad and comprehensive definition to limit market fragmentation and avoidance of central clearing.

The benefits of central clearing—including the benefits of netting—increase with the fraction of total volume of similar transactions submitting for clearing at a CCP. Significant gaps persist in the current coverage of transaction data in U.S. Treasury repo.[827] The Commission understands that, among bilaterally settled repo, approximately half was centrally cleared as of 2021.[828] Centrally

[816] *Id.*

[817] *See supra* note 239.

[818] *See* part II.A.2.a *supra.*

[819] *See* DTCC May 2021 White Paper, *supra* note 307, at 5; 2021 IAWG Report, *supra* note 4, at 6.

[820] FICC Rule 2A, section 7(e) (requirement that FICC Netting Members submit to FICC all of their eligible trades with other Netting Members); FICC Rule 18, section 2 (similar requirement with regard to Repo transactions); *cf.* FICC Rule 3, section 8(e) (providing clearing requirement for FICC IDB Members), *supra* note 19.

[821] With regard to Sponsored GC Repos, as noted above, these transactions can be secured with generic CUSIPs that include U.S. Treasury securities, and with other generic CUSIPs that include other securities, such as agency securities and mortgage backed securities. Because the requirement to clear eligible secondary market transactions is limited to eligible secondary market transactions in U.S. Treasury securities, it would not apply to Sponsored GC Repo generic CUSIPs that do not include U.S. Treasury securities.

[822] *See supra* note 14, 87 FR at 64616; 2021 IAWG Report, *supra* note 4, at 30; G–30 Report, *supra* note 5.

[823] *See supra* note 369.

[824] DTCC/FICC Letter, *supra* note 33, at 12–13.

[825] TMPG Repo White Paper, *supra* note 75, at 1.

[826] *See supra* note 81.

[827] 2021 IAWG Report, *supra* note 4, at 29. Some of the benefits discussed here may be mitigated if central clearing of repo were to occur at multiple CCPs (*e.g.,* in there was an additional registered clearing agency that accepted repo for clearing and in the absence of an agreement between those registered clearing agencies, the netting benefits may be less than those if there were but a single clearing agency accepting repo for clearing).

[828] *Id.* (''Non-centrally cleared bilateral repo represents a significant portion of the Treasury market, roughly equal in size to centrally cleared repo.'') (citing a 2015 pilot program by the U.S. Treasury Department); *see also* TMPG Repo White Paper, *supra* note 804, at 1; Katy Burne, *Future-Proofing the U.S. Treasury Market,* BNY Mellon Aerial View 7 (2021), *available at https://www.bnymellon.com/content/dam/bnymellon/documents/pdf/aerial-view/future-proofing-the-us-treasury-market.pdf.coredownload.pdf* (noting that 63% of repo transactions remain non-centrally cleared according to Office of Financial Research data as of Sept. 10, 2021).

cleared triparty repo is a relatively new service, and the proportion may be smaller. Thus, despite the volume of centrally cleared repo transactions as seen in Figure 10 above, and the development of services to encompass more types of repo transactions at FICC, the Commission understands the volume of repo not currently centrally cleared to be substantial. The requirement that all U.S. Treasury CCA members submit all eligible repurchase agreements for central clearing would increase the fraction of total volume of such transactions submitted for central clearing, realizing the benefits described above in this section. In addition, because repo participants tend to be sophisticated market players, the requirement for repo transactions will cover a set of market participants many of whom will have built most of the necessary processes and infrastructure to comply with the rule.

One commenter noted an additional potential benefit to money market funds (''MMFs'').[829] The commenter stated that MMFs are only permitted to execute repo transactions with counterparties that are rated by one of the top rating agencies, a benefit typically accessible to only larger participants due to the prohibitive cost of obtaining and maintaining a rating from the top tier rating agencies. The commenter stated that this limits the number of potential counterparties with which MMFs can execute repo transactions, limiting liquidity and pricing options available to the MMFs. If MMFs are able to transact as sponsored members whose trades are centrally cleared and are able to look through the initial counterparty to the credit worthiness of the CCP itself, liquidity and pricing available to MMFs is likely to improve.

Some commenters questioned the need for a requirement with respect to repo, noting that the balance sheet netting efficiencies already exist, providing a natural incentive to centrally clear such transactions.[830] The Commission agrees that centrally cleared repo already benefits from favorable treatment on balance sheet, but believes that a requirement to clear repo transactions would result in more transactions being centrally cleared and, accordingly, additional balance sheet efficiency and capacity to intermediate repo transactions.[831] Although FICC netting members may wish to increase the fraction of their repo business that is centrally cleared in order to take greater advantage of netting efficiencies, they are only able to do so to the extent that their counterparties have taken the steps necessary to access clearing. Requiring most repo transactions with a FICC netting member on one side to be centrally cleared assures that counterparties will have taken such steps. Thus, there would still be benefits from the requirement, despite the currently existing balance sheet treatment.

The OFR published a 2023 report on an OFR pilot data collection of non-centrally cleared bilateral repurchase agreement (''NCCBR'') trades spanning nine dealers over three reporting dates in June 2022.[832] Of the four bilateral repo segments discussed (centrally cleared transactions settled on the triparty platform, centrally cleared transactions using the FICC DVP service, non-centrally cleared transactions settled on the triparty platform, and NCCBR transactions), the NCCBR segment is the largest of the four segments of the repo market in terms of gross repo exposure by primary dealers.[833] The OFR' report uses the pilot data collection to answer the question of why volume in this segment is so high despite the benefits of central clearing, including the ability of dealers to net their repo positions with one counterparty against reverse repo positions with another counterparty for the purpose of calculating certain regulatory ratios, thus reducing the balance sheet costs of participating in repo. The report's authors estimate that over 60% of all Treasury trades in the NCCBR market are naturally netted (matching repo and reverse repo with the same counterparty and tenor, typically as part of a relative value trade); however, they also show that substantial balance sheet netting benefits could still result from the trades that are not naturally netted if NCCBR trades were moved into central clearing.[834]

Several commenters recommended excluding triparty repos from the definition of an eligible secondary market transaction.[835] Four of these commenters suggested that the cost of including triparty repos would outweigh the benefits.[836] Several commenters argued that including triparty repos would not significantly reduce the risks that the proposal seeks to address because the current triparty market infrastructure inherently mitigates the associated risks.[837] Specifically, these commenters argue that credit risk in the triparty market is mitigated by the triparty agent's provision of custodial, collateral management, and settlement services.[838] Moreover, one commenter stated that the infrastructure underlying the triparty repo market is robust and provides credit protections, operational safeguards, and strict internal controls akin to central clearing.[839] One commenter added that the triparty market is relatively safe from credit risk because the triparty agent is subject to prudential regulation.[840] One commenter added that settlement risk in the triparty market is nearly eliminated because collateral posted to the triparty platform cannot generally be repledged outside the platform.[841] The commenter stated, therefore, that the only significant source of settlement risk is the rare occurrence of a counterparty's nonpayment of the repurchase price, which is generally attributable to operational risk as opposed to credit risk.[842]

Despite supporting the exclusion of triparty repos from the definition of an eligible secondary market transaction, one commenter acknowledged that the triparty agent ''does not fulfill a CCP role—it does not guarantee either counterparty's performance through novation or otherwise and does not assume counterparty risk.'' [843] The Commission recognizes that the current triparty market infrastructure incorporates credit protections, operational safeguards, and strict internal controls. However, as discussed above, the triparty agent does not fulfill a CCP role, and therefore, the Commission disagrees with the contention that the current market infrastructure incorporates controls akin to those available through central

[829] Letter from the Independent Dealer & Trader Association, at 10–11 (Sept. 1, 2023) (''IDTA Letter 2'').

[830] *See supra* note 84.

[831] Duffie *supra* note 718, provides empirical evidence with supporting theory that the current intermediation capacity of the U.S. Treasury market impairs its resilience. Among the improvements he discusses that could increase the market's intermediation capacity under stress is broader central clearing. *See Resilience redux in the US Treasury market, supra* note 718. *See also Dealer Capacity and US Treasury,* presentation to SEC Staff (July 2023), *supra* note 702.

[832] *See* Hempel et al. (2023), *supra* note 564.

[833] *Id.*

[834] *Id.*

[835] *See supra* note 85.

[836] *See* MFA Letter, *supra* note 81, at 6, 14; SIFMA/IIB Letter, *supra* note 37, at 20; ICI Letter, *supra* note 85, at 11; Federated Letter, *supra* note 85, at 5.

[837] *See* MFA Letter, *supra* note 81, at 14; SIFMA/AMG Letter, *supra* note 35, at 11; ICI Letter, *supra* note 85, at 12, 22; Citadel Letter, *supra* note 81, at 6; Federated Letter, *supra* note 85, at 5.

[838] *See id.*

[839] *See* ICI Letter, *supra* note 85, at 22.

[840] *See* MFA Letter, *supra* note 81, at 14.

[841] *See* Federated Letter, *supra* note 85, at 5.

[842] *See* Federated Letter, *supra* note 85, at 5.

[843] ICI Letter, *supra* note 85, at 33.

clearing.[844] Therefore, the benefits accruing to additional central clearing using a U.S. Treasury securities CCA apply in varying degree to triparty transactions as well.[845]

In response to the commenter who stated that most risks are eliminated because collateral cannot be posted outside the triparty platform, the Commission disagrees. For example, significant risks exist if concerns emerge regarding the financial condition of borrowers in the triparty market.[846] In such scenarios, even though collateral stays within the triparty platform, the repo buyer could still face the sudden default of a triparty repo counterparty.[847] Moreover, the Commission understands that settlement failures occur regularly and tend to spike during market stress events.[848] Even though not considered a default, settlement failures create credit exposure to the failing counterparty and market risk exposure with respect to the relevant Treasuries.[849] Furthermore, settlement failures may prevent or make more costly the non-failing party's delivery of the relevant Treasuries in respect of other transactions.

One commenter stated that the Commission must address other aspects of the Sponsored Service to better promote the objectives of central clearing, with such issues including the treatment of the start leg of the transaction, FICC's obligations to complete settlement of a Sponsored Member's positions in the event of a Sponsoring Member's default, and a Sponsored Member's ability to engage with FICC to address issues arising from repo transactions that have been submitted through sponsored clearing.[850] The commenter stated that, within the Sponsored Service, FICC does not novate the settlement of the start leg of a repo transaction that is submitted for clearing between a sponsoring Member and a sponsored Member, although it does novate the end leg of the transaction, meaning that the counterparties continue to be responsible for settlement outside of FICC and bear the risk of a settlement fail vis a vis one another. The commenter also states that the lack of central clearing for the start leg of repo transactions in the Sponsored Service means that a requirement to clear eligible secondary market transactions may not eliminate counterparty credit risk issues to the extent the Commission anticipates, which, in turn, means that the proposal may not increase competition or reduce spreads as the Commission predicted in the Proposing Release.

The Commission understands that, contrary to transactions cleared at FICC outside the Sponsored Service, FICC currently does not novate the start legs of same-day settling Sponsored DVP Repos where the Sponsored Member's pre-novation counterparty is its Sponsoring Member (*i.e.,* "done-with" Sponsored DVP Repo) or of Sponsored GC Repos. However, the Commission does not believe that this failure to novate is inconsistent with the definition of an eligible secondary market transaction being adopted in this release.[851] The Commission acknowledges that settlement of the start leg occurring outside central clearing could somewhat reduce the benefits of central clearing in this limited instance, but the counterparty credit risk arising from the start legs of such transactions are largely addressed by the fact that they usually settle on a delivery-versus-payment basis between the counterparties, meaning that the securities and funds are exchanged simultaneously and resulting in less counterparty credit risk to address. However, the Commission further understands that FICC has stated that it is able to clear the start leg of any repo and currently does clear the start leg of all repos between two direct participants, the start leg of any Sponsored DVP repo where the Sponsored Member's pre-novation counterparty is a third-party member of FICC (*i.e.,* "done-away" from the Sponsoring Member), and any Sponsored DVP Repo where the start leg of such repo is scheduled to settle on some business day in the future (*i.e.,* forward-settling repos).[852]

One commenter stated that neither the Sponsored Bilateral DVP Service nor the Sponsored GC Repo Service compel FICC to complete the settlement of a sponsored member's transactions in the event of a sponsoring member's default, and that this approach is not consistent with the Commission's assumption that central clearing increases the likelihood of settlement.[853] The Commission understands that this ability to, potentially, terminate the Sponsored Member's transaction in such circumstances arises from the fact that, within the Sponsored Service, by design, the Sponsoring Member serves as the processing agent for all movement of funds and securities for its Sponsored Members, and FICC is not able to guarantee that an insolvent Sponsoring Member, which may be subject to the control of another legal entity, such as a bankruptcy trustee, would be able to continue processing such transactions. This aspect of FICC's rules is consistent with how other central counterparties have addressed the potential termination of customer transactions in the event of their agent's default.[854] As discussed in Part II.B.2.c *supra,* the Commission does not believe that the potential for FICC to terminate these transactions, in the unlikely event of a Sponsoring Member default in which it is unable to work with the controlling legal entity, means that the benefits in the Proposing Release would not be, to a great extent, realized.

iii. Application of the Requirement To Clear Eligible Secondary Market Transactions to Purchases and Sales of U.S. Treasury Securities

As discussed above, 68 percent of cash market transactions in U.S. Treasury securities are not centrally cleared, and another 19 percent of such transactions are subject to so-called hybrid clearing.[855] The Commission has identified certain categories of purchases and sales of U.S. Treasury securities that it believes should be part of the requirement to clear eligible

[844] *See supra* part II.A.2.a *supra.*

[845] *Id.*

[846] *See* 2013 Annual Report of the Financial Stability Oversight Council, at 4, 12–13, 133–134, *available at https://home.treasury.gov/system/files/261/FSOC-2013-Annual-Report.pdf;* Begalle et al., *supra* note 98 (discussing concern that stress caused by a potential default of a triparty repo counterparty can lead to either pre-default fire sales of assets by the counterparty or post-default fire sales of collateral by the triparty repo investor and the related financial stability concerns).

[847] *See* SEC Division of Investment Management Guidance Update: Counterparty Risk Management Practices with Respect to Tri-Party Repurchase Agreements (July 2013), *available at https://www.sec.gov/divisions/investment/guidance/im-guidance-2013-03.pdf.*

[848] *See e.g.,* Adam Copeland, Antoine Martin, Michael Walker, Repo Runs: Evidence from the Tri-Party Repo Market, N.Y. Fed Staff Report No. 506, at 26–30, *available at https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr506.pdf;* Tobias Adrian, Christopher R. Burke, and James J. McAndrews, *The Federal Reserve's Primary Dealer Credit Facility,* 15 Fed. Res. Bank N.Y. Current Issues in Econ. and Fin. 4, *available at https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci15-4.pdf; see also* Michael Fleming & Kenneth Garbade, *Explaining Settlement Fails,* 11 Fed. Res. Bank N.Y. Current Issues in Econ. and Fin. 1 (Sept. 2005), *available at https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci11-9.pdf.*

[849] *See* Treasury Market Practice Group, *U.S. Treasury Securities Fails Charge Trading Practice* (July 27, 2018), *available at https://www.newyorkfed.org/medialibrary/microsites/tmpg/files/TMPG-UST-fails-charge-trading-practice-FINAL-07-27-18.pdf.*

[850] ICI Letter, *supra* note 85, at 26–28.

[851] *See* Part II.C.2.c, *supra.*

[852] *See* FICC Rule 11, section 2, *supra* note 19; FICC Buyside FAQ, *supra* note 169, at 2–3.

[853] ICI Letter, *supra* note 85, at 27.

[854] *See supra* note 438 and referencing paragraph.

[855] Proposing Release, *supra* note 14, at 64613.

secondary market transactions, *i.e.,* for which U.S. Treasury securities CCAs are obligated to impose membership rules to require clearing of such transactions. The benefits of including these categories are described below.

As with repurchase transactions, the general benefits of central clearing discussed in part IV.A *supra* become greater as the fraction of total transaction volume that is centrally cleared increases. In other words, there are positive externalities associated with broader central clearing. However, unlike in the repo market, the Commission is not requiring that all cash market transactions completed with a FICC member be centrally cleared.[856]

Several commenters suggested that the scope of eligible secondary market transactions in the cash market be broadened. One commenter stated that the Commission should align the scope of the definition with respect to cash transactions with the proposed scope for repos, subject to certain limited exceptions for investors that trade de minimis volumes. The commenter argued that the Commission's approach with respect to cash transactions will increase costs for a specific subset of market participants, thereby putting them at a competitive disadvantage, while failing to deliver the envisaged market-wide benefits associated with central clearing (*i.e.,* it would materially reduce the associated multilateral netting benefits, impair the risk management practices of clearing agencies, and hinder the evolution in trading protocols that can be expected from a market-wide clearing requirement).[857] For similar reasons, another commenter also stated that the benefits of central clearing detailed ''will only materialize if a market-wide mandate is implemented'' and supported defining the scope of eligible secondary market transactions for cash transactions as broadly as that proposed for repos.[858] Another commenter stated that limiting the scope of the cash clearing mandate would result in unwarranted competitive disadvantages and related market distortions for some types of investors, such as hedge funds, or some types of trading platforms, such as anonymous trading facilities.[859]

The Commission proposed a targeted approach to clearing in the cash market in the Proposing Release, limiting the clearing requirement to specific types of entities transacting with members of a U.S. Treasury securities CCA that pose certain risks when clearing cash market treasury transactions bilaterally.[860] As discussed in the Proposing Release and discussed in part II.2.b *supra,* the Commission believed that including within the scope of eligible transactions the cash transactions of levered funds and hedge funds is more important than those of other market participants that were not included in part because the strategies employed by hedge funds ''can increase the likelihood that the fund will experience stress or fail, and amplify the effects on financial markets.'' [861] The Commission is not including purchases and sales of U.S. Treasury securities between a direct participant and either a hedge fund or a levered account within the definition of an eligible secondary market transaction in light of questions raised by commenters regarding the inclusion of a hedge fund and a leveraged account as proposed that merit further consideration, and the Commission will continue to evaluate the issues raised to determine if any further action is appropriate.[862]

In response to the comment that characterized a market-wide mandate as a ''necessary condition'' for adoption of any mandate, the Commission does not believe that all benefits of central clearing exist only if the entire market is centrally cleared. The increased clearing of cash transactions, targeted to address the differing risk profiles of each market segment, would still bring the benefits of central clearing to an important part of the cash market. As explained below, cash and repo markets differ in important ways that suggest a broader definition of eligible secondary market transactions for repo and a less broad definition for cash transactions. Though there are linkages across markets, segments of the Treasury market are distinct, and for this reason, the Commission addresses the risks in each of these categories separately in parts II.A.2.b.ii through iii *supra.*

The Commission understands the set of participants in U.S. Treasury securities cash markets to be far broader and more heterogeneous than in the repo markets. The cash market has many participants that trade in relatively small amounts, whereas the market for repo is dominated by larger, more sophisticated institutions. Although difficult to quantify precisely, the number of participants is one or more orders of magnitude greater in the cash market as compared with the repo market. Because the benefits increase with the number and size of transactions, whereas the costs have a large fixed component, extending the clearing mandate to institutions that are market participants in repo markets and a subset of the institutions that are participants in cash markets should capture a large fraction of market activity, while also capturing the most active market participants who may already have some ability to connect with the clearing agency and experience with central clearing.

a. IDB Transactions

The amendments being adopted require that all purchases and sales of U.S. Treasury securities entered into by a direct participant of a U.S. Treasury securities CCA and any counterparty, if the direct participant of the CCA brings together multiple buyers and sellers using a trading facility (such as a limit order book) and serves as a counterparty to both the purchaser and seller in two separate transactions executed on its platform, be subject to the requirement to centrally clear eligible secondary market transactions. This requirement encompasses the transactions of those entities serving as IDBs in the U.S. Treasury securities market, in that it covers entities that are standing in the middle of transactions between two counterparties that execute a trade on the IDB's platform.[863]

The amendments being adopted will result in more central clearing of IDB trades. FICC Member IDBs do not take directional positions on the securities that trade on the IDB's platform. Consequently, a requirement that FICC member IDBs centrally clear all of their trades will give FICC better insight into the risk position of its clearing members though the elimination of the hybrid clearing transactions mentioned above.

In contrast to other FICC members, FICC members that are also IDBs will be required to centrally clear all of their cash trades (and repo, as described above). As described in the TMPG White Paper and in the recent G–30

[856] The G–30 report recommends an approach to clearing all of repo, and some cash trades. *See generally* G–30 Report, *supra* note 5.

[857] Citadel Letter, *supra* note 81, at 5.

[858] ARB et al. Letter, *supra* note 81, at 4 (stating that the netting benefits associated with transitioning only proprietary trading firm (''PTF'') transactions into central clearing are much smaller, given the substantial netting that already occurs directly with inter-dealer brokers (''IDBs''); the trading-related benefits of central clearing will only accrue to market participants if their transactions are covered by the proposed mandate; and that clearing agency resiliency will be negatively impacted if only one segment of the market is cleared).

[859] MFA Letter, *supra* note 81, at 2.

[860] *See* part II.A.2.b *supra* for discussion of the justification for the scope as proposed.

[861] Proposing Release, *supra* note 14 at 64623–4.

[862] *See* part II.A.2.b.i *supra.*

[863] *See* Proposing Release, *supra* note 14, at 64616 for further discussion of IDBs and their role in the cash market for U.S. Treasury securities.

report,[864] IDBs act as central nodes in the system, in effect serving as clearing agencies without the regulatory structure of clearing agency. Furthermore, the netting benefits to IDBs, as described in this section are likely to be particularly high, because each transaction on an IDB is matched by a transaction on the other side. IDBs are sophisticated institutions that have experience managing the central clearing of trades as they already centrally clear all trades with other FICC members.

The configuration of counterparty risk presented by hybrid clearing allows FICC to manage the risks arising from the IDB–FICC member trade, but FICC cannot manage the risks arising from the IDB's offsetting trade with its non-FICC member counterparty and the potential counterparty credit risk and settlement risk arising to the IDB from that trade.[865] Thus, the IDB is not able to net all of its positions for clearing at FICC, and the IDB's positions appear to FICC to be directional, which impacts the amount of margin that FICC collects for the visible leg of the ''hybrid'' transaction. This lack of visibility can increase risk during stress events, when margin requirements usually increase. Thus, FICC is indirectly exposed to the IDB's non-centrally cleared leg of the hybrid clearing transaction, but it lacks the information to understand and manage its indirect exposure to this transaction. As a result, in the event that the non-FICC counterparty were to default to the IDB, causing stress to the IDB, that stress to the IDB could be transmitted to the CCP and potentially to the system as a whole.[866] In particular, if the IDB's non-FICC counterparty fails to settle a transaction that is subject to hybrid clearing, such an IDB may not be able to settle the corresponding transaction that has been cleared with FICC, which could lead the IDB to default. As part of its existing default management procedures, FICC could seek to mutualize its losses from the IDB's default, which could in turn transmit stress to the market as a whole.

The Commission has previously stated that membership requirements help to guard against defaults of any CCP member, as well to protect the CCP and the financial system as a whole from the risk that one member's default could cause others to default, potentially including the CCP itself.[867] Further, contagion stemming from a CCP member default could be problematic for the system as a whole, even if the health of the CCP is not implicated. This is so because the default could cause others to back away from participating in the market. This risk of decreased market participation could be particularly acute if the defaulting participant were an IDB, whose withdrawal from the market could jeopardize other market participants' ability to access the market for on-the-run U.S. Treasury securities.[868] And because IDBs facilitate a significant proportion of trading in on-the-run U.S. Treasury securities (that is, they form central nodes), such a withdrawal could have significant consequences for the market as a whole.[869] The requirement to clear eligible secondary market transactions should therefore help mitigate this risk by mandating that a U.S. Treasury securities CCA ensure its IDB members clear both sides of their transactions, thereby eliminating the various facets of potential contagion risk posed by so-called hybrid clearing.

Commenters generally supported the inclusion of IDB transactions in the definition of an eligible secondary market transaction.[870] Another commenter, although not supporting a requirement to clear repos, stated that if such a requirement was adopted it should be limited to IDBs and broker-dealers because (1) the counterparties to such transactions are the most active participants in the Treasury repo markets, thereby allowing the Commission to meaningfully increase central clearing without applying a more categorical requirement, and (2) because such transactions are more interconnected with the rest of the market and have a higher possibility to transfer risk to outside parties (including potentially a U.S. Treasury securities CCA).[871]

However, certain commenters asserted that this aspect of the definition would inappropriately disadvantage IDBs, with uncertain benefits and potentially significant negative consequences that would result if market participants shifted their trading activity away from IDBs.[872] Three commenters expressed concerns that including IDB transactions in the definition of an eligible secondary market transaction could draw trading activity away from IDBs, thereby reducing market liquidity and market stability.[873] The commenters also noted that IDBs are anonymous platforms that currently support all-to-all trading, which the Commission has recognized would improve market structure and stability.[874] The commenters argued that including IDB transactions in the definition of an eligible secondary market transaction could, therefore, hinder all-to-all trading.[875] One of these commenters further argued that by discouraging market participants from trading on IDBs, the requirement to clear eligible secondary market transactions, as drafted, could limit the choices of market participants with respect to trading venues.[876]

The Commission disagrees with these commenters. The inclusion of IDB transactions, along with other types of transactions, would not necessarily lead to decreased liquidity and market stability or negatively impact all-to-all trading in the U.S. Treasury market. The benefits to market participants from trading on an IDBs, that is the ability find counterparties and to trade anonymously are significant and will continue even if such transactions are eligible secondary market transactions, meaning that such transactions would incur the costs associated with central clearing and described below.

Moreover, even in the event that some of these concerns materialize from the inclusion of IDB transactions, the inclusion of IDB transactions is justified as it would allow the U.S. Treasury securities CCA to better risk manage ''hybrid'' transactions that are currently not being submitted for central clearing. Specifically, including IDB transactions in the definition of an eligible secondary market transaction would address the potential for contagion risk associated with hybrid clearing. As explained in the Proposing Release, the configuration of counterparty risk presented by hybrid clearing allows the U.S. Treasury securities CCA to manage the risks arising from the IDB–CCA direct participant transaction, on the one hand, but the U.S. Treasury securities CCA cannot manage the risks arising from the IDB's offsetting transaction with its non-member counterparty and

[864] *See generally* G–30 Report, *supra* note 5.

[865] *See, e.g.,* TMPG White Paper, *supra* note 13, at 22 (noting that in a hybrid clearing arrangement, an ''IDB's rights and obligations towards the CCP are not offset and therefore the IDB is not in a net zero settlement position with respect to the CCP at settlement date.'').

[866] *See* DTCC May 2021 White Paper, *supra* note 307, at 5.

[867] *See* CCA Standards Proposing Release, *supra* note 8.

[868] TMPG White Paper, *supra* note 13, at 32.

[869] *See id.*

[870] *See* AIMA Letter, *supra* note 81, at 7.

[871] *See* SIFMA/IIB Letter, *supra* note 37, at 19–20.

[872] *See* ICI Letter, *supra* note 85, at 3, 11; MFA Letter, *supra* note 81, at 19–21; *see also* Tradeweb Letter, *supra* note 81, at 3–4.

[873] *See* ICI Letter, *supra* note 85, at 3, 11; MFA Letter, *supra* note 81, at 20; Tradeweb Letter, *supra* note 81, at 3–4.

[874] *See id.*

[875] *See id.*

[876] *See* MFA Letter, *supra* note 81, at 20.

the potential counterparty credit risk and settlement risk arising to the IDB from that trade.[877] Thus, under the current hybrid clearing model, the U.S. Treasury securities CCA is indirectly exposed to the IDB's non-centrally cleared transaction, but it lacks the ability to risk manage its indirect exposure to this non-centrally cleared leg of the transaction. Specifically, it does not know who the ultimate counterparty of the transaction is and cannot collect margin on that transaction. This, in turn, results in margin collection at the CCP which is based upon only one transaction and has been calculated to cover this seemingly directional position, as well as an inability to net these offsetting transactions and provide the benefits of central clearing. In particular, if the IDB's non-CCP member counterparty fails to settle a transaction that is subject to hybrid clearing, such IDB may not be able to settle the corresponding transaction that has been cleared with the U.S. Treasury securities CCA due to a lack of financial resources at the IDB, which could lead the IDB to default.[878] As part of its existing default management procedures, the U.S. Treasury securities CCA could seek to mutualize its losses from the IDB's default, which could in turn transmit stress to the market as a whole.

As noted above, the Commission has previously stated that membership requirements help to guard against defaults of any CCP member, as well as to protect the CCP and the financial system as a whole from the risk that one member's default could cause others to default, potentially including the CCP itself.[879] Further, contagion stemming from a CCP member default could undermine confidence in the financial system as a whole, even if the health of the CCP is not implicated. This is because the default could cause others to back away from participating in the market. This risk of decreased participation could be particularly problematic if the defaulting participant was an IDB, whose withdrawal from the market could impact other market participants' ability to access the market for on-the-run U.S. Treasury securities, approximately 49.7% of which trade on IDBs.[880] Including such transactions as eligible secondary market transactions would therefore help protect against this risk by requiring that a U.S. Treasury securities CCA ensure that direct participants who are IDBs centrally clear both sides of their transactions, thereby eliminating the various aspects of potential contagion risk posed by so-called hybrid clearing.

b. Other Cash Transactions

The Commission has identified additional categories of cash transactions of U.S. Treasury securities to include in the membership requirements for a U.S Treasury securities CCA that it believes will provide the benefits of increased central clearing of U.S. Treasury securities transactions described above.

The Commission is defining an eligible secondary market transaction to include those cash purchase and sale transactions in which the counterparty of the direct participant is a registered broker-dealer, government securities broker, or dealer.[881] These entities, by definition, are engaged in the business of effecting transactions in securities for the account of others (for brokers) or for their own accounts (for dealers). Thus, these entities already are participating in securities markets and have identified mechanisms to clear and settle their transactions.[882] More generally, many registered brokers and dealers are familiar with transacting through introducing brokers who pass their transactions to clearing brokers for clearing and settlement.

In the Proposing Release, the Commission proposed to include in the definition of eligible secondary market transaction any purchases and sales of U.S. Treasury securities between a direct participant and a counterparty that is: (i) a hedge fund, that is any private fund (other than a securitized asset fund): (a) with respect to which one or more investment advisers (or related persons of investment advisers) may be paid a performance fee or allocation calculated by taking into account unrealized gains (other than a fee or allocation the calculation of which may take into account unrealized gains solely for the purpose of reducing such fee or allocation to reflect net unrealized losses); (b) that may borrow an amount in excess of one-half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or (c) that may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration) (''hedge fund transactions''), or (ii) an account at a registered broker-dealer, government securities dealer, or government securities broker where such account may borrow an amount in excess of one-half of the value of the account or may have gross notional exposure of the transactions in the account that is more than twice the value of the account (''leveraged account transactions'').[883]

Some commenters supported the proposed inclusion of transactions with hedge funds within the definition of an eligible secondary market transaction.[884] However, other commenters asserted that transactions with a hedge fund should not be within the definition of an eligible secondary market transaction. Specifically, one commenter stated that because of the nature of the definition, eligible secondary market transactions would include those with firms that may (but in practice might not actually) exceed the quantitative thresholds without regard to the risks that these firms actually take on, or their investment models and strategies. Further, the commenter stated that the definition would not reflect any effort to assess whether any particular fund or account actually imposes systemic risk, and would instead treat the mere ability to obtain leverage as a source of risk.[885] Another commenter stated that there is no data to support imposing a clearing requirement that targets just hedge funds and leveraged accounts and expressed concern that a partial mandate may result in some dealers choosing to offer liquidity only in a cleared environment thereby reducing the liquidity available today to accounts in the uncleared cash market.[886] Another commenter stated that the inclusion of hedge funds within the counterparties to an eligible secondary market transaction would arbitrarily single out hedge funds' cash Treasury transactions and would leave out other important market participants' cash

[877] *See, e.g.,* TMPG White Paper, *supra* note 13, at 22 (noting that in a hybrid clearing arrangement, an IDB's rights and obligations to the CCP are not offset and the IDB is not in a net zero settlement position with respect to the CCP at settlement date). Thus, the IDB is not able to net all of its positions for clearing at a U.S. Treasury securities CCA, and the IDB's positions appear to the CCA to be directional, which impacts the amount of margin that the CCA collects for the transaction.

[878] *See* 2021 IAWG Report, *supra* note 4, at 31; *See also* DTCC May 2021 White Paper, *supra* note 307.

[879] *See supra* note 308.

[880] TMPG White Paper, *supra* note 13, at 32; part IV.B.3 (Table 1) *supra.*

[881] 15 U.S.C. 78o(a) and 78o–5(a) (requirement to register) and 78c(4), (5), (43), and (44) (definitions).

[882] *See, e.g.,* FICC Rules 3A, 8, 18, *supra* note 663 (providing for prime brokerage and correspondent clearing and sponsored membership); *see also* October 2021 White Paper, *supra* note 681, at 5–7.

[883] *See* part II.A.2.b *supra.*

[884] *See* DTCC/FICC Letter, *supra* note 33; Better Markets Letter, *supra* note 33; AFREF Letter, *supra* note 33.

[885] *See* MFA Letter, *supra* note 81 at 19–20.

[886] *See* SIFMA AMG Letter, *supra* note 35, at 11.

Treasury transactions that also comprise a large segment of Treasury market liquidity.[887]

As the Commission stated in the Proposing Release, hedge funds generally can engage in trading strategies that may pose heightened risks of potential financial distress to their counterparties, including those who are direct participants of a U.S. Treasury securities CCA. The Commission previously has recognized that the strategies employed by hedge funds ''can increase the likelihood that the fund will experience stress or fail, and amplify the effects on financial markets.'' [888] The Commission also has stated that significant hedge fund failures, resulting from their investment positions or use of leverage or both, could result in material losses at the financial institutions that lend to them if collateral securing this lending is inadequate, and that these losses could have systemic implications if they require these financial institutions to scale back their lending efforts or other financing activities generally.[889]

Similar to the risks posed to a U.S. Treasury securities CCA by non-centrally cleared trades entered into by an IDB, non-centrally cleared transactions entered into between hedge funds and direct participants of the CCA could cause risks to the CCA in the event that the hedge fund is not able to meet its obligations to the direct participant, which could, in turn, create stress to the direct participant and through to the CCA. Therefore, including the direct participant's purchase and sale transactions with hedge funds within the definition of an eligible secondary market transaction would have reduced the potential for financial distress arising from the transactions that could affect the direct participant and the U.S. Treasury securities CCA. This aspect of the proposal would also have resulted in consistent and transparent risk management being applied to such transactions, as discussed further in part II.A.2.a *supra.*

However, in response to comments received and as discussed in part II.A.2.b *supra,* the Commission is not adopting a definition of eligible secondary market transaction in Rule 17ad–22(a) that includes these transactions.[890]

iv. Exclusions From the Requirement To Clear Eligible Secondary Market Transactions

The Commission is excluding certain otherwise eligible secondary market transactions in U.S. Treasury securities from the requirement to clear eligible secondary market transactions. Recognizing the importance of U.S. Treasury securities not only to the financing of the United States government, but also their central role in the formulation and execution of monetary policy and other governmental functions, the Commission is excluding from the requirement to clear eligible secondary market transactions any otherwise eligible secondary market transaction in U.S. Treasury securities between a direct participant of a U.S. Treasury securities CCA and a central bank.[891] For similar reasons, the Commission is also excluding from the requirement to clear eligible secondary market transactions otherwise eligible secondary market transactions in U.S. Treasury securities between a direct participant of a U.S. Treasury securities CCA and a sovereign entity or an international financial institution.[892] In a change from the proposal, and for the reasons given above, the Commission is excluding from the requirement to clear eligible secondary market transactions otherwise eligible secondary market transactions in U.S. Treasury securities between a direct participant of a U.S. Treasury securities CCA and either a state and local government or a covered clearing agency providing central counterparty services, a derivatives clearing organization (*see* 7 U.S.C. 7a–1 and 17 CFR 39.3), or is regulated as a central counterparty in its home jurisdiction.[893]

One commenter recommended that the Commission exempt transactions in U.S. Treasury securities between affiliates from any central clearing requirement. The commenter stated that inter-affiliate transactions are important to corporate groups, which may use them to achieve efficient risk and capital allocation and obtain flexibility for addressing customer demands.[894] The commenter further stated that requiring inter-affiliate transactions to be centrally cleared would impose additional costs with limited benefits, for two reasons. First, if an inter-affiliate transaction is part of a ''back-to-back arrangement,'' meaning that the related external transaction between the affiliated counterparty and a non-affiliated counterparty is not centrally cleared, then subjecting the inter-affiliate transaction to a central clearing requirement does nothing to reduce the contagion risk presented by the non-affiliated counterparty. The commenter further asserted that if that external transaction is already centrally cleared, the contagion risk would already be addressed and requiring the inter-affiliate transaction to be cleared would not create additional benefits. Second, a direct participant's affiliate's credit risk is already part of the group-wide financial risks to which the Treasury CCP is exposed, and central clearing of inter-affiliate transactions is unlikely to meaningfully impact the risk profile.[895]

The Commission agrees and in a change from the proposing release, the Commission is conditionally excluding inter-affiliate repo.[896] The Commission believes that, in certain circumstances, the counterparty credit risk posed by inter-affiliate transactions may be less than other transactions.[897] However, the credit risk is not eliminated because affiliated entities are separate legal entities and, generally, are not legally responsible for each other's contractual obligations. In the event that one or more affiliated entities becomes insolvent, the affiliates, as separate legal entities, would be managed as separate estates in a bankruptcy, with the trustee having a duty to the creditors of the affiliate, not the affiliated family. Other benefits of increased central clearing

[887] *See* AIMA Letter, *supra* note 81, at 7.

[888] *See* Form PF Proposing Release, *supra* note 279, 76 FR at 8073 (citing President's Working Group on Financial Markets, Hedge Funds, Leverage, and the Lessons of Long Term Capital Management (Apr. 1999), at 23).

[889] *Id.* (also noting that the simultaneous failure of several similarly positioned hedge funds could create contagion through the financial markets if the failing funds had to liquidate their investment positions at fire sale prices).

[890] *Id.*

[891] *See* Proposing Release, *supra* note 14, at 64625 for a discussion of the proposed definition of a central bank for the purposes of the rule.

[892] *See id.* for a discussion of the proposed definition of sovereign entity and international financial institution.

[893] *See* part II.A.2.a.vii *supra* and part II.A.2.a.iii *supra.*

[894] SIFMA/IIB Letter, *supra* note 37, at 21–22.

[895] *Id.*

[896] *See* part II.A.2.a, *supra.* The Commission is conditioning the availability of the exclusion for inter-affiliate transactions on an obligation for the affiliated counterparty to submit its eligible repo transactions for clearance and settlement. This condition should help ensure that a direct participant cannot rely upon an inter-affiliate transaction to avoid the requirement to clear eligible secondary market transactions. If there were no such condition, a direct participant could simply use inter-affiliate transactions to move securities and funds to affiliates, and the affiliate could then enter into external transactions with counterparties which, if entered into with the direct participant, would be eligible secondary market transactions.

[897] *See, e.g.,* Clearing Exemption for Swaps Between Certain Affiliated Entities, 77 FR 50425, 50427 (Mar. 2012) (discussing the internalization of counterparty risk on inter-affiliate swap transactions as wholly owned members of the same corporate group, but also discussing that similar benefits may not accrue for other inter-affiliate swaps when the counterparties are not members of the same group).

such as consistent risk management and centralized default management are likely to be less important for transactions within an affiliated family. Therefore, the Commission believes the benefits of clearing such transactions are likely less than those from similar transactions with non-affiliates while the costs of doing so are likely similar.

Although the Commission believes that the benefits of central clearing are generally increasing in the fraction of total volume that is centrally cleared, it also believes that the Federal Reserve System should be free to choose the clearance and settlement mechanisms that are most appropriate to effectuating its policy objectives.[898] Further, the Commission believes that the exclusion should extend to foreign central banks, sovereign entities and international financial institutions for reasons of international comity.[899] In light of ongoing expectations that Federal Reserve Banks and agencies of the Federal Government will not be subject to foreign regulatory requirements in their transactions in the sovereign debt of other nations, the Commission believes principles of international comity counsel in favor of exempting foreign central banks, sovereign authorities, and international institutions.

The Commission is also excluding transactions between U.S. Treasury CCA members and natural persons from the requirement to clear eligible secondary market transactions. The Commission believes that natural persons generally transact in small volumes and should not present much, if any, contagion risk to a U.S. Treasury securities CCA and therefore, the benefits discussed above are unlikely to be important for these transactions. Commenters expressed support for these exclusions.[900]

Two commenters asked the Commission to adopt an exemption that would allow FCMs to continue to engage in eligible secondary market transactions in U.S. Treasury securities outside of central clearing, and another commenter acknowledged the potential interaction between the proposal and the regulatory framework governing FCMs.[901] FCMs can also be registered with the Commission as broker-dealers.[902] Commenters expressed concern as to whether the account structure provided by FICC would be consistent with the regulatory framework governing FCMs.[903] The Commission recognizes the apparent tension between the rule amendments being adopted and the application of Rule 1.25(d)(2), as described in part II.A.2.a.iv, *supra.*

For the reasons discussed above in part II.A.2.a.iv, the Commission does not believe that an exclusion for FCMs is necessary to accommodate the relevant provisions of the CFTC Rules. Moreover, an exclusion for FCMs would be inconsistent with the purpose of the rule which is to help reduce contagion risk to the CCA and bring the benefits of central clearing to more transactions involving U.S. Treasury securities, particularly in light of their significance to the Treasury market.

b. Other Changes to Covered Clearing Agency Standards

The Commission believes that certain additional changes to its Covered Clearing Agency Standards that apply only to U.S. Treasury securities CCAs are warranted to facilitate additional clearing. Such changes should help ensure that the U.S. Treasury securities CCA can continue to manage the risks arising from more transactions from additional indirect participants and to facilitate the increased use of central clearing and the accompanying benefits. These changes, by making central clearing more efficient for market participants, also create incentives for greater use of central clearing.

i. Policies and Procedures Regarding Direct Participants' Transactions

The Commission is adopting Rule 17ad–22(e)(18)(iv)(B) that requires a U.S. Treasury securities CCA establish, implement, maintain and enforce written policies and procedures to identify and monitor its direct participants' required submission of transactions for clearing, including, at a minimum, addressing a direct participant's failure to submit transactions. The Commission believes that such a requirement should help ensure that a U.S. Treasury securities CCA adopts policies and procedures directed at understanding whether and how its participants comply with the policies that will be adopted as part of the requirement to clear eligible secondary market transactions requiring the submission of specified eligible secondary market transactions for clearing. Without such policies and procedures, it would be difficult for the CCA to assess if the direct participants are complying with the requirement to clear eligible secondary market transactions.

One commenter supported this aspect of the proposal.[904] This commenter anticipated that implementation of this aspect of the proposal would be similar to implementation of other Covered Clearing Agency Standards provisions that use that phrase.[905] The commenter stated that it expects a U.S. Treasury securities CCA would take steps to remediate non-compliance on the part of its direct participants in a manner consistent with the Covered Clearing Agency Standards and breaches of the CCA's own rules.[906]

ii. Netting and Margin Practices for House and Customer Accounts

The Commission is amending Rule 17ad–22(e)(6)(i) to require a U.S. Treasury securities CCA to establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, calculate, collect, and hold margin amounts from a direct participant for its proprietary U.S. Treasury securities positions, separately and independently from margin calculated and collected from that direct participant in connection with U.S. Treasury securities transactions by an indirect participant that relies on the services provided by the direct participant to access the covered clearing agency's payment, clearing, or settlement facilities. As described further below, such changes should allow a U.S. Treasury securities CCA to better understand the source of potential risk arising from the U.S. Treasury securities transactions it clears and potentially further incentivize central clearing.

In practice, at FICC, clearing a U.S. Treasury securities transaction between a direct participant and its customer, *i.e.,* a dealer to client trade, would not result in separate collection of margin for the customer transaction. Except for transactions submitted under the FICC sponsored member program,[907] FICC margins the transactions in the direct participant's (*i.e.,* the dealer's) account on a net basis, allowing any of the trades for the participant's own accounts to net

[898] *See* Proposing Release, *supra* note 14, for a discussion of the activities of Federal Reserve Bank of New York's open market operations conducted at the direction of the Federal Open Market Committee.

[899] *See id.,* for a discussion of the Commission's belief in the principles of international comity.

[900] SIFMA/IIB Letter, *supra* note 37, at 20; CME Letter, *supra* note 81.

[901] *See supra* note 200. *See also* part II.A.2.a.iv, *supra,* for discussion of FCMs and the regulatory framework governing them.

[902] One commenter states that the majority of FCMs are dually registered as FCMs and broker-dealers. *See* FIA Letter, *supra* note 200, at 2.

[903] *See* part II.A.2.a.iv, *supra.*

[904] *See* FICC/DTCC Letter, *supra* note 33, at 21–22. *See also* part II.A.4 *supra* for additional discussion.

[905] *Id.*

[906] *Id.*

[907] *See* DTCC October 2021 White Paper, *supra* note 681.

against trades by the participant's customers.[908]

Under the amendments to Rule 17ad–22(e)(6)(i), a U.S. Treasury securities CCA is required to establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, calculate margin amounts for all transactions that a direct participant submits to the CCP on behalf of others, separately from the margin that is calculated for transactions that the direct participant submits on its own behalf. Such policies and procedures must also provide that margin collateralizing customer positions be collected separately from margin collateralizing a direct participant's proprietary positions. Finally, the CCP will also be required to have policies and procedures reasonably designed to, as applicable, ensure that any margin held for customers or other indirect participants of a member is held in an account separate from those of the direct participant.

Because the amendments to Rule 17ad–22(e)(6)(i) require separating positions in U.S. Treasury securities transactions of a direct participant in a U.S. Treasury securities CCA from those of customers or other indirect participants, the indirect participants' positions, including those submitted outside of the sponsored member program, will no longer be netted against the direct participant's positions. The indirect participants' positions will be subject to the covered clearing agency's risk management procedures, including collection of margin specific to those transactions. These changes should allow a U.S. Treasury securities CCA to better understand the source of potential risk arising from the U.S. Treasury securities transactions it clears. In addition, these changes should help avoid the risk of a disorderly default in the event of a direct participant default, in that FICC will be responsible for the central liquidation of the defaulting participant's trades without directly impacting the trades of the participant's customers or the margin posted for those trades.

Moreover, the amendments to Rule 17ad–22(e)(6)(i) should result in dealer-to-customer trades gaining more benefits from central clearing. Because margin for a direct participant's (*i.e.,* a dealer's) trades will be calculated, collected, and held separately and independently from those of an indirect participant, such as a customer, the direct participant's trades with the indirect participant can be netted against the direct participant's position vis-à-vis other dealers.[909]

Holding margin amounts from a direct participant of a U.S Treasury securities CCA separately and independently from those of an indirect participant may reduce incentives for indirect participants to trade excessively in times of high volatility.[910] Such incentives exist because the customers of a broker-dealer do not always bear the full cost of settlement risk for their trades. Broker-dealers incur costs in managing settlement risk with CCPs. Broker-dealers can recover the average cost of risk management from their customers. However, if a particular trade has above-average settlement risk, such as when market prices are unusually volatile, it is difficult for broker-dealers to pass along these higher costs to their customers because fees typically depend on factors other than those such as market volatility that impact settlement risk. Holding margin of indirect participants separately from direct participants should reduce any such incentives to trade more than they otherwise would if they bore the full cost of settlement risk for their trades.

Commenters generally supported the proposed amendment to Rule 17ad–22(e)(6)(i).[911] However, commenters also raised several additional issues with respect to the separation of house and customer margin that are addressed in part II.B.1 *supra.* As discussed below,[912] an additional commenter stated that the proposed separation of house and customer margin would negatively impact small and mid-size broker-dealers who are disproportionately affected by FICC's Excess Capital Premium (''ECP'') charge, which is a margin add-on that collects a premium when a member's VaR charge exceeds the member's Net Capital, net assets or equity capital (as applicable to that member based on its type of regulation).[913] As discussed in part II.B1 *supra,* the commenter's concerns regarding the interplay between purported required gross margining and the ECP charge rests on the assumption that gross margin is required under the proposal, which, as discussed in the prior paragraph, is not the case. In addition, FICC recently has indicated that it intends to make available client clearing models that do not require gross margin, consistent with its current offerings.[914]

A commenter requested that the SEC encourage FICC to establish a feature allowing (but not requiring) registered fund sponsored members to support their obligations by having margin posted with FICC (''FICC registered fund margin framework'') rather than by paying fees to the sponsoring member.[915] While the commenter noted that the Sponsored Service under current FICC rules does not raise custody issues for registered funds under the 1940 Act because registered funds are not required to post margin to FICC, if a fund's margin were permitted to be posted with FICC, that could raise custody issues for funds unless such funds had relief from certain provisions of the 1940 Act.[916] The commenter stated that permitting registered funds' margin to be posted with FICC could reduce costs for registered funds and facilitate their use of cleared reverse repos and term repos.[917] The Commission understands that FICC's current rules for the Sponsored Service do not require sponsored and sponsoring member margin to be calculated or held separately implying that the sponsoring member is satisfying all FICC margin requirements. Thus, current practice bundles trade execution and clearing, including the posting of margin. As such, registered funds in effect pay the costs associated with the posting of margin either through fees or through inferior pricing. Enabling registered fund margin to be posted at FICC creates the potential for unbundling these activities, and for greater competition.

The Commission agrees that facilitating the ability for a registered fund's margin to be posted at FICC as an alternative to the sponsoring member satisfying all FICC margin requirements and passing the cost of doing so through to the registered fund may lower the cost of trading for the fund, and the Commission's five year position discussed in part II.A.2.a.ii *supra,* will help facilitate the posting of registered fund margin to satisfy a U.S. Treasury securities CCA's margin deposit

[908] *Id.* at 5–6.

[909] *See* Marta Chaffee and Sam Schulhofer-Wohl, *supra* note 678, at 3.

[910] *See* Sam Schulhofer-Wohl, *Externalities in Securities Clearing and Settlement: Should Securities CCPs Clear Trades for Everyone?* (Fed. Res. Bank Chi. Working Paper No. 2021–02, 2021).

[911] *See* note 33 *supra.*

[912] *See* part IV.C.3.b *infra.*

[913] IDTA Letter, *supra* note 66, at 4; IDTA Letter 2, *supra* note 829, at 7; *see also* FICC Rule 4, section 14, *supra* note 19.

[914] *See* DTCC 2023 White Paper, *supra* note 107, at 6 (discussing that the proposal would allow the option to calculate and collect margin associated with customer activity on a gross or net basis depending on the client clearing model selected by the member and stating that FICC would offer options via different access models that would allow those parties to balance the benefits of netting and segregation in different ways).

[915] *See supra* note 125.

[916] *See* part II.A.2.a.ii *supra.*

[917] ICI Letter, *supra* note 85.

requirements. The ability to separate the trade execution and clearing services of sponsoring a registered fund's transactions with the CCA from the posting margin may facilitate done-away trading and enhance the ability of smaller CCA netting members to become sponsoring members or expand the capacity of sponsoring members in the Sponsored Service.

iii. Facilitating Access to U.S. Treasury Securities CCAs

The various access models currently available to access central clearing in the U.S. Treasury securities market may not meet the needs of the many different types of market participants who transact in U.S. Treasury securities with the direct members of a U.S. Treasury Securities CCA. The additional provision to Rule 17ad–22(e)(18)(iv)(C) requires a U.S. Treasury securities CCA to establish, implement, maintain and enforce certain written policies and procedures regarding access to clearance and settlement services, which, while not prescribing specific methods of access, is intended to ensure that all U.S. Treasury security CCAs have appropriate means to facilitate access to clearance and settlement services in a manner suited to the needs of market participants, including indirect participants.

Some market participants have commented on the current practice of tying clearing services to trading under the sponsored clearing model.[918] Under this model, the decision to clear the trades of an indirect participant appears to be contingent on that indirect participant trading with the direct participant sponsoring the indirect member.[919] If the indirect participant is a competitor of the sponsoring direct participant and the direct participant has discretion on which trades to clear, the indirect participant may have difficulty accessing clearing. The rule requires the U.S. Treasury securities CCA to ensure appropriate means to facilitate access; for some current indirect participants this may imply direct membership (with a potential change in membership criteria); alternatively, requiring something similar to a ''done-away'' clearing model may be another means of facilitating clearing.

Other considerations relate to the services available through the sponsored clearing model. For example, buy-side participants, currently engage in both triparty and bilateral repo, across multiple tenors (both overnight and long term), and on either side (selling or buying) of the transaction. At present, it appears that FICC direct members may be able to decline to submit a trade with counterparties who are not FICC direct members for central clearing at their discretion.[920] Thus some indirect participants who are unable to enter into a similar transaction using a different FICC direct member who is willing to submit the trade for central clearing would not be able to access central clearing under the current practice. The rule requires FICC to create new policies and procedures to facilitate access to clearing for these participants.

One commenter opposed the inclusion of registered funds because the current clearing framework is not sufficiently developed to support such a central clearing requirement.[921] The commenter identified several issues to be addressed prior to adopting such a requirement, including improvements to the Sponsored Service and develop a ''done away'' model (*see* part II.B.2 *supra* for additional discussion of the issues raised by this commenter).

In addition, the Rule 17ad–22(e)(18)(iv)(C) requires the CCA's written policies and procedures be annually reviewed by the CCA's board of directors to ensure that the CCA has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants. This review should help ensure that such policies regarding access to clearance and settlement services, including for indirect participants, are reviewed annually by the U.S. Treasury securities CCA's board of directors. The annual review ensures that such policies and procedures be reviewed periodically and potentially updated to address any changes in market conditions.

c. Amendments to Rules 15c3–3 and 15c3–3a

The rules and rule amendments being adopted and that are discussed above could cause a substantial increase in the margin broker-dealers must post to a U.S. Treasury securities CCA resulting from their customers' cleared U.S. Treasury securities positions. Currently, Rules 15c3–3 and 15c3–3a do not permit broker-dealers to include a debit in the customer reserve formula equal to the amount of margin required and on deposit at a U.S. Treasury securities CCA. This is because no U.S. Treasury securities CCA has implemented rules and practices designed to segregate customer margin and limit it to being used solely to cover obligations of the broker-dealer's customers. Therefore, increases in the amount of margin required to be deposited at a U.S. Treasury securities CCA as a result of the requirement to clear eligible secondary market transactions would result in corresponding increases in the need to use broker-dealers' cash and securities to meet these requirements.

The amendment to Rule 15c3–3a permits, under certain conditions, margin required and on deposit at a U.S. Treasury securities CCA to be included as a debit item in the customer reserve formula. This new debit item will offset credit items in the Rule 15c3–3a formula and, thereby, free up resources that could be used to meet the margin requirements of a U.S. Treasury securities CCA. The amendment allows a customer's broker to use customer funds to meet margin requirements at the CCP generated by the customer's trades, lowering the cost of providing clearing services.

As discussed further below, we expect these changes to allow more efficient use of margin for cleared trades relative to the baseline. This change, alone, could create incentives for greater use of central clearing, and thus could promote the benefits described in previous sections.

Overall, commenters supported the proposal to permit this debit item.[922] One commenter stated that the practical effect of this change would be to allow broker-dealers to use margin collected from customers to satisfy margin requirements associated with such customers' transactions, rather than using proprietary funds to finance customer margin as is the case today, and expressed its support for this amendment because it will free up broker-dealer resources by reducing the amount of proprietary funds needed to finance customer margin and therefore lower the cost of clearing, while continuing to protect customer funds.[923] Another commenter stated that this change would reduce the costs of centrally clearing U.S. Treasury securities transactions and thus incentivize more central clearing of such transactions.[924]

[918] *See* Futures Industry Association Principal Traders Group, *Clearing a Path to a More Resilient Treasury Market,* at 10 (July 2021), *available at https://www.fia.org/sites/default/files/2021-07/FIA-PTG_Paper_Resilient%20Treasury%20Market_FINAL.pdf* (''FIA–PTG Whitepaper'').

[919] *See id.* at 7.

[920] *See* part IV.B.3 *supra.*

[921] ICI Letter, *supra* note 85.

[922] *See supra* note 446.

[923] *See* MFA Letter, *supra* note 81, at 10.

[924] *See* SIFMA/IIB Letter, *supra* note 37, at 12.

2. Costs

The Commission has, where practicable, attempted to quantify the economic effects it expects may result from the amendments and new rules that it is adopting. In some cases, however, data needed to quantify these economic effects is not currently available or depends on the particular changes made to the U.S. Treasury securities CCA policies and procedures. As noted below, in the Proposing Release the Commission was unable to quantify certain economic effects and solicited comment, including estimates and data from interested parties, which could help inform the estimates of the economic effects of the new rules and amendments.

Significant costs of central clearing for market participants may include: (i) initial margin requirements (which in practice are held as ''clearing fund'' at FICC and subject to loss mutualization and the attendant adverse capital implications); (ii) clearing fees; (iii) obligations with respect to FICC's capped contingency liquidity facility (''CCLF''); (iv) the operational build necessary to access central clearing (either as a direct participant or as an indirect participant); and (v) legal costs and time associated with onboarding customers for indirect central clearing, including, *e.g.,* the need for Sponsoring Members to file UCC financing statements with respect to Sponsored Members under the Sponsored Member program. These costs are discussed in more detail below. Not all costs are expected to be borne by all participants and may depend on rules of the clearing agency.

One commenter stated that the increased costs of centrally clearing U.S. Treasury security transactions may reduce liquidity and diversity in the Treasury market if firms reduce activity, leave the market, or if barriers to entry are too high, given the significant costs of clearing for market participants.[925] The commenter identified several types of costs, including initial margin requirements, clearing fees, obligations with respect to FICC's CCLF, the operational build necessary to access central clearing either as a direct or indirect participant, and legal costs and time associated with onboarding customers for indirect central clearing, including, *e.g.,* the need for Sponsoring Members to file UCC financing statements with respect to Sponsored Members under the Sponsored Member program. The commenter stated that the impact of these costs would be disproportionately felt by small and mid-sized participants in the U.S. Treasury market, and that they would reduce diversity in the market and further increase concentration among market participants (which may increase systemic risk) if such participants leave the market.[926]

Increased transaction costs will, all else equal, reduce the expected return of a particular investment. If this were the only effect then the risk/return tradeoff would worsen and transaction volume could fall and liquidity deteriorate. However, central clearing also provides numerous benefits described above, including a possible decrease in transaction costs.[927] Many of these benefits could be expected to particularly benefit small and mid-sized participants, for example the reduction in counterparty credit risk that can result from central clearing may particularly benefit smaller market participants.

Commenters mentioned the potential concentration risk that would arise because of the requirement to clear eligible secondary market transactions, specifically because only one covered clearing agency currently provides such services. One commenter stated that concentrating such significant levels of settlement, operational, liquidity and credit risk in one institution means that were there operational or liquidity stress at FICC, widespread dysfunction in the Treasury markets could result.[928] One commenter agreed that the existence of one covered clearing agency serving the U.S. Treasury market is highly problematic as it creates enormous concentration risk for market participants, and highlighted that, given the importance of the U.S. Treasury market to the overall global economy, there needs to be a compelling reason for increasing the concentration of cleared trading activity in a single clearing house particularly when there is no alternative or fallback venue should the clearing house experience a disruption to its operations or more significantly were to fail.[929]

The Commission also recognizes the risks associated with increased centralization of clearance and settlement activities. In particular, the Commission has previously noted that ''[w]hile providing benefits to market participants, the concentration of these activities at a covered clearing agency implicitly exposes market participants to the risks faced by covered clearing agencies themselves, making risk management at covered clearing agencies a key element of systemic risk mitigation.'' [930]

As discussed previously, currently only FICC provides CCP services for U.S. Treasury securities transactions, including outright cash transactions and repos.[931] Were FICC unable to provide its CCP services for any reason then this could have a broad and severe impact on the overall U.S. economy. The FSOC recognized this when it designated FICC as a systemically important financial market utility in 2012,[932] which subjects it to heightened risk management requirements and additional regulatory supervision, by both its primary regulator and the Board of Governors.[933] In addition, FICC is subject to the Covered Clearing Agency Standards, which address the various types of risk that FICC faces as a CCP, including settlement, operational, liquidity, and credit risk. FICC also must meet its obligations under both Section 19(b) of the Exchange Act, as a self-regulatory organization, and Title VIII of the Dodd-Frank Act. The Commission believes that this overall supervisory framework, including the Covered Clearing Agency Standards, should help ensure that FICC continues to be subject to robust supervision and oversight and to be able to manage the risks presented to it, even those arising from increased Treasury clearing.

a. Costs to FICC and Its Members of the Requirement To Clear Eligible Secondary Market Transactions

The Commission believes that many of the direct costs of the rules and amendments it is adopting to the U.S. Treasury securities CCA are a result of new policies and procedures requirements, the costs of which are likely to be modest. This is because all

[925] *See* SIFMA/IIB Letter, *supra* note 37.

[926] *See* SIFMA/IIB Letter, *supra* note 37, at 8.

[927] *See* part IV.C.1 *supra.*

[928] *See* SIFMA/IIB Letter, *supra* note 37, at 10.

[929] SIFMA/AMG Letter, *supra* note 37, at 9.

[930] *See* CCA Standards Proposing Release, *supra* note 8, 79 FR at 29587.

[931] *See* Proposing Release, *supra* note 14 at 64612. *See also* part II.A.1.b *supra.*

[932] *See supra* note 369.

[933] *Id.* at 119. The Commission previously stated that Congress has recognized in the Clearing Supervision Act that the operation of multilateral payment, clearing or settlement activities may reduce risks for clearing participants and the broader financial system, while also creating new risks that require multilateral payment, clearing or settlement activities to be well-designed and operated in a safe and sound manner. The Clearing Supervision Act is designed, in part, to create a regulatory framework to help deal with such risk management issues, which is generally consistent with the Exchange Act requirement that clearing agencies organize themselves in a manner to facilitate prompt and accurate clearance and settlement, safeguard securities and funds and protect investors. *See* CCA Standards Proposing Release, *supra* note 8, 76 FR at 14474; *see also* 12 U.S.C. 5462(9), 5463(a)(2).

but one of these amendments and rules require the CCA to make certain changes to its policies and procedures. The other amends Rule 15c3–3a to permit margin required and on deposit at a U.S. Treasury securities CCA to be included as a debit item in the customer reserve formula for broker-dealers, subject to the conditions discussed above. As discussed above, the amendments to Rule 15c3–3a require several conditions to be met, including that the U.S. Treasury securities CCA calculate a separate margin amount for each customer on a gross basis.[934] Comments submitted by the single current U.S. Treasury securities CCA acknowledged that it would need to make documentation, operational, organizational, and systems changes in order to comply with the proposal.[935]

Rule 17ad–22(e)(18)(iv) requires a U.S. Treasury securities CCA to establish, implement, maintain and enforce written policies and procedures, as discussed above.[936] Because policies and procedures regarding the clearing of all eligible secondary market transactions entered into by a direct participant in a U.S. Treasury securities CCA are not currently required under existing Rule 17ad–22, the Commission believes that Rule 17ad–22(e)(18)(iv) may require a covered clearing agency to make substantial changes to its policies and procedures. The rule amendment contains similar provisions to existing FICC rules but will also impose additional requirements that do not appear in existing Rule 17ad–22. As a result, the Commission believes that a U.S. Treasury securities CCA will incur burdens of reviewing and updating existing policies and procedures in order to comply with the provisions of Rule 17ad–22(e)(18)(iv) and, in some cases, may need to create new policies and procedures.[937]

The Commission estimates that U.S. Treasury securities CCAs will incur an aggregate one-time direct cost of approximately $207,000 to create new policies and procedures.[938] [939] The rule also requires ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the rule. The Commission estimates that the ongoing activities required by Rule 17ad–22(e)(18)(iv) impose an aggregate ongoing cost on covered clearing agencies of approximately $61,000 per year.[940]

i. Costs Attendant to an Increase in CCLF

The new rules and amendments being adopted will likely result in a significant increase in the volume of U.S. Treasury securities transactions submitted to clearing. The G–30 has reported that FICC differs qualitatively from other CCPs in that counterparty credit risks are relatively small but liquidity risks in the event of member defaults could be extraordinarily large.[941] This is because net long positions generate liquidity obligations for FICC since, in the event of a member default, FICC would have to deliver cash in order to complete settlement of such positions with non-defaulting parties. Increased clearing volume of cash and repo transactions as a result of the rule could increase FICC's credit and liquidity exposure to its largest participant family, including those participants acting as sponsors of non-members.[942] FICC is obligated by Commission rule to maintain liquidity resources to settle all obligations of its largest participant family, in the event of default.[943] These resources include the CCLF in which Members will be required to hold and fund their deliveries to an insolvent clearing member up to a predetermined cap by entering into repo transactions with FICC until it completes the associated close-out. This facility allows clearing members to effectively manage their potential financing requirements with predetermined caps.[944]

As reported in the CPMI–IOSCO disclosure by FICC for Q2 of 2023, the combined liquidity commitment by clearing members to the FICC's CCLF was $86.3 billion for all repos and cash trades of U.S. Treasury and Agency securities. Since the inception of the CCLF in 2018, the CCLF has ranged in size from $82.5B to $108B.[945] Commitments by bank-affiliated dealers to the CCLF count against regulatory liquidity requirements, including the Liquidity Coverage Ratio (LCR).[946] Dealers affiliated with banks may satisfy their CCLF obligations using a guarantee from that affiliated bank but dealers not affiliated with banks may incur costs to obtain commitments to meet CCLF liquidity requirements. FICC states that when examining the impact of the rule amendments being adopted, its findings are inconclusive about the potential impact of the incremental indirect participant Treasury volume on FICC's liquidity needs or its CCLF.[947]

The size and cost of a firm's liquidity plan is tied not only to its own exposure at FICC, but also to the maximum exposure of the largest systemically important financial institution (''SIFI'') banks. One commenter stated that its members have reduced their portfolios as part of their CCLF liquidity plans.[948] At the same time, SIFIs have increased the size of their portfolios, and

[934] *See* part II.C.2.c *supra.*

[935] *See* DTCC/FICC Letter, *supra* note 33, at v. Although DTCC/FICC acknowledged there would be required system and other changes, it did not provide any estimate of the costs of such changes.

[936] *See* part II.A.4 *supra* for a discussion of the requirement that a U.S. Treasury securities CCA establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, identify and monitor its direct participants' required submission of transactions for clearing, including, at a minimum, addressing a direct participant's failure to submit transactions. See part II.B.2 *supra* for a discussion of the requirement that U.S. Treasury securities CCA establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, ensure that it has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants, which policies and procedures the U.S. Treasury securities CCA's board of directors reviews annually.

[937] *See* part IV.C.2.c.ii, *infra.*

[938] To monetize the internal costs, the Commission staff used data from SIFMA publications, modified by Commission staff to account for an 1800 hour work-year and multiplied by 5.35 (professionals) or 2.93 (office) to account for bonuses, firm size, employee benefits and overhead. *See* SIFMA, Management and Professional Earnings in the Security Industry—2013 (Oct. 7, 2013); SIFMA, Office Salaries in the Securities Industry—2013 (Oct. 7, 2013). These figures have been adjusted for inflation using data published by the Bureau of Labor Statistics.

[939] This figure was calculated as follows: Assistant General Counsel for 40 hours (at $518 per hour) + Compliance Attorney for 80 hours (at $406 per hour) + Computer Operations Manager for 20 hours (at $490 per hour) + Senior Risk Management Specialist for 40 hours (at $397 per hour) + Business Risk Analyst for 80 hours (at $305 per hour) = $103,280 × 2 respondent clearing agencies = $206,560. *See* part V.A *infra.*

[940] This figure was calculated as follows: Compliance Attorney for 25 hours (at $406 per hour) + Business Risk Analyst for 40 hours (at $305 per hour) + Senior Risk Management Specialist for 20 hours (at $397 per hour) = $30,290 × 2 respondent clearing agencies = $60,580. *See* part V.A *infra.*

[941] G–30 Report, *supra* note 5, at 14.

[942] Participant family means that if a participant directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, another participant then the affiliated participants shall be collectively deemed to be a single participant family. *See* Rule 17ad–22(a).

[943] *See* part IV.B.3 *supra.*

[944] FICC Disclosure Framework 2021 at 88, *available at https://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/FICC_Disclosure_Framework.pdf.*

[945] *See* part IV.B.3 *supra.*

[946] LCR is calculated as the ratio of High-Quality Liquid Assets (HQLA) divided by estimated total net cash outflow during a 30-day stress period. Because commitments by bank-affiliated dealers to the CCLF would increase the denominator of the ratio, a bank-affiliated dealer would have to increase HQLA to reach a required level of LCR.

[947] *See* DTCC 2023 White Paper, *supra* note 107, at 3, 19.

[948] IDTA Letter, *supra* note 66, at 8–9.

correspondingly, the very risk that the CCLF was designed to reduce.[949]

ii. Costs of the Requirement To Clear Eligible Secondary Market Transactions in Terms of Increased Margining for Existing FICC Members

As discussed above, the Commission recognizes that these amendments could cause an increase in the margin clearing members must post to a U.S. Treasury securities CCA resulting from the additional transactions that will be submitted for clearing as a result of these amendments. Although various SRO margin rules provide for the collection of margin for certain transactions in U.S. Treasury securities, the Commission understands that transactions between dealers and institutional customers are subject to a variable ''good-faith'' margin standard, which the Commission understands—based on its supervisory experience—can often result in fewer financial resources collected for margin exposures than those that would be collected if a CCP margin model, like the one used at FICC, were used.[950] Mitigating the potential for higher margin requirements for transactions submitted for clearing at a U.S. Treasury securities CCA is the benefit of netting that results from additional centrally cleared transactions.[951] As described in part IV.C.1 *supra,* this mitigant is likely to be especially significant in the case of IDB members. Also, potentially substantially mitigating the costs for clearing members is the ability for broker-dealers to include a debit in the customer reserve formula equal to the amount of margin required and on deposit at a U.S. Treasury securities CCA, as described in part II.C *supra.*

Based on a survey of its members, FICC estimates that incremental indirect participant Treasury volume could result in a corresponding increase in Value at Risk (VaR) margin of approximately $26.6 billion across the FICC/GSD membership.[952] [953] Netting members' required fund deposits to the clearing fund are primarily driven by a VaR charge; however, other margin charges may be collected when applicable.[954] The cost to the netting members of the additional required fund deposits estimated by FICC is likely be less than this for three reasons. First, the definition of an eligible secondary market transaction with respect to cash transactions that is being adopted is narrower than that which was proposed and on which FICC's estimates were based. Second, some fraction of the additional secondary market transactions that will be centrally cleared due to the new rules that would otherwise have been cleared bilaterally would also have been subject to margin requirements. Finally, since margin is only posted pending settlement, the cost to the posting entity is the opportunity cost of the funds.

One commenter, on behalf of its broker-dealer members, stated that there is a transaction cost difference between current bilateral trades that are cleared using the triparty platform and an identical transaction that must be centrally cleared.[955] The commenter further noted that this cost across a volume of trades is borne by clients of broker-dealers. The commenter stated that while the actual costs may vary across its membership, its members are currently paying about $3.00 per transaction settled on the triparty platform and bilaterally cleared over $7.00 for a similar tri-party transaction that was centrally cleared through FICC. The commenter stated that this is because FICC imposes intraday and end-of-day position management charges, among other charges, making it materially cost prohibitive to transact with FICC and thereby increasing the cost of trading to the end customer. Besides the direct impact of these costs, which could limit trading, costs of central clearing may incentivize non-direct participants of a Treasury CCP to look for ways to trade away from direct participants in order to not have to centrally clear Treasury transactions, negatively affecting both liquidity and competition.

Several commenters discussed facilitating cross-margining of indirect participants' transactions in U.S. Treasury securities with those in U.S. Treasury futures as a method to lower costs of trading and thereby incentivize additional clearing.[956] One commenter stated that cross-margining would lower costs for market participants by allowing them to apply margin across positions submitted for clearing through various clearinghouses. The commenter stated that this would ensure that a market participant can post margin adequate to support its positions without having to post margin in excess of regulatory requirements due to an inability to apply margin across platforms.[957] As discussed above, other commenters made additional suggestions lowering costs by creating additional cross margining opportunities.[958] The current cross-margining agreement between FICC and CME is part of the GSD rulebook, and any changes to it have to be filed with the Commission pursuant to Section 19(b) of the Exchange Act. The Commission agrees that cross-margining can be beneficial to market participants.[959] Rules requiring segregation of client margin should facilitate cross-margining. If such cross-margining were adopted, some costs of clearing would be mitigated.

One commenter stated that central clearing can have procyclical effects in times of market stress due to the margin requirements of clearing agencies, further reducing liquidity when it is most needed.[960] The commenter stated that, depending on the applicable margin models, clearing can be procyclical in times of market turmoil, as increased margin requirements (including intraday and ad hoc calls) drive demand for liquid assets, which,

[949] *Id.*

[950] *See supra* note 27.

[951] *See* part IV.C.1 *supra* for a discussion of the benefits of multilateral netting expected to result from higher volumes of centrally cleared transactions.

[952] *See* DTCC 2023 White Paper, *supra* note 107, at 3, 16. FICC estimates that, in aggregate, there will be an incremental $500 billion of indirect participant Treasury repo activity, $520 billion of indirect participant Treasury reverse repo activity and $605 billion of indirect participant Treasury cash activity that could be submitted to FICC under the Proposing Release if it were adopted. The increase in margin is based on this estimate of increased central clearing activity. The estimates assume that all incremental indirect participant volume clears through one of FICC's client clearing models that calculate margin on a gross basis. The estimates could decrease if the activity were cleared through one of FICC's client clearing models that calculate margin on a net basis. *See also* note 377, *supra,* regarding margin methodologies. BNY Mellon estimates as much as $370 billion in additional Treasury cash activity and $2.8 trillion in additional Treasury repo and reverse repo activity that could be submitted to FICC although they note that exemptions could reduce these amounts. *See* BNY Mellon, *Reassembly Required: Central Clearing could Reshape the U.S. Treasury Market* (November 2023), *available at https://www.bnymellon.com/us/en/insights/all-insights/central-clearing-us-treasury-market.html.*

[953] There is uncertainty among market participants about how much additional margin would have to be collected by FICC. For example, in an article in the Financial Times' Alphaville, an analyst at Barclays is quoted as estimating the additional margin could be $45 billion. Bryce Elder, *Repo reform is a $2tn mystery wrapped in an enigma of dodgy data,* FT Alphaville (Oct.13, 2023), *available at https://www.ft.com/content/518cbd3b-b1ed-4c3e-bd5e-9ac5bee99d9f.* The discussion concluding that the cost to netting members of the additional required fund deposits estimated by FICC applies to this alternative estimate as well.

[954] *See* DTCC, *F.A.Q. FICC—Risk Management, available at https://www.dtcc.com/USTclearing/-/media/Files/Downloads/Microsites/Treasury-Clearing/FICC-Risk-Management-FAQ.pdf* (last visited Dec. 11, 2023).

[955] IDTA Letter, *supra* note 66, at 4.

[956] MFA Letter at 11; SIFMA/IIB Letter, *supra* note 37, at 13; SIFMA AMG Letter at 8.

[957] MFA Letter at 11.

[958] *See* part II.A.1.0 *supra.*

[959] *Id.*

[960] SIFMA/IIB Letter, *supra* note 37, at 9.

in turn, increases the scarcity of those assets and further drives market stress. The commenter described FICC's rules as allowing FICC to demand, at any time in its discretion, additional margin from its members in times of market volatility, including through intraday calls, to safeguard the clearing infrastructure.[961]

The Commission acknowledges that, in times of market stress, margin calls may increase to address the ongoing market volatility. This is by design, as margin models are built to be responsive to current market conditions. The Commission has specifically required that CCAs have the authority and operational capacity to make intraday margin calls in defined circumstances.[962] This ability is important to the CCA's ability to manage the risk and cover the credit exposures that its participants may bring to the CCA. When considering a CCA's authority with respect to intraday margin, the Commission may consider its potential procyclicality.[963] In addition, the Commission may consider the transparency of the margin model, such that market participants can understand when the CCA may make margin calls.[964] In addition to the FICC rules cited by the commenter, FICC has provided additional transparency regarding how it determines the need for intraday margin calls, including the specific criteria that it uses to assess the need.[965] FICC is also subject to Rule 17ad–22(e)(23), which requires certain levels of public disclosure regarding FICC's margin methodology and the costs of participating in FICC, as discussed further in part II.B.2 *supra.* The Commission's ongoing consideration of the role and function of intraday margin calls, as well as market participants' ability to understand such calls, obviates the need for separate study in connection with this proposal.[966]

iii. Other Costs

Several commenters raised additional issues related to costs or limitations on benefits of the new rules and amendments. One commenter explained that registered funds' access to the Treasury repo market could be restricted by the number or willingness of the FICC netting members to provide sponsoring services, with attending negative effect on the market liquidity.[967]

Commenters have raised concerns that increases in demand for the Sponsored Service may put pressure on existing sponsoring members and reduce their ability or willingness to onboard additional clients. Such outcomes may result in these market participants not being able to trade with some of the largest banks and broker dealers who are direct members of FICC unless they are able to access clearing using an alternative clearing model, reducing the number of potential counterparties, possibly raising trading costs. Demand for sponsored access to clearing could also drive up the price of providing such services and provide an incentive for new competitors to enter the market for providing sponsored clearing services. Alternatively, it is possible that as part of review of its access models and related policies and procedures required by Rule 17ad–22(e)(18)(iv)(C), that FICC may modify its access models in a way that results in improved access for market participants who otherwise be so affected. Another commenter explained the impact of the ECP charge in conjunction with FICC's Sponsored Service, stating that ''the combination of gross margining and ECP currently in use under the Sponsored Model, and what is prescribed in the Proposed Rule, effectively prevents smaller and middle market broker dealers from materially participating in the Treasury market.[968]

However, another commenter explained that, in addition to the Sponsored Service, the U.S. Treasury securities CCA offers a variety of way to access central clearing for indirect participants.[969] For example, FICC's Prime Brokerage Clearing and Correspondent Clearing models currently support clearing of transactions between indirect participants although, at present, these models are rarely used.[970] As stated in the Proposing Release, the Commission continues to believe that the U.S. Treasury securities CCA generally should consider a wide variety of appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants. In view of the critical services it provides, the U.S. Treasury securities CCA generally should seek to provide access in as flexible a means as possible, consistent with its responsibility to provide sound risk management and comply with other provisions of the Exchange Act, the Covered Clearing Agency Standards, and other applicable regulatory requirements.

b. Costs to Non-Members of a U.S Treasury Securities CCA as a Result of the Requirement To Clear Eligible Secondary Market Transactions

The requirement to clear eligible secondary market transactions requires that all repo transactions with a direct participant be centrally cleared and that

[961] *Id.*

[962] 17 CFR 240.17ad–22(e)(6)(ii).

[963] *See, e.g.,* Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving a Proposed Rule Change to Modify the Calculation of the MBSD VaR Floor to Incorporate a Minimum Margin Amount, Exchange Act Release No. 92303, at 32 (June 30, 2021) (discussing commenter's concern regarding potential procyclical nature of a margin methodology change); Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of Proposed Rule Change Concerning The Options Clearing Corporation's Margin Methodology for Incorporating Variations in Implied Volatility, Exchange Act Release No. 95319, at 3 (July 19, 2022) (referencing the impact of a change to margin methodology on procyclicality of margin).

[964] *See, e.g.,* Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving a Proposed Rule Change to Enhance National Securities Clearing Corporation's Haircut-Based Volatility Charge Applicable to Illiquid Securities and UITs and Make Certain Other Changes to Procedure XV, Exchange Act Release No. 34–90502, at 56–59 (Nov. 24, 2020) (discussing commenter's concerns regarding transparency of change to margin methodology).

[965] *See* Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Changes to the Required Fund Deposit Calculation in the Government Securities Division Rulebook, Exchange Act Release No. 82588 (Jan. 26, 2018) (identifying the following specific parameter breaks: (i) a dollar threshold that evaluates whether a Netting Member's Intraday VaR Charge equals or exceeds a set dollar amount (then set at $1,000,000) when compared to the VaR Charge that was included in the most recently collected Required Fund Deposit including, any subsequently collected Intraday Supplemental Fund Deposit; (ii) a percentage threshold, that evaluates whether the Intraday VaR Charge equals or exceeds a percentage increase (then set at 100%) of the VaR Charge that was included in the most recently collected Required Fund Deposit including, if applicable, any subsequently collected Intraday Supplemental Fund Deposit; (iii) the coverage target, that evaluates whether a Netting Member is experiencing backtesting results below the 99% confidence level). FICC has updated this information via Important Notices to its participants. *See, e.g.,* Important Notice GOV1244–22, GSD Intraday Supplemental Fund Deposit Parameter Change (Apr. 11, 2022), *available at https://www.dtcc.com/-/media/Files/pdf/2022/4/11/GOV1244-22.pdf* (raising the coverage target).

[966] *See also* Proposed Rule, Covered Clearing Agency Resilience and Recovery and Wind-Down Plans, Exchange Act Release No. 97516 (May 17, 2023), 88 FR 34708 (May 30, 2023) (proposing additional requirements with respect to intraday margin that CCAs require intraday monitoring of their exposures and specifying particular circumstances in which the CCA should make intraday margin calls).

[967] ICI Letter, *supra* note 85, at 30–31.

[968] IDTA Letter, *supra* note 66, at 5. This commenter's stated concern regards the interplay between the ECP and gross margining and rests on the assumption that gross margining is required by the rule which is not the case. *See supra* part II.B.1. However, the ECP in its current form may impact the willingness of small and middle market broker dealers from sponsoring additional market participants.

[969] DTCC Letter, *supra* note 33, at 18–21.

[970] *Id.* at 20.

certain cash transactions with a direct participant to be centrally cleared. The costs incurred by non-members of a U.S. Treasury securities CCA to comply with this requirement will depend on the policies and procedures developed by the CCA, as discussed in parts IV.C.2.a *supra* and IV.C.2.d *infra.*

As stated above, the Commission believes that these amendments will increase central clearing in the U.S Treasury securities market. Transactions that are not currently submitted for central clearing but would be under the amendments being adopted will be subject to certain transaction, position, and other fees as determined by the U.S. Treasury securities CCA.[971]

Market participants who enter into eligible secondary market transactions with members of U.S. Treasury securities CCAs who do not have access to clearing may incur costs related to establishing the required relationships with a clearing member in order to submit the eligible transactions for clearing. These market participants may also incur additional costs related to the submission and management of margin. It is possible that such market participants may seek alternative counterparties that are not U.S. Treasury securities CCA members in order to avoid incurring these costs.

As discussed in the baseline, the majority of repo and cash transactions in the dealer-to-customer segment are not centrally cleared. This differentiates the U.S. Treasury securities market from the markets for swaps and for futures. There is currently some clearing of customer repo; the majority of this clearing is ''done-with''—the clearing broker and the counterparty are one and the same. However, in the swaps and futures markets, and in the equities market, clearing is ''done-away''—meaning that the clearing broker may be other than the trading counterparty. Market participants have identified costs with the done-with model. Market participants in the secondary market for U.S Treasury securities that will be required to be centrally cleared could incur direct costs for arranging clearing-related legal agreements with every potential counterparty. Depending on the customer there may be a large number of such arrangements.

There are indirect costs arising when a trading counterparty is a competitor. For example, the pricing and offering of clearing services may be determined by forces other than the costs and benefits of the clearing relationship itself, such as the degree of competition between the counterparties. Other economic arrangements facilitating customer clearing are possible and may develop, as in other markets.[972] One such arrangement is direct CCA membership. However, for smaller entities, CCA membership may not be economically viable, and for some entities, legal requirements may prevent direct membership. Another possibility is seeking out counterparties other than CCA members. The ''done away'' structure of clearing has worked effectively in other markets, and, if it were to develop so that all market participants with demand could trade using the ''done-away'' structure, would significantly mitigate these costs.

Some participants may not currently post margin for cash clearing and may be now required to do so, depending on the form the clearing relationship takes. There may be costs associated with the transfer of margin. An institutional investor self-managing its account would instruct its custodian to post margin with the CCA on the execution date, and post a transaction in its internal accounting system showing the movement of margin. The day after trade execution, the investor would oversee the return of margin from FICC, with an attendant mark of a transaction on the investor's internal accounting system. Similar steps would occur for an institutional investor trading through an investment adviser, though in this case the adviser might instruct the custodian and mark the transaction, depending on whether the adviser has custody. The institutional investor might also pay a wire fee associated with the transfer of margin.

Besides the costs of developing new contracts with counterparties to support central clearing, there will also be a cost to non-CCA members associated with margin, to the extent that more margin is required than in a bilateral agreement. This cost of margining is analogous to that borne by CCA members and is discussed further above.

As a result of the rule, a potential cost to money market fund participants that face FICC as a counterparty is that the funds' credit ratings could be affected if FICC becomes a substantially large counterparty of these participants, which could be interpreted by credit models and ratings methodologies as a heightened concentration risk factor. As concentration risk in a CCP is typically not viewed in the same way as concentration risk with a bilateral trading party, credit rating agencies may quickly adapt their methods to distinguish the CCA from a conventional counterparty. In the absence of such changes at credit rating agencies, money market fund participants may find it necessary to either alter their investment strategies to substitute purchases of Treasury securities for repo or to enter into repo transactions with entities that are not direct members of a Treasury securities CCA.

As discussed above, increased demand for the Sponsored Service and the existence of compliance and capital costs for sponsoring members may limit the ability of some market participants to access clearing through the Sponsored Service. Unless these market participants are able to access clearing through alternative clearing models, they may be unable to trade repo with some of the largest banks and broker dealers who are direct members of FICC, reducing the number of potential counterparties, and possibly resulting in inferior pricing for such market participants. Alternatively, it is possible that as part of review of its access models and related policies and procedures required by Rule 17ad–22(e)(18)(iv)(C), that FICC may modify its access models in a way that results in improved access for market participants who otherwise be so affected.

One commenter argued that including triparty repos in the definition of an eligible secondary market transaction would likely impair the cash and collateral management processes of hedge funds and alternative asset managers.[973] Specifically, the commenter suggested that such firms currently conduct same-day bilateral transactions that they would not be able to conduct with a direct participant of a U.S. Treasury securities CCA required to centrally clear its repo transactions.[974]

The Commission disagrees with this commenter. In its supervisory capacity, the Commission is aware that registered funds, hedge funds, and alternative asset managers currently conduct centrally cleared triparty repo transactions. For example, the Commission is aware that numerous hedge funds conduct such same-day transactions as sponsored members of FICC. Therefore, the existing operational infrastructure supports centrally cleared triparty repo transactions.

As discussed above, two commenters asked the Commission to adopt an exemption that would allow FCMs to continue to engage in eligible secondary

[971] The fee structure for FICC is described in its rulebook. *See* FICC Rules, *supra* note 19, at 307.

[972] *See* FIA–PTG Whitepaper, *supra* note 918 (for a description of different client clearing models).

[973] *See* MFA Letter at 17.

[974] *See id.*

market transactions in U.S. Treasury securities outside of central clearing.[975] For the reasons discussed above in part II.A.2.a.iv *supra,* the Commission is not excluding repo transactions between FICC netting members and FCMs from the definition of eligible secondary market transactions. However, the Commission recognizes that the tension between the rules governing FCMs and the rule amendments being adopted may raise costs for FCMs if it restricts the choice of models that can be used to access central clearing or reduces the number of potential counterparties. For example, one of the commenters explained that FCMs are permitted to invest customer funds in certain securities determined by the CFTC to be ''consistent with the objectives of preserving capital and maintaining liquidity.'' [976] The commenter stated that permitted investments include, among other things, U.S. Treasury securities, and investments with U.S. Treasury securities may be made by either direct purchase or sale or by entering into repo transactions.[977] The commenter further explained that, for repo transactions, an FCM's ''permitted counterparties are limited to a bank . . . , securities broker-dealer, or government securities dealer registered with the [Commission],'' and a clearing agency is not a permitted counterparty.[978] If an FCM is unable to clear repo transactions then it would not be able to trade with FICC netting members, reducing the number of potential counterparties available to it.

c. Other Changes to Covered Clearing Agency Standards

i. Netting and Margin Practices for House and Customer Accounts

The amendments to Rule 17ad–22(e)(6)(i) require a U.S. Treasury securities CCA to establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, calculate, collect, and hold margin amounts from a direct participant for its proprietary U.S. Treasury securities positions, separately and independently from margin calculated and collected from that direct participant in connection with U.S. Treasury securities transactions by an indirect participant that relies on the services provided by the direct participant to access the covered clearing agency's payment, clearing, or settlement facilities.[979] The amendments to Rule 17ad–22(e)(6)(i) contain similar provisions to existing FICC rules, specifically with respect to its Sponsored Member program, but also impose additional requirements that do not appear in existing Rule 17ad–22. As a result, the Commission believes that a U.S. Treasury securities CCA will incur burdens of reviewing and updating existing policies and procedures in order to comply with the amendments to Rule 17ad–22(e)(6) and, in some cases, may need to create new policies and procedures.[980]

The Commission estimates that U.S. Treasury securities CCAs will incur an aggregate one-time cost of approximately $106,850 to create new policies and procedures.[981] The amendments to the rule also require ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the rule. The Commission estimates that the ongoing activities required by the amendments to Rule 17ad–22(e)(6) will impose an aggregate ongoing cost on covered clearing agencies of approximately $60,580 per year.[982]

ii. Facilitating Access to U.S. Treasury Securities CCAs

Rule 17ad–22(e)(18)(iv)(C) requires a U.S. Treasury securities CCA to establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, ensure that it has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants, which policies and procedures the U.S. Treasury securities CCA's board of directors reviews annually.

The rule requires a U.S. Treasury securities CCA to establish, implement, maintain and enforce written policies and procedures. The Commission believes that a respondent U.S. Treasury securities CCA will incur burdens of reviewing and updating existing policies and procedures and will need to create new policies and procedures in order to comply with the provisions of Rule 17ad–22(e)(18)(iv)(C). These costs are included in the costs of creating new policies and procedures associated with Rule 17ad–22(e) discussed above.

Commenters generally supported the Commission's attention to the need for appropriate access to the U.S. Treasury securities CCA, and several commenters specifically agreed that the Commission should not prescribe any particular model. One commenter stated that the commenter ''fully agree[s] with the Commission that flexibility and an open-access approach are critical to facilitating access to clearing. [ ], dictating a single model of clearing would close off clearing to many market participants, force indirect participants to bear additional clearing costs, increase concentration, reduce competition, and negatively impact market liquidity.'' [983] In addition, another commenter supported the proposal to rely on the clearing agencies to develop the model and infrastructure and that clearing agencies should have flexibility to innovate in this area. This commenter also noted many market stakeholders may prefer an agency model or some form of limited membership with a clearing agency.[984]

Another commenter stated that the Commission should encourage FICC to improve the existing Sponsored Service in several ways: (1) to further develop a ''give up'' structure to facilitate best execution (and accommodate ''done-away'' trades), noting that FICC's prime broker/correspondent clearing infrastructure could be leveraged to develop a give up model outside of prime brokerage (which would need to provide for standardized documentation that facilitates additions and deletions of approved brokers, agreed-upon terms for rejection of trades by a sponsoring member and centralized storage of delegations); and (2) to add a feature permitting (but not requiring) sponsored members to directly support their obligations to FICC through margin posting rather than by paying fees to the sponsoring member reflecting the cost of

[975] *See supra* note 901 and referencing text.

[976] FIA Letter, *supra* note 200, at 4–5 (discussing 17 CFR 1.25(b)).

[977] FIA Letter, *supra* note 200, at 4–5 (discussing 17 CFR 1.25(a)).

[978] FIA Letter, *supra* note 200, at 5 (discussing 17 CFR 1.25(d)(2)).

[979] *See* part II.B.1 *supra.*

[980] For general information and statistics regarding the Sponsored Service, *see* DTCC, *Sponsored Service, supra* note 669. The Sponsored Service also allows the submission of cash transactions; however, at this time, the service is generally used only for U.S. Treasury repo transactions.

[981] This figure was calculated as follows: Assistant General Counsel for 20 hours (at $518 per hour) + Compliance Attorney for 40 hours (at $406 per hour) + Computer Operations Manager for 12 hours (at $490 per hour) + Senior Programmer for 20 hours (at $368 per hour) + Senior Risk Management Specialist for 25 hours (at $397 per hour) + Senior Business Analyst for 12 hours (at $305 per hour) = $53,425 × 2 respondent clearing agencies = $106,850. *See* part V.B *infra.*

[982] This figure was calculated as follows: Compliance Attorney for 25 hours (at $406 per hour) + Business Risk Analyst for 40 hours (at $305 per hour) + Senior Risk Management Specialist for 20 hours (at $397 per hour) = $30,290 × 2 respondent clearing agencies = $60,580. *See* part V.B *infra.*

[983] FICC/DTCC Letter, *supra* note 33, at 18.

[984] ICE Letter, *supra* note 85, at 3.

its clearing fund contributions.[985] As stated in the Proposing Release, the Commission believes that U.S. Treasury securities CCAs should continue to develop access models that would best serve the needs of market participants, and the Commission encourages such CCAs to take all appropriate steps to accommodate ''done-away'' trades. The Commission would consider any proposals in this regard consistent with its obligations under Section 19 of the Exchange Act.

d. Amendments to Rules 15c3–3 and 15c3–3a

The amendment to Rule 15c3–3a permits, under certain conditions, margin required and on deposit at a U.S. Treasury securities CCA to be included as a debit item in the customer reserve formula. This new debit item offset credit items in the Rule 15c3–3a formula and, thereby, free up resources that could be used to meet the margin requirements of a U.S. Treasury securities CCA. The amendment allows a customer's broker to use customer funds to meet margin requirements at the CCP generated by the customer's trades, lowering the cost of providing clearing services. Broker-dealers may incur costs from updating procedures and systems to be able to use customer funds to meet customer margin requirements. However, the amended rule does not require that the broker-dealer does so.

Overall, commenters supported the proposal to permit this debit item.[986] Commenters stated that the proposed amendments would make clearing more efficient and free up resources that could be used to meet the CCA's margin requirements, while continuing to protect customer funds.[987] Commenters also stated that the proposal would incentivize central clearing.[988] A commenter stated that the proposal would extend to margin held at a U.S. Treasury securities CCA the same treatment as margin posted to other clearing organizations.[989] As a result, this commenter stated that the proposal would facilitate greater access to clearing and eliminate an undue burden on competition. Another commenter—in supporting the proposal—stated that it does not make sense that margin cannot be freely rehypothecated from a customer through a broker-dealer to a U.S. Treasury securities CCA without the broker-dealer receiving a beneficial adjustment as part of its customer reserve formula calculation.[990] For greater and more efficient client clearing, another commenter encouraged the Commission to adopt this proposal irrespective of whether the requirement to clear eligible secondary market transactions is adopted.[991]

One commenter sought clarification that the conditions of Rule 15c3–3 would not preclude a U.S. Treasury securities CCA from entering into a repurchase transaction involving customer cash margin, so long as the purchased securities under such repurchase transaction consist of U.S. Treasury securities held in a segregated account for the benefit of customers and satisfy certain other requirements.[992] The commenter provided a summary of potential protections that could be put in place to ensure that—if a U.S. Treasury securities CCA uses cash in the broker-dealer's segregated account for liquidity purposes—the cash would be protected through collateral comprising U.S. Treasury securities deposited into the account and other measures.[993] As discussed in part II.C.4.iii, *supra* the Commission would need to review a more detailed plan for how the cash will be used and customers protected before taking any action on the commenter's request. The Commission acknowledges that the degree to which costs that are incurred in order to maintain sufficient qualifying liquid resources are directly born by various participants depends in part on the use of customer margin as a qualifying liquid resource.[994]

e. Other Costs

One commenter stated that the Commission should consider that ''the sheer number and complexity of the Proposals, when considered in their totality, if adopted, would impose staggering aggregate costs, as well as unprecedented operational and other practical challenges.'' [995] But, consistent with its long-standing practice, the Commission's economic analysis in each adopting release considers the incremental benefits and costs for the specific rule—that is the benefits and costs stemming from that rule compared to the baseline. In doing so, the Commission acknowledges that in some cases resource limitations can lead to higher compliance costs when the compliance period of the rule being considered overlaps with the compliance period of other rules. In determining compliance periods, the Commission considers the benefits of the rules as well as the costs of delayed compliance periods and potential overlapping compliance periods.

In this regard, some commenters mentioned the proposals which culminated in the recent adoptions of the May 2023 SEC Form PF Amending Release, the Beneficial Ownership Amending Release, the Private Fund Advisers Adopting Release, the Rule 10c–1a Adopting Release, the Short Position Reporting Adopting Release, and the Securitizations Conflicts Adopting Release.[996] The Commission acknowledges that there are compliance periods for certain requirements of these rules that overlap in time with the final rule, which may impose costs on resource constrained entities affected by multiple rules.[997]

However, the Commission does not think these increased costs from overlapping compliance periods will be significant for several reasons. First, the number of market participants who directly or indirectly engage in eligible secondary market transactions in Treasury securities that will be subject to the final rule and who will be subject to one or more of the other recently adopted rules could be limited based on whether those participants' activities fall within the scope of the other rules.[998] Second, for the reasons

[985] ICI Letter, *supra* note 85.

[986] *See* AIMA Letter, *supra* note 81; CME Letter, *supra* note 81; DTCC/FICC Letter, *supra* note 33; ICE Letter, *supra* note 33; MFA Letter, *supra* note 81; ISDA Letter, *supra* note 391; SIFMA AMG Letter, *supra* note 35.

[987] *See* AIMA Letter, *supra* note 81; MFA Letter, *supra* note 81; SIFMA/IIB Letter *supra* note 37.

[988] *See* CME Letter, *supra* note 81; SIFMA AMG Letter, *supra* note 35.

[989] *See* DTCC/FICC Letter, *supra* note 33.

[990] *See* SIFMA AMG Letter, *supra* note 35.

[991] *See* ISDA Letter, *supra* note 391.

[992] DTCC/FICC Letter II, *supra* note 503. *See also* part II.C.4.iii, *supra* for additional discussion of the issue raised by this comment letter.

[993] *Id.*

[994] One such source is FICC's CCLF. *See* part IV.B.4, *supra* and part IV.C.2.a.i, *supra*. *See also supra* note 688, and referencing text regarding the Commission's requiring FICC to hold qualifying liquid resources sufficient to meet a cover-1 standard.

[995] MFA Letter 2, *supra* note 600, at 3; *see* ICI Letter 2, *supra* note 600, at 3 (stating that the Commission should consider ''practical realities such as the implementation timelines as well as operational and compliance requirements'').

[996] *See supra* note 600. As stated above, commenters also specifically suggested the Commission consider potential overlapping compliance costs between the final rule and certain proposing releases. *See supra* note 608. These proposals have not been adopted and thus have not been considered as part of the baseline here. To the extent those proposals are adopted in the future, the baseline in those subsequent rulemakings will reflect the regulatory landscape that is current at that time.

[997] *See supra* notes 602 to 607 (summarizing compliance dates).

[998] The Rule 10c–1a Adopting Release will require only persons who agree to a covered securities loan to report that activity. The Short Position Reporting Adopting Release will require only institutional investment managers that meet or exceed certain reporting thresholds to report short position and short activity data for equity securities.

Continued

discussed above, we have adopted a phased approach to implementation and compliance based on input from commenters.[999] Further, all of the other rules have long compliance periods, which is expected to facilitate planning, preparation and investment and thereby limit the cost of overlapping compliance periods.[1000] Third, commenters' concerns about the costs of overlapping compliance periods were raised in response to the proposal and as discussed above, we have taken steps to reduce costs of the final rule.[1001]

3. Effect on Efficiency, Competition, and Capital Formation

a. Efficiency

i. Price Transparency

As mentioned in part IV.B *supra,* the majority of trading in on-the-run U.S. Treasury securities in the interdealer market occurs on electronic platforms operated by IDBs that bring together buyers and sellers anonymously using order books or other trading facilities supported by advanced electronic trading technology. These platforms are usually run independently in the sense that there is no centralized market for price discovery or even a ''single virtual market with multiple points of entry''.[1002] As a result, pre-trade transparency is suboptimal: quotations and prices coming from and going to an IDB may be distributed unevenly to market participants who have a relationship with that IDB. Efficiency, which measures the degree to which prices can quickly respond to relevant information, is impaired because of this market fragmentation; some areas of the market may not reflect information passed on by prices in other sectors. Central clearing can promote price discovery in several ways: first, the clearing agency itself becomes a source of data; [1003] and second, the accessibility of central clearing could promote all-to-all trading as previously mentioned in part II.A.1 *supra,* which should reduce the obstacles to information flow that come from fragmentation.[1004]

ii. Operational and Balance Sheet Efficiency

Greater use of central clearing could also increase the operational efficiency of trading U.S. Treasury securities. Central clearing replaces a complex web of bilateral clearing relationships with a single relationship to the CCP. In that sense, the complex network of relationships that a market participant may have for bilaterally clearing U.S. Treasury securities would shrink, with attendant reductions in paperwork, administrative costs, and operational risk.

Central clearing also enhances balance sheet efficiency, allowing firms to put capital to more productive uses. The amendments to Rule 15c3–3a permit, under certain conditions, margin required and on deposit at a U.S. Treasury securities CCA to be included as a debit item in the customer reserve formula. This new debit item offset credit items in the Rule 15c3–3a formula and, thereby, free up resources that could be used to meet the margin requirements of a U.S. Treasury securities CCA. The amendment allows a customer's broker to use customer funds to meet margin requirements at the CCP generated by the customer's trades, lowering the cost of providing clearing services. Though these lower costs may or may not be fully passed on to customers, in a competitive environment the Commission expects that at least some of these savings will pass through to customers.

b. Competition

With respect to the market for execution of U.S. Treasury securities by broker-dealers, increased central clearing can enhance the ability of smaller participants to compete with incumbent dealers.[1005] Similarly, decreased counterparty credit risk—and potentially lower costs for intermediation—could result in narrower spreads, thereby enhancing market quality.[1006] While estimating this quantitatively is difficult, research has demonstrated lower costs associated with central clearing in other settings.[1007] Moreover, increased accessibility of central clearing in U.S. Treasury securities markets could support all-to-all trading, which should further improve competitive pricing, market structure and resiliency.[1008]

Commenters suggest that costs of clearing may be disproportionately felt by small and mid-size participants in the Treasury market.[1009] An additional commenter stated that the proposed separation of house and customer margin would negatively impact small and mid-size broker-dealers who are disproportionately affected by FICC's Excess Capital Premium (''ECP'') charge, which is a margin add-on that collects a premium when a member's VaR charge exceeds the member's Net Capital, net assets or equity capital (as applicable to that member based on its type of regulation).[1010] The commenter explained the impact of the ECP charge in conjunction with FICC's Sponsored Service, stating that ''the combination of gross margining and ECP currently in use under the Sponsored Model, and what is prescribed in the Proposed Rule, effectively prevents smaller and middle market broker dealers from materially participating in the Treasury market.[1011] The commenter states that the ultimate effect of the ECP charge is exacerbated when customer/institutional counterparty margin is included in the calculation, and the surcharge prevents smaller independent broker-dealers from sponsoring institutional counterparties/customers.[1012] The commenter's concerns regarding the interplay between purported required gross margining and the ECP charge rests on the assumption that gross margin is required under the proposal, which, as discussed in part II.B.1 *supra,* is not the case.[1013] With respect to the

And the Securitizations Conflicts Adopting Release will affect only certain entities—and their affiliates and subsidiaries—that participate in securitization transactions. *See supra* notes 605 to 607. In addition, FICC will not be affected by any of the six rules identified by commenters.

[999] *See* part III *supra.*

[1000] *See supra* notes 602 to 607.

[1001] The final rule mitigates costs relative to the proposal in the following ways. First, the scope of the definition of eligible secondary market transaction in Rule 17ad–22(a) has been revised to exclude repos by other clearing organizations, repos by state and local governments, and inter-affiliate repos. Second, the scope of the definition of eligible secondary market transaction has been modified to no longer include cash transactions by hedge funds and leveraged accounts. Third, the Commission is modifying paragraph (a) of Note H to Rule 15c3–3a to permit ''qualified customer securities'' to be used to meet the customer position margin requirement in addition to cash and U.S. Treasury securities. Finally, to reduce operational burdens on broker-dealers, the Commission is removing the proposed requirement to return excess collateral within one business day that was part of fifth rule set—identified in paragraph (b)(2)(v) of proposed Note H.

[1002] Maureen O'Hara and Mao Ye, *Is Market Fragmentation Harming Market Quality?,* 100 J. Fin. Econ. 459 (2011).

[1003] FIA–PTG Whitepaper, *supra* note 918.

[1004] *See supra* note 31.

[1005] *See* G–30 Report, *supra* note 5, at 13.

[1006] *Id.*

[1007] *See* Y.C. Loon & Z.K. Zhong, *The Impact of Central Clearing on Counterparty Risk, Liquidity, and Trading: Evidence From the Credit Default Swap Market,* 112 J. Fin. Econ. 91 (2014).

[1008] *See* 2021 IAWG Report, *supra* note 4, at 30; Duffie, *supra* note 27, at 16; G–30 Report, *supra* note 5, at 13.

[1009] Letter from Evan Gerhard, President and CEO of ASL Capital Markets (Dec. 23, 2022) and letter from SIA Partners (Aug. 31, 2023) at 22 (''SIA Partners 2'').

[1010] IDTA Letter, *supra* note 66, at 4; *see also* FICC Rule 4, section 14, *supra* note 19.

[1011] IDTA Letter, *supra* note 66, at 5.

[1012] IDTA Letter, *supra* note 66, at 5.

[1013] The rule does require that a proprietary position not be netted against a customer position. This could enhance competition because dealers with customers are no longer advantaged relative to those without. It enhances the unbundling of

ECP charge on its own, the Commission is not taking any action with respect to the ECP charge as part of adopting these new requirements. The ECP charge is part of FICC's existing rulebook, which is an SRO rule, and any change to that rulebook would be made pursuant to the proposed rule change process under Section 19(b).[1014]

While the rule does not require gross margining of customers, the rule does require members to clear additional transactions relative to the baseline. Because the dominant clearing model is the sponsored model, and because the sponsored model does use gross margining, which implicates the ECP, the Commission acknowledges the commenter's concerns regarding possible competitive effects on the Treasury market. Specifically, the existence of the ECP links the costs of sponsorship with the capital of the entity, and hence sponsorship is more economical for some than for others. Because current market practice is to bundle execution with clearing, some entities may face additional hurdles in trade execution in that it may be uneconomical for them to serve as sponsoring members for a large dollar value of trades.

There are two factors that mitigate any potential impact of the ECP on competitiveness. First, there are alternatives to the sponsored clearing model that do not require gross margining. The commenter cites one such model, and notes ambiguity as to whether this model can indeed be used by independent dealers.[1015] The Commission acknowledges the commenter's concern but notes that FICC recently has indicated that it intends to make available client clearing models that do not require gross margin, consistent with its current offerings.[1016] Second, the amendments to Rule 15c3–3a, which permit margin required and on deposit at a U.S. Treasury securities CCA to be included as a debit item in the customer reserve formula makes it economical for dealers to post margin on behalf of their customers. This may encourage the development of clearing models that are based on counterparty risk, rather than the capital of the trading entity. In a second letter, the same commenter advocates for a common margining regime for FICC, where members participating in the MBSD, GSD, or the CME are accounted for properly in terms of offsetting positions[1017] and while that subject is not within the scope of this release, permitting rehypothecation of margin may have directionally similar effects.

With respect to the market for U.S. Treasury securities clearing services, currently there is a single provider of central clearing. The amendments will likely engender indirect costs associated with increased levels of central clearing in the secondary market for U.S. Treasury securities. Generally, the economic characteristics of a financial market infrastructure (''FMI''), including clearing agencies, include specialization, economies of scale, barriers to entry, and a limited number of competitors.[1018] [1019] The Commission noted in its proposal of rules applicable to covered clearing agencies that such characteristics, coupled with the particulars of an FMI's legal mandate, could result in market power, leading to lower levels of service, higher prices, and under-investment in risk management systems.[1020] Market power may also affect the allocation of benefits and costs flowing from these new rules and amendments that are being adopted, namely the extent to which these benefits and costs are passed through by FICC to participants.[1021] The centralization of clearing activities for a particular class of transaction in a single clearing agency may also result in a reduction in its incentives to innovate and to invest in the development of appropriate risk management practices on an ongoing basis.

Finally, the scope of the rule does not preclude members of FICC from strategically renouncing membership if they assess that the benefits of maintaining their ability to trade without centrally clearing their trades exceed their costs of surrendering their membership with the CCA. If this scenario materializes for a number of FICC members, then there will be costs to the overall market. Those costs could be the product of a smaller number of clearing members competing in the market for clearing services. Costs could also manifest themselves as increased risk from non-centrally cleared transactions and a reduction in the margin, operational and capital efficiencies related to central clearing. Further, if the number of clearing members falls, then the exposure of FICC to its largest clearing member could increase resulting in additional increases in the required size of the CCLF.

In addition, as stated above, some commenters requested the Commission consider interactions between the economic effects of the proposed rule and other recent Commission rules, as well as practical realities such as implementation timelines.[1022] As discussed above, the Commission acknowledges that overlapping compliance periods may in some cases increase costs. This may be particularly true for smaller entities with more limited compliance resources. This effect can negatively impact competition because these entities may be less able to absorb or pass on these additional costs, making it more difficult for them to remain in business or compete. However, we have mitigated the overall costs of the final rules relative to the proposal.[1023] Moreover, all of the other rules have long compliance periods to facilitate planning, preparation and investment, thereby mitigating the cost to smaller entities of overlapping compliance periods.[1024] We therefore do not expect the risk of negative competitive effects from increased compliance costs from simultaneous compliance periods to be significant.

c. Capital Formation

The new rule and amendments may encourage private-sector capital formation. U.S. Treasury securities form a benchmark for fixed income and even equity rates of return, and the new rule could lower the cost of capital for

clearing and trading services described in part IV.C.1 *supra.*

[1014] Exchange Act Section 19(b); *see also* Section 19(c).

[1015] *See* IDTA Letter, *supra* note 66, at 7.

[1016] *See* DTCC 2023 White Paper, *supra* note 107, at 6 (discussing that the proposal would allow the option to calculate and collect margin associated with customer activity on a gross or net basis depending on the client clearing model selected by the member and stating that FICC would offer options via different access models that would allow those parties to balance the benefits of netting and segregation in different ways).

[1017] IDTA Letter 2, *supra* note 829, at 2.

[1018] *See* Comm. on Payment and Settlement Sys. and Tech. Comm. Int'l Org. Sec. Comms, *Principles for Financial Market Infrastructures* (Apr. 16, 2012), *available at https://www.bis.org/cpmi/publ/d101a.pdf.*

[1019] *See generally* Nadia Linciano et al., *The Clearing and Settlement Industry: Structure Competition and Regulatory Issues* (Italian Secs. & Exch. Comm'n Research Paper 58, May 2005), *available at https://www.ssrn.com/abstract=777508* (concluding in part that the core services offered by the clearance and settlement industry tend toward natural monopolies because the industry can be characterized as a network industry, where consumers buy systems rather than single goods, consumption externalities exist, costs lock-in consumers once they choose a system, and production improves with economies of scale).

[1020] *See* CCA Standards Proposing Release, *supra* note 8. *See also* ICE Letter, *supra* note 31, at 2.

[1021] For a discussion of cost pass-through, including when there lacks competition, see for example, RBB Econ., Cost pass-through: theory, measurement and policy implications, A Report prepared for the Office of Fair Trading (2014), *available at https://www.gov.uk/government/publications/cost-pass-through-theory-measurement-and-policy-implications.*

[1022] *See* parts IV.B, *supra.*

[1023] *See supra* note 1003.

[1024] *See supra* notes 604 to 607.

private-sector issuers.[1025] If the yield required by investors to hold U.S. Treasury securities reflects, in part, the risks associated with the buying and selling of U.S. Treasury securities, and increased central clearing of these transactions lowers those risks, then the new rule may put downward pressure on required yields.

Research has shown that investors value both the safety and liquidity of U.S. Treasury securities. Because prices in the primary market both reflect and are driven by prices in the secondary market, liquidity could be one of the factors translating into lower rates of borrowing costs for U.S. taxpayers.[1026]

D. Reasonable Alternatives

1. Require U.S. Treasury Securities CCAs To Have Policies and Procedures Requiring Only IDB Clearing Members To Submit U.S. Treasury Securities Cash Trades With Non-Members for Central Clearing

In the Proposing Release, the Commission considered the alternative of narrowing the scope of the requirement to clear eligible secondary market transactions as it pertains to cash transactions in the secondary market for U.S. Treasury securities. The narrower definition of eligible secondary market transaction contemplated in this alternative included (1) a repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities, in which one of the counterparties is a direct participant; or (2) a purchase or sale between a direct participant and any counterparty, if the direct participant of the covered clearing agency (A) brings together multiple buyers and sellers using a trading facility (such as a limit order book) and (B) is a counterparty to both the buyer and seller in two separate transactions.[1027] This alternative differs from the proposal by omitting from the definition of eligible transactions those cash transactions between a direct participant and a registered broker-dealer, government securities broker, government securities dealer, hedge fund, or account at a registered broker-dealer, government securities dealer, or government securities broker where such account may borrow an amount in excess of one-half of its net assets or may have gross notional exposure in excess of twice its net assets.[1028]

Several commenters supported the Commission's proposal overall, including the cash clearing requirement.[1029] By contrast, other commenters opposed cash clearing generally.[1030] Other commenters suggested that the scope of eligible secondary market transactions in the cash market be broadened.[1031]

As discussed in the proposing release, the benefits arising from cash clearing for IDB members are particularly high. Hybrid clearing creates unique issues for FICC because FICC is able to manage the risks arising from the IDB–FICC member trade, but it lacks any knowledge of the IDB's offsetting trade with its other counterparty and the potential exposure arising to the IDB from that trade, leaving the IDB, from FICC's perspective, as apparently having a directional exposure despite the non-centrally cleared trade that would leave the IDB flat.[1032] This lack of knowledge could prevent FICC from ''accurately identifying, measuring and managing its direct and indirect counterparty risk exposure and can affect its decision-making,'' [1033] which in turn potentially increases the likelihood that a default of an IDB member could in turn harm the CCP or the system as a whole. As stated in the Proposing Release, the Commission has previously stated that membership requirements help to guard against defaults of any CCP member, as well to protect the CCP and the financial system as a whole from the risk that one member's default could cause others to default, potentially including the CCP itself. Further, contagion stemming from a CCP member default could be problematic for the system as a whole, even if the health of the CCP is not implicated. The default could cause others to back away from participating in the market, particularly if the defaulting participant was an IDB, whose withdrawal from the market could jeopardize other market participants' ability to access the market for U.S. Treasury securities.[1034]

This alternative would, with a more limited scope, move a large portion of secondary market transactions in U.S. Treasury securities that are not currently centrally cleared into central clearing.[1035] The degree of central clearing would still allow for a partial picture of concentrated positions to the clearing agency. That said, there would be a limited benefit in terms of operational and balance sheet efficiency, and the benefits other than those specifically related to the IDB would be greatly reduced. Specifically, the reduced scope of this alternative would not capture types of participants that are usually leveraged such as hedge funds.

As discussed in part II.A.2.b *supra,* the Commission is not including transactions with hedge funds and leveraged accounts in the definition of eligible transactions. The definition of eligible secondary market transaction in Rule 17ad–22(a) is being adopted as proposed with respect to IDB transactions and transactions that involve a purchase or sale between a direct participant and a registered broker-dealer, government securities broker, or government securities dealer. Including these transactions within the scope of eligible transactions increases the benefits discussed above associated with an increased proportion of transactions being centrally cleared.[1036] However, as discussed above, the costs associated with including these transactions within the scope of eligible transactions may be less than those transactions not included by this alternative.[1037]

[1025] Standard textbook treatments of finance use the U.S. Treasury rate of return as a benchmark in computing the cost of capital for private companies. The link between interest rates of government debt and corporate debt is a long-standing feature of the financial landscape. *See, e.g.,* Benjamin Friedman, *Implications of Government Deficits for Interest Rates, Equity Returns, and Corporate Financing,* Fin. Corp. Cap. Form. (1986). *See also* Philippon, *The Bond Market's Q,* Q. J. Econ. (Aug. 2009) (noting a link between the level of interest rates and investment).

[1026] *See* Arvind Krishnamurthy & Annette Vissing-Jorgensen, *The Aggregate Demand for Treasury Debt,* 120 J. Pol. Econ. (Apr. 2012).

[1027] *See* Proposing Release. Such direct participants are referred to in this section and the alternatives below as ''IDBs''.

[1028] *See* Proposing Release, *supra* note 14, 88 FR at 64663; *see also id.* at 64622 for a discussion of cash transactions included in the definition of eligible transactions.

[1029] AFREF Letter, *supra* note 33, at 2; Better Markets Letter, *supra* note 33, at 2, 6–8.

[1030] *See* part II.A.2.b *supra* for a discussion of comments received regarding cash clearing.

[1031] *Id.*

[1032] *See* TMPG White Paper, *supra* note 13 at 22 (noting that in a hybrid clearing arrangement, an ''IDB's rights and obligations vis-a-vis the CCP are not offset and therefore the IDB is not in a net zero settlement position with respect to the CCP at settlement date.'').

[1033] *See* TMPG White Paper, *supra* note 13, at 27.

[1034] *See* TMPG White Paper, *supra* note 13, at 32.

[1035] *Id.*

[1036] *See* Proposing Release, *supra* note 14, and part IV.A, *supra* of this release for a discussion of the benefits associated with increased central clearing.

[1037] *See* Proposing Release, *supra* note 14, at 64665 for a discussion of the familiarity of many registered brokers with methods of central clearing of U.S. Treasury securities transactions. *See also* Id at 64669 for a discussion of the costs to non-FICC members, including the entities included within this alternative, of the requirement to clear eligible secondary market transactions.

2. Require U.S. Treasury Securities CCAs To Have Policies and Procedures Requiring the Submission of All Repurchase Agreements Without Requirements for the Submission of Cash Transactions

In the Proposing Release, the Commission considered excluding the cash U.S. Treasury securities market from the proposed rule, and instead only requiring that covered clearing agencies have policies and procedures reasonably designed to require that direct participants of the covered clearing agency submit for central clearing all transactions in U.S. Treasury repo transactions into which it enters.[1038]

Several commenters supported the Commission's proposal overall, including the cash clearing requirement.[1039] By contrast, other commenters opposed cash clearing generally.[1040]

The Commission understands that there is a likely benefit of additional balance sheet capacity that flows from clearing repo transactions in U.S. Treasury securities that might not occur with the clearing of cash transactions. Multilateral netting can reduce the amount of balance sheet capacity required for intermediation of repo and could enhance dealer capacity to make markets during normal times and stress events, because existing bank capital and leverage requirements recognize the risk-reducing effects of multilateral netting of trades that CCP clearing accomplishes.[1041]

The upfront costs of adjusting to the rule would be lower under this alternative than under the current proposal, as a result of a smaller number of participants and activities in scope and also the current level of interconnectedness among those participants. As previously mentioned, the number of participants in the U.S. Treasury repo market is significantly smaller than the number of participants in the cash market and is composed of sophisticated investors who have already incurred the costs of building the ability to novate transactions to the CCP. Infrastructure for Sponsored Clearing already exists, so processing changes should be less than in other more comprehensive alternatives and costs would be concentrated on the implementation of similar agreements at a larger scale.

Nevertheless, excluding the cash U.S. Treasury securities market from the rule would omit the largest sector of the U.S. Treasury market, both in terms of activity and number of participants. This alternative would yield smaller benefits in the areas of financial stability, risk visibility, margin offset efficiencies, and capital requirement reductions. The Commission believes that, given the scale-intensive nature of clearing, there are economies of scale that can only be realized when a larger number of financial market participants clear their U.S. Treasury securities cash trades.

3. Include All Cash Transactions Within the Scope of Eligible Secondary Market Transactions With Exceptions for Central Banks, Sovereign Entities, International Financial Institutions, and Natural Persons

In the Proposing Release, the Commission considered requiring covered clearing agencies to have policies and procedures reasonably designed to require that direct participants of the covered clearing agency submit for central clearing all cash and repo transactions in U.S. Treasury securities into which they enter, except for natural persons, central banks, sovereign entities and international finance institutions. This policy option would include cash transactions between direct participants of a U.S. Treasury securities CCA and any counterparty except for those that fall within one of the aforementioned exceptions.[1042] Several commenters opposed cash clearing generally.[1043]

This alternative would capture more of the potential benefits and positive externalities that result from increased central clearing, more closely resembling the assumptions and estimated benefits of Fleming and Keane's calculations on clearing benefits.[1044] By virtue of requiring all repo and most cash transactions to be centrally cleared, the alternative goes the furthest in solving the underlying collective action problem whereby some participants may find it optimal to not participate in central clearing, reducing the benefits that may accrue to the market as a whole.

Several commenters suggested that the scope of eligible secondary market transactions in the cash market be broadened. One commenter stated that the Commission should align the scope of the definition with respect to cash transactions with the proposed scope for repos, subject to certain limited exceptions for investors that trade de minimis volumes. The commenter argued that the Commission's approach with respect to cash transactions will increase costs for a specific subset of market participants, thereby putting them at a competitive disadvantage, while failing to deliver the envisaged market-wide benefits associated with central clearing (*i.e.,* it would materially reduce the associated multilateral netting benefits, impair the risk management practices of clearing agencies, and hinder the evolution in trading protocols that can be expected from a market-wide clearing requirement).[1045] For similar reasons, another commenter also stated that the benefits of central clearing detailed will only materialize if "a market-wide mandate is implemented" and supported defining the scope of eligible secondary market transactions for cash transactions as broadly as that proposed for repos.[1046] Another commenter stated that limiting the scope of the cash clearing mandate would result in unwarranted competitive disadvantages and related market distortions for some types of investors, such as hedge funds, or some types of trading platforms, such as anonymous trading facilities.[1047] An additional commenter stated that the proposed definition leaves out other important market participants' cash Treasury transactions that also comprise a large segment of Treasury market liquidity, and that the Commission should require other market participants' cash Treasury transactions in which a direct participant is involved to be cleared, so that the benefits of central clearing that the Commission cites will accrue throughout the broader cash Treasury market.[1048] In addition, another commenter acknowledged the benefits of a comprehensive clearing requirement, but acknowledged the need for a pragmatic approach and supported the Commission's proposed requirements as a reasonable foundation

[1038] *See* Proposing Release, *supra* note 14.

[1039] AFREF Letter, *supra* note 33, at 2; Better Markets Letter, *supra* note 33, at 2, 6–8.

[1040] *See* part II.A.2.b *supra* for a discussion of comments received regarding cash clearing.

[1041] *See* 2021 IAWG Report, *supra* note 4; Liang & Parkinson, *supra* note 725, at 9; Duffie, *supra* note 27, at 16–17.

[1042] *See* Proposing Release, *supra* note 14.

[1043] *See* part II.A.2.b *supra* for a discussion of comments received regarding cash clearing.

[1044] Fleming & Keane (2021), *supra* note 796.

[1045] Citadel Letter, *supra* note 81, at 5.

[1046] ARB et al. Letter, *supra* note 81, at 4 (stating that the netting benefits associated with transitioning only proprietary trading firm ("PTF") transactions into central clearing are much smaller, given the substantial netting that already occurs directly with inter-dealer brokers ("IDBs"); the trading-related benefits of central clearing will only accrue to market participants if their transactions are covered by the proposed mandate; and that clearing agency resiliency will be negatively impacted if only one segment of the market is cleared).

[1047] MFA Letter, *supra* note 81, at 2.

[1048] AIMA Letter, *supra* note 81, at 7.

to begin mandatory central clearing in this market.[1049]

As discussed above, the benefits of clearing are scale-dependent, so that a more comprehensive clearing directive would result in larger positive externalities (*e.g.,* lower contagion risk, less financial network complexity) and larger economies of scale (*e.g.,* larger margin offsets) for the U.S. Treasury securities market. Another benefit of this alternative would be an enhanced ability of FICC (and, by extension, regulatory agencies) to observe the dynamics and manage the risks in the U.S. Treasury securities markets.

Nevertheless, there are compelling reasons for the exclusions that the proposal makes for a specific sample of market participants. Buy-side participants in the U.S. Treasury securities markets that do not take on any leverage, or take less than one-half their assets in leverage, such as the majority of bond mutual funds, typically have lower daily turnover. As a result of their lower turnover and subsequent lower volume, they typically do not have the existing infrastructure to readily connect to the CCP, making their up-front costs significantly higher than for other participants. This implies that the costs of subjecting these participants to the requirement to clear eligible secondary market transactions are likely higher than those of participants included in the proposal and the benefits smaller.

4. Require U.S. Treasury Securities CCAs To Change CCA Access Provisions and Netting and Margin Practices for House and Customer Accounts and Rule 15c3–3

In the Proposing Release the Commission considered, as an alternative to the policy choices it proposed, only amending Rules 15c3–3, 17ad–22(e)(6)(i), and 17ad–22(e)(18)(iv)(C).[1050] This alternative would not include a requirement to clear eligible secondary market transactions, as set forth in Proposed Rule 17ad–22(e)(18)(iv)(A) and (B).[1051]

Overall, commenters supported the proposed amendments to Rule 15c3–3a.[1052] For increased and more efficient client clearing, another commenter encouraged the Commission to adopt this proposal irrespective of whether the Commission adopts the requirement to clear eligible secondary market transactions, as set forth in Proposed Rule 17ad–22(e)(18)(iv)(A) and (B).[1053]

This alternative would require a U.S. Treasury securities CCA to establish, implement, maintain and enforce certain written policies and procedures that would be reasonably designed to, as applicable, calculate, collect, and hold margin amounts from a direct participant for its proprietary U.S. Treasury securities positions separately and independently from margin that would be held for an indirect participant. Specifically, the requirement to separately and independently hold an indirect participant's margin would apply to margin calculated by and collected from a direct participant in connection with its U.S. Treasury securities transactions with an indirect participant that relies on the direct participant's services to access the covered clearing agency's payment, clearing, or settlement facilities.

The alternative would also include changes to 17ad–22(e)(18)(iv)(C), directing FICC to, as more fully described above, have policies and procedures, to be annually reviewed by its board of directors, to have appropriate means to facilitate access to clearing all eligible secondary market transactions in U.S. Treasury securities. This alternative would also include changes to Rule 15c3–3a, to permit margin required and on deposit at a U.S. Treasury securities CCA to be included as a debit item in the customer reserve formula, subject to the conditions discussed below. This new debit item would offset credit items in the Rule 15c3–3a formula and, thereby, free up resources that could be used to meet the margin requirements of a U.S. Treasury securities CCA. The new debit item would be reported on a newly created Item 15 of the Rule 15c3–3a reserve formula.

As discussed in part IV.C.2.b *supra,* the proposed amendments to Rule 17ad–22(e)(6)(i) should produce benefits for dealer-to-customer trades. Because margin for a direct participant's (*i.e.,* a dealer's) trades that have been novated to the CCP would be calculated, collected, and held separately and independently from those of an indirect participant, such as a customer, the direct participant's trades with the indirect participant that have been novated to the CCP would be able to be netted against the direct participant's position with other dealers. Such netting is not currently available. In summary, the Commission expects changes in the customer reserve formula and expanded margin offset possibilities to allow more efficient use of margin for cleared trades relative to current market practice.

As discussed in part II.A.1.a *supra,* commenters identified several methods by which the Commission could or should incentivize additional central clearing without adopting a requirement to clear eligible secondary market transactions. One of the methods commenters identified was to adopt Rule 15c3–3 discussed in part II.C *infra* as a method to incentivize additional central clearing.[1054] As discussed in part II.5 *supra* the Commission agrees that the methods identified by the commenters could incentivize and facilitate additional central clearing. The Commission therefore is adopting the amendments to Rule 15c3–3, the requirement to segregate house and customer margin, and the need to ensure access to central clearing, as discussed in parts II.C, II.B.1, and II.B.2 *supra* respectively. The Commission does not believe that these changes should be made without also requiring that U.S. Treasury securities CCAs obligate their direct participants to submit eligible secondary market transactions for clearing. Merely incentivizing and facilitating greater central clearing, as opposed to requiring central clearing, would not sufficiently address the current risks to U.S. Treasury securities CCAs. Therefore, for the reasons discussed in part II.2.a and b, the requirement to clear is also necessary.

V. Paperwork Reduction Act

A. Proposed Changes to Covered Clearing Agency Standards

As discussed in the Proposing Release,[1055] the amendments to Rule 17ad–22(e) contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[1056] The Commission submitted the proposed collections of information to the Office of Management and Budget (''OMB'') for review in accordance with the PRA. The title of the information collection for Rule 17ad–22(e) is ''Clearing Agency Standards for Operation and Governance'' (OMB Control No. 3235–0695). The amendments to Rule 17ad–22(e) add two new information collections, titled ''17ad–22(e)(6)

[1049] GTS Letter, *supra* note 81, at 3–5.

[1050] *See* Proposing Release, *supra* note 14.

[1051] *Id.*

[1052] *See* AIMA Letter, *supra* note 81, at 8; CME Letter, *supra* note 81, at 4; DTCC/FICC Letter, *supra* note 33, at 28–29; ICE Letter, *supra* note 33, at 3; MFA Letter, *supra* note 81, at 10; ISDA Letter, *supra* note 391, at 2; SIFMA AMG Letter, *supra* note 35, at 8. See part II.C *supra* for a discussion of comments received.

[1053] *See* ISDA Letter, *supra* note 391, at 2.

[1054] *See supra* note 344.

[1055] Proposing Release, *supra* note 14, 87 FR at 64675–77.

[1056] *See* 44 U.S.C. 3501 *et seq.*

(Treasury Clearing)'' and ''17ad–22(e)(18) (Treasury Clearing),'' respectively, to OMB Control No. 3235–0695. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Respondents under this rule are Treasury securities CCAs, of which there is currently one. The Commission anticipates that one additional entity may seek to register as a clearing agency to provide CCP services for Treasury securities in the next three years, and so for purposes of this rulemaking the Commission has assumed two respondents.

As described above in parts II.A and B *supra,* the Commission is adopting the amendments to Rules 17ad–22(e)(6) and (e)(18) as proposed, and the Commission has received no comments on the burden estimates provided in the Proposing Release. Accordingly, the Commission is not adjusting the burden estimates from the Proposing Release, except with respect to minor changes to correct mathematical errors, as described more fully below.

1. Amendment to Rule 17ad–22(e)(6)

The purpose of this collection of information is to enable a covered clearing agency for Treasury securities to better understand and manage the risks presented by transactions that a direct participant may submit on behalf of its customer, *i.e.,* an indirect participant which relies upon the direct participant to access the covered clearing agency. The collection is mandatory. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential subject to the provisions of applicable law.[1057]

The amendment to Rule 17ad–22(e)(6) requires a Treasury securities CCA to establish, implement, maintain and enforce written policies and procedures. The amendment contains similar provisions to existing FICC rules, specifically with respect to its Sponsored Member program, but also imposes additional requirements that did not previously appear in Rule 17ad–22. As a result, the Commission believes that a respondent Treasury securities CCA will incur burdens of reviewing and updating existing policies and procedures in order to comply with the amendment to Rule 17ad–22(e)(6) and, in some cases, may need to create new policies and procedures.[1058] The Commission believes that the PRA burdens for the amendment to Rule 17ad–22(e)(6) may require a respondent clearing agency to make substantial changes to its policies and procedures. Based on the similar policies and procedures requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[1059] the Commission estimates that the amendment to Rule 17ad–22(e)(6) would impose on each respondent Treasury securities CCA an initial burden of 129 hours in the first year.[1060]

In addition, the amendment to Rule 17ad–22(e)(6) imposes ongoing burdens on a respondent Treasury securities CCA. The amended rule requires ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the amended rule. Based on the similar reporting requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[1061] the Commission estimates that the ongoing activities required by the amendment to Rule 17ad–22(e)(6) would impose an ongoing burden of 85 hours per year (including the first year).[1062] Therefore, the aggregate ongoing industry burden associated with the amendments to Rule 17ad–22(e)(6) for the two respondents is approximately 170 hours per year.[1063]

Name of information collection	Type of burden	Number of respondents	Initial burden per entity (hours)	Aggregate initial burden (hours)	Ongoing burden per entity (hours)	Aggregate ongoing burden (hours)
17ad–22(e)(6) (Treasury Clearing)	Recordkeeping	2	129	258	[a] 85	[b] 170

[a] *See supra* note 963.
[b] *See id.*

2. Amendment to Rule 17ad–22(e)(18)(iv)

The purpose of the collection of information under Rule 17ad–22(e)(18)(iv) is to enable a U.S. Treasury securities CCA to ensure that its direct participants submit for clearance and settlement, as a requirement of membership in the CCA, all eligible secondary market transactions in U.S. Treasury securities to the U.S. Treasury securities CCA to which the direct participants are a counterparty. This should, in turn, help ensure that the risk presented by the eligible secondary market transactions of that direct participant that are not centrally cleared would not be transmitted to the U.S. Treasury securities CCA, and to enable the CCA to identify and manage the risks posed by those transactions that are currently not submitted for central clearing. In addition, the purpose of this rule is to ensure that the U.S. Treasury

[1057] *See, e.g.,* 5 U.S.C. 552. Exemption 4 of the Freedom of Information Act provides an exemption for trade secrets and commercial or financial information obtained from a person and privileged or confidential. *See* 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are 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. *See* 5 U.S.C. 552(b)(8).

[1058] *See* Proposing Release, *supra* note 14, 87 FR at 64622 (discussing existing FICC rules for sponsored member program).

[1059] *See* CCA Standards Adopting Release, *supra* note 10, 81 FR at 70895–97 (discussing Rules 17ad–22(e)(13), (15), and (18)). Although the rule amendment is with respect to Rule 17ad–22(e)(6), the Commission believes that these Rules present the best overall comparison to the rule amendment, in light of the nature of the changes needed to implement the rule amendment here and what was proposed in the Covered Clearing Agency Standards.

[1060] This figure was calculated as follows: (Assistant General Counsel for 20 hours) + (Compliance Attorney for 40 hours) + (Computer Operations Manager for 12 hours) + (Senior Programmer for 20 hours) + (Senior Risk Management Specialist for 25 hours) + (Senior Business Analyst for 12 hours) = 129 hours × 2 respondent clearing agencies = 258 hours.

[1061] *See* CCA Standards Adopting Release, *supra* note 10, 81 FR at 70893 and 70895–96 (discussing Rules 17ad–22(e)(6) and (13)).

[1062] This figure was calculated as follows: (Compliance Attorney for 25 hours + Business Risk Analyst for 40 hours + Senior Risk Management Specialist for 20 hours) = 85 hours × 2 respondent clearing agencies = 170 ongoing burden hours. (This figure is a corrected version from that in the 2022 Proposing Release, which contained a calculation error in the chart that overstated the estimated burden by 6 hours per respondent, and another calculation error in the accompanying footnote that understated the estimated burden by 5 hours per respondent. *See* Proposing Release, *supra* note 14, 87 FR at 64675, footnote 505 and accompanying text.)

[1063] This figure was calculated as follows: 85 hours × 2 respondent clearing agencies = 170 hours.

securities CCA adopts policies and procedures to identify and monitor its direct participants' submission of transactions for clearance and settlement, including how the CCA would address a failure to submit transactions that are required to be submitted. Finally, the purpose of the rule is to ensure that the CCA has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants, which policies and procedures the board of directors of such covered clearing agency reviews annually.

This additional collection is mandatory. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential subject to the provisions of applicable law.[1064]

The amendment to Rule 17ad–22(e)(18)(iv) requires a U.S. Treasury securities CCA to establish, implement, maintain and enforce written policies and procedures, as discussed above. Because such policies and procedures are not currently required under existing Rule 17ad–22, the Commission believes that the estimated PRA burdens for the amendment to Rule 17ad–22(e)(18)(iv) would be significant and may require a respondent clearing agency to make substantial changes to its policies and procedures. The amendment contains similar provisions to existing rules, but also imposes additional requirements that did not previously appear in Rule 17ad–22.[1065] As a result, the Commission believes that a respondent U.S. Treasury securities CCA would incur burdens of reviewing and updating existing policies and procedures in order to comply with the provisions of amended Rule 17ad–22(e)(18)(iv) and, in some cases, may need to create new policies and procedures. Based on the similar policies and procedures requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[1066] the Commission estimates that the amendment to Rule 17ad–22(e)(18)(iv) would impose on each respondent Treasury securities CCA an initial burden of 260 hours in the first year.[1067]

In addition, the amendment to Rule 17ad–22(e)(18)(iv) imposes ongoing burdens on a respondent Treasury securities CCA. The amended rule requires ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the amendment. Based on the similar reporting requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[1068] the Commission estimates that the ongoing activities required by the amendment to Rule 17ad–22(e)(18)(iv) would impose an ongoing burden of 85 hours per year (including the first year).[1069] Therefore, the aggregate ongoing industry burden associated with the amendment to Rule 17ad–22(e)(18)(iv) for the two respondents is approximately 170 hours per year.[1070]

Name of information collection	Type of burden	Number of respondents	Initial burden per entity (hours)	Aggregate initial burden (hours)	Ongoing burden per entity (hours)	Aggregated ongoing burden (hours)
17ad–22(e)(18) (Treasury Clearing)	Recordkeeping	2	260	520	[a] 85	170

[a] This figure is a corrected version from that in the 2022 Proposing Release, which contained an error in the calculation that understated the estimated burden by 5 hours. *See* Proposing Release, *supra* note 13, 87 FR 64675.

B. Broker-Dealers

The final rule amendment to Rule 15c3–3a does not require a new collection of information on the part of any entities subject to these rules. Accordingly, the requirements imposed by the PRA are not applicable to this rule.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires the Commission, in promulgating rules, to consider the impact of those rules on small entities.[1071] Section 603(a) of the Administrative Procedure Act,[1072] as amended by the RFA, generally requires the Commission to undertake a final regulatory flexibility analysis of all proposed rules to determine the impact of such rulemaking on ''small entities.''[1073] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule which, if adopted, would not have a significant economic impact on a substantial number of small entities.[1074] In the Proposing Release, the Commission certified that the proposed amendments to Rules 17ad–22 and 15c3–3a would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Proposing Release solicited comment on the certification. The Commission received no comments on this certification.

A. Clearing Agencies

The amendments to Rule 17ad–22 would apply to covered clearing agencies, which would include

[1064] *See, e.g.,* 5 U.S.C. 552 *et seq.* Exemption 4 of the Freedom of Information Act provides an exemption for trade secrets and commercial or financial information obtained from a person and privileged or confidential. *See* 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are 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. *See* 5 U.S.C. 552(b)(8).

[1065] *See* Proposing Release, *supra* note 14, 87 FR n.34 and accompanying text (discussing current FICC rules).

[1066] *See* CCA Standards Adopting Release, *supra* note 10, 81 FR at 70895–97 (discussing Rules 17ad–22(e)(13), (15), and (18)). The Commission believes that these Rules present the best comparison to the rule amendment, in light of the nature of the rule amendment. Although the rule amendment is with respect to Rule 17ad–22(e)(18), the Commission believes that considering additional rules in the Covered Clearing Agency Standards is reasonable in light of the nature of the rule amendment and the changes necessary to establish and implement the requirements of the rule amendment, as compared to the current Commission rules and U.S. Treasury securities CCA rules.

[1067] This figure was calculated as follows: Assistant General Counsel for 40 hours + Compliance Attorney for 80 hours + Computer Operations Manager for 20 hours + Senior Risk Management Specialist for 40 hours + Business Risk Analyst for 80 hours = 260 hours × 2 respondent clearing agencies = 520 hours.

[1068] *See supra* note above (discussing relevant aspects of the Covered Clearing Agency Standards).

[1069] This figure was calculated as follows: (Compliance Attorney for 25 hours + Business Risk Analyst for 40 hours + Senior Risk Management Specialist for 20 hours) = 85 ongoing burden hours per year.

[1070] This figure was calculated as follows: 85 hours × 2 respondent clearing agencies = 170 hours.

[1071] *See* 5 U.S.C. 601 *et seq.*

[1072] 5 U.S.C. 603(a).

[1073] Section 601(b) of the RFA permits agencies to formulate their own definitions of ''small entities.'' *See* 5 U.S.C. 601(b). The Commission has adopted definitions for the term ''small entity'' for the purposes of rulemaking in accordance with the RFA. These definitions, as relevant to this rulemaking, are set forth in 17 CFR 240.0–10.

[1074] *See* 5 U.S.C. 605(b).

registered clearing agencies that provide the services of a central counterparty or central securities depository.[1075] For the purposes of Commission rulemaking and as applicable to the proposed amendments to Rule 17ad–22, a small entity includes, when used with reference to a clearing agency, a clearing agency that (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.[1076]

Based on the Commission's existing information about the clearing agencies currently registered with the Commission, the Commission believes that such entities exceed the thresholds defining ''small entities'' set out above. While other clearing agencies may emerge and seek to register as clearing agencies, the Commission does not believe that any such entities would be ''small entities'' as defined in Exchange Act Rule 0–10.[1077] In any case, clearing agencies can only become subject to the new requirements under Rule 17ad–22(e) should they meet the definition of a covered clearing agency, as described above. Accordingly, the Commission believes that any such registered clearing agencies will exceed the thresholds for ''small entities'' set forth in Exchange Act Rule 0–10.

B. Broker-Dealers

For purposes of Commission rulemaking in connection with the RFA, a small entity includes a broker-dealer that: (1) had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act, or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1078] Under the standards adopted by the Small Business Administration, small entities in the finance and insurance industry include the following: (1) for entities in credit intermediation and related activities, firms with $175 million or less in assets; (2) for non-depository credit intermediation and certain other activities, firms with $7 million or less in annual receipts; (3) for entities in financial investments and related activities, firms with $7 million or less in annual receipts; (4) for insurance carriers and entities in related activities, firms with $7 million or less in annual receipts; and (5) for funds, trusts, and other financial vehicles, firms with $7 million or less in annual receipts.

The final rule amendment to Rule 15c3–3a would permit margin required and on deposit with covered clearing agencies for U.S. Treasury securities to be included by broker-dealers as a debit in the reserve formulas for accounts of customers and proprietary accounts of broker-dealers, subject to certain conditions. Only carrying broker-dealers will be impacted by the final rule amendment. This is because only carrying broker-dealers are required to maintain a customer or PAB reserve account and may collect customer margin.

Based on FOCUS Report data, the Commission estimates that as of June 30, 2023, there were approximately 772 broker-dealers that were ''small'' for the purposes of Rule 0–10. Of these, the Commission estimates that there are less than ten broker-dealers that are carrying broker-dealers (*i.e.,* can carry customer or PAB margin accounts and extend credit). However, based on June 30, 2023, FOCUS Report data, none of these small carrying broker-dealers carried debit balances. This means that any ''small'' carrying firms are not extending margin credit to their customers, and therefore, the final rule amendment likely would not apply to them. Therefore, while the Commission believes that some small broker-dealers could be affected by the final amendment, the amendment will not have a significant impact on a substantial number of small broker-dealers.

C. Certification

For the reasons described above, the Commission certifies that the final amendments to Rules 17ad–22 and 15c3–3a would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

VII. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,[1079] the Office of Information and Regulatory Affairs has designated these rules as a ''major rule,'' as defined by 5 U.S.C. 804(2).

Statutory Authority

The Commission is amending Rule 17ad–22 under the Commission's rulemaking authority set forth in section 17A of the Exchange Act, 15 U.S.C. 78q–1, and section 805 of the Clearing Supervision Act, 15 U.S.C. 5464 respectively. Pursuant to the Exchange Act, 15 U.S.C. 78a *et seq.,* and particularly, sections 15 and 23(a) (15 U.S.C. 78*o* and 78w(a)), thereof, the Commission is amending § 240.15c3–3a under the Exchange Act.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended 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 the sectional authority for § 240.17ad–22 is revised 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, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; 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 240.15c3–3a is also issued under Pub. L. 111–203, § 939, 939A, 124. Stat. 1376 (2010) (15 U.S.C. 78c, 15 U.S.C. 78*o*–7 note).

* * * * *

Section 240.17ad–22 is also issued under 12 U.S.C. 5461 *et seq.*

* * * * *

[1075] 17 CFR 240.17ad–22(a)(5).

[1076] *See* 17 CFR 240.0–10(d).

[1077] *See* 17 CFR 240.0–10(d). The Commission based this determination on its review of public sources of financial information about registered clearing agencies and lifecycle event service providers for OTC derivatives.

[1078] *See* 17 CFR 240.0–10(c).

[1079] 5 U.S.C. 801 *et seq.*

■ 2. Revise and republish § 240.15c3–3a to read as follows:

§ 240.15c3–3a Exhibit A—Formula for determination of customer and PAB account reserve requirements of brokers and dealers under § 240.15c3–3.

	Credits	Debits
1. Free credit balances and other credit balances in customers' security accounts. (See Note A)	XXX	....
2. Monies borrowed collateralized by securities carried for the accounts of customers (See Note B)	XXX	....
3. Monies payable against customers' securities loaned (See Note C)	XXX	....
4. Customers' securities failed to receive (See Note D)	XXX	
5. Credit balances in firm accounts which are attributable to principal sales to customers	XXX	....
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days	XXX	....
7. Market value of short security count differences over 30 calendar days old	XXX	....
8. Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days	XXX	....
9. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transfer by the transfer agent or the issuer during the 40 days	XXX	....
10. Debit balances in customers' cash and margin accounts excluding unsecured accounts and accounts doubtful of collection. (See Note E)	....	XXX
11. Securities borrowed to effectuate short sales by customers and securities borrowed to make delivery on customers' securities failed to deliver	....	XXX
12. Failed to deliver of customers' securities not older than 30 calendar days	....	XXX
13. Margin required and on deposit with the Options Clearing Corporation for all option contracts written or purchased in customer accounts. (See Note F)	....	XXX
14. Margin required and on deposit with a clearing agency registered with the Commission under section 17A of the Act (15 U.S.C. 78q–1) or a derivatives clearing organization registered with the Commodity Futures Trading Commission under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) related to the following types of positions written, purchased or sold in customer accounts: (1) security futures products and (2) futures contracts (and options thereon) carried in a securities account pursuant to an SRO portfolio margining rule (See Note G)	....	XXX
15. Margin required and on deposit with a clearing agency registered with the Commission under section 17A of the Act (15 U.S.C. 78q–1) resulting from the following types of transactions in U.S. Treasury securities in customer accounts that have been cleared, settled, and novated by the clearing agency: (1) purchases and sales of U.S. Treasury securities; and (2) U.S. Treasury securities repurchase and reverse repurchase agreements (See Note H)	....	XXX
Total credits	....	....
Total debits	....	....
16. Excess of total credits (sum of items 1–9) over total debits (sum of items 10–15) required to be on deposit in the ''Reserve Bank Account'' (§ 240.15c3–3(e)). If the computation is made monthly as permitted by this section, the deposit must be not less than 105 percent of the excess of total credits over total debits	....	XXX

Notes Regarding the Customer Reserve Bank Account Computation

Note A. Item 1 must include all outstanding drafts payable to customers which have been applied against free credit balances or other credit balances and must also include checks drawn in excess of bank balances per the records of the broker or dealer.

Note B. Item 2 must include the amount of options-related or security futures product-related Letters of Credit obtained by a member of a registered clearing agency or a derivatives clearing organization which are collateralized by customers' securities, to the extent of the member's margin requirement at the registered clearing agency or derivatives clearing organization. Item 2 must also include the amount of Letters of Credit which are collateralized by customers' securities and related to other futures contracts (and options thereon) carried in a securities account pursuant to an SRO portfolio margining rule. Item 2 must include the market value of customers' securities on deposit at a ''qualified clearing agency'' as defined in Note H below.

Note C. Item 3 must include in addition to monies payable against customers' securities loaned the amount by which the market value of securities loaned exceeds the collateral value received from the lending of such securities.

Note D. Item 4 must include in addition to customers' securities failed to receive the amount by which the market value of securities failed to receive and outstanding more than thirty (30) calendar days exceeds their contract value.

Note E. (1) Debit balances in margin accounts must be reduced by the amount by which a specific security (other than an exempted security) which is collateral for margin accounts exceeds in aggregate value 15 percent of the aggregate value of all securities which collateralize all margin accounts receivable; provided, however, the required reduction must not be in excess of the amounts of the debit balance required to be excluded because of this concentration rule. A specified security is deemed to be collateral for a margin account only to the extent it represents in value not more than 140 percent of the customer debit balance in a margin account.

(2) Debit balances in special omnibus accounts, maintained in compliance with the requirements of Section 7(f) of Regulation T (12 CFR 220.7(f)) or similar accounts carried on behalf of another broker or dealer, must be reduced by any deficits in such accounts (or if a credit, such credit must be increased) less any calls for margin, mark to the market, or other required deposits which are outstanding five business days or less.

(3) Debit balances in customers' cash and margin accounts included in the formula under Item 10 must be reduced by an amount equal to 1 percent of their aggregate value.

(4) Debit balances in cash and margin accounts of household members and other persons related to principals of a broker or dealer and debit balances in cash and margin accounts of affiliated persons of a broker or dealer must be excluded from the Reserve Formula, unless the broker or dealer can demonstrate that such debit balances are directly related to credit items in the formula.

(5) Debit balances in margin accounts (other than omnibus accounts) must be reduced by the amount by which any single customer's debit balance exceeds 25 percent (to the extent such amount is greater than $50,000) of the broker-dealer's tentative net capital (*i.e.,* net capital prior to securities haircuts) unless the broker or dealer can demonstrate that the debit balance is directly related to credit items in the Reserve Formula. Related accounts (*e.g.,* the separate accounts of an individual, accounts under common control or subject to cross guarantees) will be deemed to be a single customer's accounts for purposes of this provision. If the registered national securities exchange or the registered national securities association having responsibility for

examining the broker or dealer (''designated examining authority'') is satisfied, after taking into account the circumstances of the concentrated account including the quality, diversity, and marketability of the collateral securing the debit balances or margin accounts subject to this provision, that the concentration of debit balances is appropriate, then such designated examining authority may grant a partial or plenary exception from this provision. The debit balance may be included in the reserve formula computation for five business days from the day the request is made.

(6) Debit balances in joint accounts, custodian accounts, participation in hedge funds or limited partnerships or similar type accounts or arrangements that include both assets of a person or persons who would be excluded from the definition of customer (''noncustomer'') and assets of a person or persons who would be included in the definition of customer must be included in the Reserve Formula in the following manner: if the percentage ownership of the non-customer is less than 5 percent then the entire debit balance shall be included in the formula; if such percentage ownership is between 5 percent and 50 percent then the portion of the debit balance attributable to the non-customer must be excluded from the formula unless the broker or dealer can demonstrate that the debit balance is directly related to credit items in the formula; or if such percentage ownership is greater than 50 percent, then the entire debit balance must be excluded from the formula unless the broker or dealer can demonstrate that the debit balance is directly related to credit items in the formula.

Note F. Item 13 must include the amount of margin required and on deposit with the Options Clearing Corporation to the extent such margin is represented by cash, proprietary qualified securities and letters of credit collateralized by customers' securities.

Note G. (a) Item 14 must include the amount of margin required and on deposit with a clearing agency registered with the Commission under section 17A of the Act (15 U.S.C. 78q–1) or a derivatives clearing organization registered with the Commodity Futures Trading Commission under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) for customer accounts to the extent that the margin is represented by cash, proprietary qualified securities, and letters of credit collateralized by customers' securities.

(b) Item 14 will apply only if the broker or dealer has the margin related to security futures products, or futures (and options thereon) carried in a securities account pursuant to an approved SRO portfolio margining program on deposit with:

(1) A registered clearing agency or derivatives clearing organization that:

(i) Maintains security deposits from clearing members in connection with regulated options or futures transactions and assessment power over member firms that equal a combined total of at least $2 billion, at least $500 million of which must be in the form of security deposits. For the purposes of this Note G, the term ''security deposits'' refers to a general fund, other than margin deposits or their equivalent, that consists of cash or securities held by a registered clearing agency or derivative clearing organization; or

(ii) Maintains at least $3 billion in margin deposits; or

(iii) Does not meet the requirements of paragraphs (b)(1)(i) through (b)(1)(iii) of this Note G, if the Commission has determined, upon a written request for exemption by or for the benefit of the broker or dealer, that the broker or dealer may utilize such a registered clearing agency or derivatives clearing organization. The Commission may, in its sole discretion, grant such an exemption subject to such conditions as are appropriate under the circumstances, if the Commission determines that such conditional or unconditional exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors; and

(2) A registered clearing agency or derivatives clearing organization that, if it holds funds or securities deposited as margin for security futures products or futures in a portfolio margin account in a bank, as defined in section 3(a)(6) of the Act (15 U.S.C. 78c(a)(6)), obtains and preserves written notification from the bank at which it holds such funds and securities or at which such funds and securities are held on its behalf. The written notification will state that all funds and/or securities deposited with the bank as margin (including customer security futures products and futures in a portfolio margin account), or held by the bank and pledged to such registered clearing agency or derivatives clearing agency as margin, are being held by the bank for the exclusive benefit of clearing members of the registered clearing agency or derivatives clearing organization (subject to the interest of such registered clearing agency or derivatives clearing organization therein), and are being kept separate from any other accounts maintained by the registered clearing agency or derivatives clearing organization with the bank. The written notification also will provide that such funds and/or securities will at no time be used directly or indirectly as security for a loan to the registered clearing agency or derivatives clearing organization by the bank, and will be subject to no right, charge, security interest, lien, or claim of any kind in favor of the bank or any person claiming through the bank. This provision, however, will not prohibit a registered clearing agency or derivatives clearing organization from pledging customer funds or securities as collateral to a bank for any purpose that the rules of the Commission or the registered clearing agency or derivatives clearing organization otherwise permit; and

(3) A registered clearing agency or derivatives clearing organization establishes, documents, and maintains:

(i) Safeguards in the handling, transfer, and delivery of cash and securities;

(ii) Fidelity bond coverage for its employees and agents who handle customer funds or securities. In the case of agents of a registered clearing agency or derivatives clearing organization, the agent may provide the fidelity bond coverage; and

(iii) Provisions for periodic examination by independent public accountants; and

(iv) A derivatives clearing organization that, if it is not otherwise registered with the Commission, has provided the Commission with a written undertaking, in a form acceptable to the Commission, executed by a duly authorized person at the derivatives clearing organization, to the effect that, with respect to the clearance and settlement of the customer security futures products and futures in a portfolio margin account of the broker or dealer, the derivatives clearing organization will permit the Commission to examine the books and records of the derivatives clearing organization for compliance with the requirements set forth in § 240.15c3–3a, Note G (b)(1) through (3).

(c) Item 14 will apply only if a broker or dealer determines, at least annually, that the registered clearing agency or derivatives clearing organization with which the broker or dealer has on deposit margin related to securities future products or futures in a portfolio margin account meets the conditions of this Note G.

Note H. (a) Item 15 must include the amount of margin required and on deposit with a clearing agency registered with the Commission under section 17A of the Act (15 U.S.C. 78q–1) that clears, settles, and novates transactions in U.S. Treasury securities (''qualified clearing agency'') to the extent that the margin is:

(1) In the form of cash, U.S. Treasury securities, or qualified customer securities; and

(2) Being used to margin U.S. Treasury securities positions of the customers of the broker or dealer that are cleared, settled, and novated by the qualified clearing agency.

(b) Item 15 will apply only if the cash and securities required and on deposit at the qualified clearing agency:

(1)(i) Are cash owed by the broker or dealer to the customer of the broker or dealer that was delivered by the broker or dealer to the qualified clearing agency to meet a margin requirement resulting from that customer's U.S. Treasury securities positions cleared, settled, and novated at the qualified clearing agency and not for any other customer's or the broker's or dealer's U.S. Treasury securities positions cleared, settled, and novated at the qualified clearing agency;

(ii) U.S. Treasury securities or qualified customer securities held in custody by the broker or dealer for the customer of the broker or dealer that were delivered by the broker or dealer to the qualified clearing agency to meet a margin requirement resulting from that customer's U.S. Treasury securities positions cleared, settled, and novated at the qualified clearing agency and not for any other customer's or the broker's or dealer's U.S. Treasury securities positions cleared, settled, and novated at the qualified clearing agency; or

(iii) U.S. Treasury securities owned by the broker or dealer that were delivered by the broker or dealer to the qualified clearing agency to meet a margin requirement resulting from a customer's U.S. Treasury securities positions cleared, settled, and novated at the qualified clearing agency under the following conditions:

(A) The broker or dealer did not owe to the customer or hold in custody for the customer sufficient cash, U.S. Treasury securities, and/or qualified customer securities to meet a margin requirement resulting from that customer's U.S. Treasury securities positions cleared, settled, and novated at the qualified clearing agency at the time the margin requirement arose;

(B) The broker or dealer calls for the customer to deliver a sufficient amount of cash, U.S. Treasury securities, and/or qualified customer securities to meet the margin requirement on the day the margin requirement arose; and

(C) The broker or dealer receives a sufficient amount of cash, U.S. Treasury securities, and/or qualified customer securities to meet the margin requirement by the close of the next business day after the margin requirement arose.

(2) Are treated in accordance with rules of the qualified clearing agency that impose the following requirements and the qualified clearing agency and broker or dealer are in compliance with the requirements of the rules (as applicable):

(i) Rules requiring the qualified clearing agency to calculate a separate margin amount for each customer of the broker or dealer and the broker or dealer to deliver that amount of margin for each customer on a gross basis;

(ii) Rules limiting the qualified clearing agency from investing cash delivered by the broker or dealer to margin U.S. Treasury security transactions of the customers of the broker or dealer or cash realized through using U.S. Treasury securities delivered by the broker or dealer for that purpose in any asset other than U.S. Treasury securities with a maturity of one year or less;

(iii) Rules requiring that the cash, U.S. Treasury securities, and qualified customer securities used to margin the U.S. Treasury securities positions of the customers of the broker or dealer be held in an account of the broker or dealer at the qualified clearing agency that is segregated from any other account of the broker or dealer at the qualified clearing agency and that is:

(A) Used exclusively to clear, settle, novate, and margin U.S. Treasury securities transactions of the customers of the broker or dealer;

(B) Designated ''Special Clearing Account for the Exclusive Benefit of the Customers of [name of broker or dealer]'';

(C) Subject to a written notice of the qualified clearing agency provided to and retained by the broker or dealer that the cash, U.S. Treasury securities, and qualified customer securities in the account are being held by the qualified clearing agency for the exclusive benefit of the customers of the broker or dealer in accordance with the regulations of the Commission and are being kept separate from any other accounts maintained by the broker or dealer or any other clearing member at the qualified clearing agency; and

(D) Subject to a written contract between the broker or dealer and the qualified clearing agency which provides that the cash, U.S. Treasury securities, and qualified customer securities in the account are not available to cover claims arising from the broker or dealer or any other clearing member defaulting on an obligation to the qualified clearing agency or subject to any other right, charge, security interest, lien, or claim of any kind in favor of the qualified clearing agency or any person claiming through the qualified clearing agency, except a right, charge, security interest, lien, or claim resulting from a cleared U.S. Treasury securities transaction of a customer of the broker or dealer effected in the account;

(iv) Rules requiring the qualified clearing agency to hold the customer cash, U.S. Treasury securities, and qualified customer securities used to margin the U.S. Treasury securities positions of the customers of the broker or dealer itself or in an account of the clearing agency at a U.S. Federal Reserve Bank or a ''bank,'' as that term is defined in section 3(a)(6) of the Act (15 U.S.C. 78c(a)(6)), that is insured by the Federal Deposit Insurance Corporation, and that the account at the U.S. Federal Reserve Bank or bank must be:

(A) Segregated from any other account of the qualified clearing agency or any other person at the U.S. Federal Reserve Bank or bank and used exclusively to hold cash, U.S. Treasury securities, and qualified customer securities to meet current margin requirements of the qualified clearing agency resulting from positions in U.S. Treasury securities of the customers of the broker or dealer members of the qualified clearing agency;

(B) Subject to a written notice of the U.S. Federal Reserve Bank or bank provided to and retained by the qualified clearing agency that the cash, U.S. Treasury securities, and qualified customer securities in the account are being held by the U.S. Federal Reserve Bank or bank pursuant to § 240.15c3–3 and are being kept separate from any other accounts maintained by the qualified clearing agency or any other person at the U.S. Federal Reserve Bank or bank; and

(C) Subject to a written contract between the qualified clearing agency and the U.S. Federal Reserve Bank or bank which provides that the cash, U.S. Treasury securities, and qualified customer securities in the account are subject to no right, charge, security interest, lien, or claim of any kind in favor of the U.S. Federal Reserve Bank or bank or any person claiming through the U.S. Federal Reserve Bank or bank; and

(v) Rules requiring systems, controls, policies, and procedures to return cash, U.S. Treasury securities, and qualified customer securities to the broker or dealer that are no longer needed to meet a current margin requirement resulting from positions in U.S. Treasury securities of the customers of the broker or dealer; and

(3) The Commission has approved rules of the qualified clearing agency that meet the conditions of this Note H and has published (and not subsequently withdrawn) a notice that brokers or dealers may include a debit in the customer reserve formula when depositing cash, U.S. Treasury securities, and/or qualified customer securities to meet a margin requirement of the qualified clearing agency resulting from positions in U.S. Treasury securities of the customers of the broker or dealer.

(c) As used in this Note H, the term ''qualified customer securities'' means the securities of a customer of the broker or dealer (other than U.S. Treasury securities) that are held in custody by the broker or dealer for the customer and that under the rules of the qualified clearing agency are eligible to be used to margin U.S. Treasury securities positions of the customer that are cleared, settled, and novated by the qualified clearing agency.

Notes Regarding the PAB Reserve Bank Account Computation

Note 1. Broker-dealers should use the formula in Exhibit A for the purposes of computing the PAB reserve requirement, except that references to ''accounts,'' ''customer accounts, or ''customers'' will be treated as references to PAB accounts.

Note 2. Any credit (including a credit applied to reduce a debit) that is included in the computation required by § 240.15c3–3 with respect to customer accounts (the ''customer reserve computation'') may not be included as a credit in the computation required by § 240.15c3–3 with respect to PAB accounts (the ''PAB reserve computation'').

Note 3. Note E(1) to § 240.15c3–3a does not apply to the PAB reserve computation.

Note 4. Note E(3) to § 240.15c3–3a which reduces debit balances by 1 percent does not apply to the PAB reserve computation.

Note 5. Interest receivable, floor brokerage, and commissions receivable of another broker or dealer from the broker or dealer (excluding clearing deposits) that are otherwise allowable assets under § 240.15c3–1 need not be included in the PAB reserve computation, provided the amounts have been clearly identified as payables on the books of the broker or dealer. Commissions receivable and other receivables of another broker or dealer from the broker or dealer that are otherwise non-allowable assets under § 240.15c3–1 and clearing deposits of another broker or dealer may be included as ''credit balances'' for purposes of the PAB reserve computation, provided the commissions receivable and other receivables are subject to immediate cash payment to the other broker or dealer and the clearing deposit is subject to payment within 30 days.

Note 6. Credits included in the PAB reserve computation that result from the use of securities held for a PAB account (''PAB securities'') that are pledged to meet intra-day margin calls in a cross-margin account established between the Options Clearing Corporation and any regulated derivatives clearing organization may be reduced to the extent that the excess margin held by the other clearing corporation in the cross-margin relationship is used the following business day to replace the PAB securities that were previously pledged. In addition, balances resulting from a portfolio margin account that are segregated pursuant to Commodity Futures Trading Commission regulations need not be included in the PAB Reserve Bank Account computation.

Note 7. Deposits received prior to a transaction pending settlement which are $5 million or greater for any single transaction or $10 million in aggregate may be excluded as credits from the PAB reserve computation if such balances are placed and maintained in a separate PAB Reserve Bank Account by

12 p.m. Eastern Time on the following business day. Thereafter, the money representing any such deposits may be withdrawn to complete the related transactions without performing a new PAB reserve computation.

Note 8. A credit balance resulting from a PAB reserve computation may be reduced by the amount that items representing such credits are swept into money market funds or mutual funds of an investment company registered under the Investment Company Act of 1940 on or prior to 10 a.m. Eastern Time on the deposit date provided that the credits swept into any such fund are not subject to any right, charge, security interest, lien, or claim of any kind in favor of the investment company or the broker or dealer. Any credits that have been swept into money market funds or mutual funds must be maintained in the name of a particular broker or for the benefit of another broker.

Note 9. Clearing deposits required to be maintained at registered clearing agencies may be included as debits in the PAB reserve computation to the extent the percentage of the deposit, which is based upon the clearing agency's aggregate deposit requirements (*e.g.,* dollar trading volume), that relates to the proprietary business of other brokers and dealers can be identified. However, Note H to Item 15 of § 240.15c3–3a applies with respect to margin delivered to a U.S. Treasury securities clearing agency.

Note 10. A broker or dealer that clears PAB accounts through an affiliate or third party clearing broker must include these PAB account balances and the omnibus PAB account balance in its PAB reserve computation.

■ 3. Redesignate § 240.17Ad–22 as § 240.17ad–22 and amend newly redesignated § 240.17ad–22 by:

■ a. In paragraph (a):

■ i. Removing the designations for paragraphs (a)(1) through (19) and placing the paragraphs alphabetical order, and

■ ii. Adding in alphabetical order definitions for ''Affiliated counterparty'', ''Central bank'', ''Eligible secondary market transaction'', ''International financial institution'', ''State or local government'', ''Sovereign entity'', and ''U.S. Treasury security''.

■ b. Revising paragraphs (e)(6)(i) and (18).

The revisions and additions read as follows:

§ 240.17ad–22 Standards for clearing agencies.

(a) * * *

Affiliated counterparty means any counterparty which meets the following criteria:

(i) The counterparty is either a bank (as defined in 15 U.S.C. 78c(6)), broker (as defined in 15 U.S.C. 78c(4)), dealer (as defined in 15 U.S.C. 78c(5)), or futures commission merchant (as defined in 7 U.S.C. 1a(28)), or any entity regulated as a bank, broker, dealer, or futures commission merchant in its home jurisdiction;

(ii) The counterparty holds, directly or indirectly, a majority ownership interest in the direct participant, or the direct participant, directly or indirectly, holds a majority ownership interest in the counterparty, or a third party, directly or indirectly, holds a majority ownership interest in both the direct participant and the counterparty; and

(iii) The counterparty, direct participant, or third party referenced in paragraph (ii) of this definition as holding the majority ownership interest would be required to report its financial statements on a consolidated basis under U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of the majority-owned party or of both majority-owned parties.

* * * * *

Central bank means a reserve bank or monetary authority of a central government (including the Board of Governors of the Federal Reserve System or any of the Federal Reserve Banks) and the Bank for International Settlements.

* * * * *

Eligible secondary market transaction refers to a secondary market transaction in U.S. Treasury securities of a type accepted for clearing by a registered covered clearing agency that is:

(i) A repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities, in which one of the counterparties is a direct participant; or

(ii) A purchase or sale, between a direct participant and:

(A) Any counterparty, if the direct participant of the covered clearing agency brings together multiple buyers and sellers using a trading facility (such as a limit order book) and is a counterparty to both the buyer and seller in two separate transactions; or

(B) Registered broker-dealer, government securities broker, or government securities dealer; except that:

(iii) Any purchase or sale transaction in U.S. Treasury securities or repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities in which one counterparty is a central bank, a sovereign entity, an international financial institution, or a natural person shall be excluded from the definition set forth in this section of an eligible secondary market transaction;

(iv) Any repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities in which one counterparty is a covered clearing agency providing central counterparty services or a derivatives clearing organization (*see* 7 U.S.C. 7a–1 and 17 CFR 39.3), or is regulated as a central counterparty in its home jurisdiction, shall be excluded from the definition set forth in this section of an eligible secondary market transaction;

(v) Any repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities in which one counterparty is a state or local government shall be excluded from the definition set forth in this section of an eligible secondary market transaction;

(vi) Any repurchase or reverse repurchase agreement collateralized by U.S. Treasury securities entered into between a direct participant and an affiliated counterparty shall be excluded from the definition set forth in this section of an eligible secondary market transaction, provided that the affiliated counterparty submit for clearance and settlement all other repurchase or reverse repurchase agreements collateralized by U.S. Treasury securities to which the affiliate is a party.

* * * * *

International financial institution means the African Development Bank; African Development Fund; Asian Development Bank; Banco Centroamericano de Integración Económica; Bank for Economic Cooperation and Development in the Middle East and North Africa; Caribbean Development Bank; Corporación Andina de Fomento; Council of Europe Development Bank; European Bank for Reconstruction and Development; European Investment Bank; European Investment Fund; European Stability Mechanism; Inter-American Development Bank; Inter-American Investment Corporation; International Bank for Reconstruction and Development; International Development Association; International Finance Corporation; International Monetary Fund; Islamic Development Bank; Multilateral Investment Guarantee Agency; Nordic Investment Bank; North American Development Bank; and any other entity that provides financing for national or regional development in which the U.S. Government is a shareholder or contributing member.

* * * * *

Sovereign entity means a central government (including the U.S. Government), or an agency, department, or ministry of a central government.

* * * * *

State or local government means a state or any political subdivision thereof, or an agency or instrumentality of a State or any political subdivision thereof, but shall not include any pension or retirement plan established and maintained by a State, its political subdivisions, or any agency or instrumentality of a State or its political subdivisions, for the benefit of its employees.

* * * * *

U.S. Treasury security means any security issued by the U.S. Department of the Treasury.

* * * * *

(e) * * *

(6) * * *

(i) Considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market, and, if the covered clearing agency provides central counterparty services for U.S. Treasury securities, calculates, collects, and holds margin amounts from a direct participant for its proprietary positions in Treasury securities separately and independently from margin calculated and collected from that direct participant in connection with U.S. Treasury securities transactions by an indirect participant that relies on the services provided by the direct participant to access the covered clearing agency's payment, clearing, or settlement facilities;

* * * * *

(18) Establish objective, risk-based, and publicly disclosed criteria for participation, which:

(i) Permit fair and open access by direct and, where relevant, indirect participants and other financial market utilities;

(ii) Require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the clearing agency;

(iii) Monitor compliance with such participation requirements on an ongoing basis; and

(iv) When the covered clearing agency provides central counterparty services for transactions in U.S. Treasury securities,

(A) Require that any direct participant of such covered clearing agency submit for clearance and settlement all of the eligible secondary market transactions to which such direct participant is a counterparty;

(B) Identify and monitor its direct participants' submission of transactions for clearing as required in paragraph (e)(18)(iv)(A) of this section, including how the covered clearing agency would address a failure to submit transactions in accordance with paragraph (e)(18)(iv)(A) of this section; and

(C) Ensure that it has appropriate means to facilitate access to clearance and settlement services of all eligible secondary market transactions in U.S. Treasury securities, including those of indirect participants, which policies and procedures the board of directors of such covered clearing agency reviews annually.

* * * * *

By the Commission.

Dated: December 13, 2023.

J. Matthew DeLesDernier,

Deputy Secretary.

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FEDERAL REGISTER

Part III

Department of Commerce

National Oceanic and Atmospheric Administration

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Port of Alaska's North Extension Stabilization Step 1 Project in Anchorage, Alaska; Notice

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD572]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Port of Alaska's North Extension Stabilization Step 1 Project in Anchorage, Alaska

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to the Port of Alaska (POA) to incidentally harass marine mammals during construction activities associated with the North Extension Stabilization Step 1 (NES1) Project in Anchorage, Alaska.

DATES: This authorization is effective from April 1, 2024, through March 31, 2025.

ADDRESSES: Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Reny Tyson Moore, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On July 19, 2022, NMFS received a request from the POA for an IHA to take marine mammals incidental to construction activities related to the NES1 project in Anchorage, Alaska. Following NMFS' review of the application, the POA submitted revised versions on December 27, 2022, July 28, 2023, and August 31, 2023. The application was deemed adequate and complete on September 7, 2023. The POA submitted a final version addressing additional minor corrections on September 21, 2023. The **Federal Register** notice of the proposed IHA and request for comments was published on November 6, 2023 (88 FR 76576). The POA's request is for take of seven species of marine mammals by Level B harassment and, for a subset of these species (*i.e.,* harbor seal (*Phoca vitulina*) and harbor porpoise (*Phocoena phocoena*)), Level A harassment. Neither the POA nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued IHAs to the POA for similar work (85 FR 19294, April 6, 2020; 86 FR 50057, September 7, 2021). The POA complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs, and information regarding their monitoring results may be found in the Effects of the Specified Activity on Marine Mammals and their Habitat section of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023), the Estimated Take section in this notice of issuance, and online at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.*

This IHA will cover 1-year of the ongoing Port of Alaska Modernization Program (PAMP) for which the POA obtained prior IHAs and intends to request additional take authorization for subsequent facets of the program. The PAMP involves construction activities related to the modernization of the POA's marine terminals.

Description of Specified Activity

The POA, located on Knik Arm in upper Cook Inlet, provides critical infrastructure for the citizens of Anchorage and a majority of the citizens of Alaska. The North Extension at the POA is a failed bulkhead structure that was constructed between 2005 and 2011. Parts of the North Extension bulkhead structure and the surrounding upland area are unstable and collapsing, and some of the sheet piles are visibly twisted and buckled. The structure presents safety hazards and logistical impediments to ongoing Port operations, and much of the upland area is currently unusable. The North Extension Stabilization (NES) project will result in removal of the failed sheet pile structure and reconfiguration and realignment of the shoreline within the North Extension, including the conversion of approximately 0.05 square kilometers (km^2; 13 acres) of developed land back to intertidal and subtidal habitat within Knik Arm. The NES project will be completed in two distinct steps, NES1 and NES2, separated by multiple years and separate permitting efforts. This notice is applicable to an IHA for the incidental take of marine mammals during in-water construction associated with NES1.

The NES1 project will involve the removal of portions of the failed sheet pile structure to stabilize the North Extension. The NES1 project will remove approximately half of the North Extension structure extending approximately 274-meters (m) north from the southern end of the North Extension. This project will also stabilize the remaining portion of the North Extension by creating an end-state embankment. While the majority of the Project will be demolition work, the term ''construction'' as used herein refers to both construction and demolition work.

In-water construction associated with this project includes vibratory installation and removal of 81 24-inch (61-centimeter (cm)) or 36-inch (91-cm) temporary steel pipe stability template piles as well as vibratory removal, splitting (via a sheet pile splitter used in conjunction with a vibratory hammer), pile cutting (via hydraulic shears or underwater ultrathermic cutting) and possible impact removal of approximately 4,216 sheet piles from the structure tailwalls, cell faces (bulkhead), and closure walls. Demolition of the failed sheet pile structure will be accomplished through excavation and dredging of impounded soils (fill material), and cutting and removal of the existing sheet piles, most likely through use of a pile splitter and vibratory hammer. It is assumed that pile splitting will produce the same or similar sound levels to a vibratory hammer used without the splitter attachment. Therefore, the use of a vibratory hammer to remove sheet piles and the use of a splitter is combined into a single category (*i.e.,* vibratory hammer removal) and treated the same in our analysis.

The first attempt to extract the sheet piles will be with direct vertical pulling or with a vibratory hammer; however, there may be complications with the sheet pile interlocks, which could become seized, and other means of pile removal may be required (*i.e.,* impact removal, shearing, or torching). In addition, to minimize potential impacts on marine mammals from in-water sheet pile removal, removal in the dry would be maximized as feasible. The demolition plan also includes stabilization of the face sheets through installation of temporary piles and dredging back into the cell to relieve pressure on the sheet piles and to eliminate any release of material into Cook Inlet beyond natural tidal forces. It is anticipated that 3 sets of 27 temporary piles would be required for a total of 81 installations and 81 removals (table 1). Temporary piles would be installed and removed with a vibratory hammer. Sound produced by vibratory pile installation and removal and impact pile removal may result in the take of marine mammals, by harassment only. Sound produced by all other NES1 project activities (*e.g.,* hydraulic shearing, ultrathermic cutting) are not expected to result in the take of marine mammals and, therefore, are not discussed further.

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Table 1 -- Estimated Timing and Duration by Month of Pile Installation and Removal Activities

Activity		April	May	June	July	August	September	October	November	Total
36-inch (91-cm) or 24-inch (61-cm) stability template pile installation	Piles	27	14	14	10	10	3	3	0	81
	Hours	6.75	3.50	3.50	2.5	2.5	0.75	0.75	0	20.25
36-inch (91-cm) or 24-inch (61-cm) stability template pile removal	Piles	0	27	13	13	13	10	4	1	81
	Hours	0	6.75	3.25	3.25	3.25	2.5	1	0.25	20.25
Sheet pile vibratory hammer removal	Piles	-	-	-	-	-	-	-	-	-
	Hours	10	45	60	60	13	12	4	2	206
Total hours		16.75	55.25	66.75	65.75	18.75	15.25	5.75	2.25	246.50

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A detailed description of the planned NES1 project is provided in the **Federal Register** notice for the proposed IHA (88 FR 76576, November 6, 2023). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specific activity.

Dates and Duration

The POA anticipates that NES1 in-water construction activities will begin on April 1, 2024 and extend through November 2024. In-water pile installation and removal associated with the NES1 project is anticipated to take place over approximately 246.5 hours on 110 nonconsecutive days between these dates. While the exact sequence of demolition and construction is uncertain, an estimated schedule of sheet pile removal and temporary stability template pile installation and removal is shown in table 1.

A detailed description of the timing and sequencing of the NES1 project is provided in the **Federal Register** notice for the proposed IHA (88 FR 76576, November 6, 2023). Since that time, no changes have been made to the dates or duration. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for more information regarding the dates and duration of the NES1 project.

Specific Geographic Region

The Municipality of Anchorage is located in the lower reaches of Knik Arm of upper Cook Inlet (see figure 2–1 in the POA's application). The POA sits on the industrial waterfront of Anchorage, just south of Cairn Point and north of Ship Creek (lat. 61°15′ N, long. 149°52′ W; Seward Meridian). Knik Arm and Turnagain Arm are the two branches of upper Cook Inlet, and Anchorage is located where the two arms join. The POA's boundaries currently occupy an area of approximately 0.52 km^2.

A detailed description of the specific geographic region of the NES1 project is provided in the **Federal Register** notice for the proposed IHA (88 FR 76576, November 6, 2023). Since that time, no changes have been made to the specific geographic region. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for more information regarding the specific geographic region of the NES1 project.

Comments and Responses

A notice of NMFS' proposal to issue an IHA to the POA was published in the **Federal Register** on November 6, 2023 (88 FR 76576). That notice described, in detail, the POA's activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. In that notice, we requested public input on the request for authorization described therein, our analyses, the proposed authorization, and any other aspect of the notice of proposed IHA, and requested that interested persons submit relevant information, suggestions, and comments.

During the 30-day public comment period, NMFS received comments from the Center for Biological Diversity (CBD) and Eklutna, Inc. NMFS also received a letter from United States Geological Survey stating that they had no comment. All relevant, substantive comments, and NMFS' responses, are provided below. The comments and recommendations are available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* Please see the comment submissions for full details regarding the recommendations and supporting rationale.

Comment 1: The CBD opposed NMFS' issuance of an IHA for construction and associated activities related to the NES1 project, stating that the proposed actions would further imperil the already critically endangered Cook Inlet beluga whale (CIBW) and that ''most of the proposed activities should not be authorized until and unless [NMFS] can ensure that take will not impede the survival and recovery of the [CIBW] population.''

Response: NMFS shares CBD's concern regarding the impacts of human activities on CIBWs and is committed to supporting the conservation and recovery of the species. Under section 101(a)(5)(D) of the MMPA, NMFS considers the at risk status of CIBWs (and other species) in both the negligible impact analysis and through our consideration of impact minimization measures that support the least practicable adverse impact on those species. For example, the IHA for the NES1 project includes a requirement to implement shutdown zones for CIBWs that encompass the estimated Level B harassment zones. However, section 101(a)(5)(D) also mandates that NMFS ''shall issue'' an IHA if we are able to make the necessary findings for any specified activity for which incidental take is requested.

In accordance with our implementing regulations at 50 CFR 216.104(c), we use the best available scientific evidence to determine whether the taking by the specified activity within the specified geographic region will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses. Based on the best scientific evidence available, NMFS determined that the take incidental to POA's NES1 project would have no more than a negligible impact on the affected species and stocks, including CIBW, and no unmitigable adverse impact on the availability of marine mammals for subsistence uses. Moreover, NMFS has required through the IHA implementation of mitigation and monitoring measures that balances the safety needs of this demolition project with reducing potential impacts to CIBWs and other marine mammals to the lowest level practicable, thereby providing the means of effecting the least practicable adverse impact on the affected species and stocks of marine mammals.

Further, as described in the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023), data from several years of scientific monitoring at the POA during previous work involving pile driving (occurring April through November) demonstrate there is no significant difference in beluga whale sightings during and in absence of pile driving (Kendell and Cornick, 2016). While we do anticipate some behavioral modifications to occur, these will likely be limited to increased travel speeds, reduced vocalizations, and potentially traveling in more cohesive groups (Kendell and Cornick, 2016). However, we anticipate behavior will return to normal after the whales move past the POA (*e.g.,* when they reach productive foraging grounds north of the POA) as these areas would not be ensonified by pile driving noise. There is no evidence CIBWs have abandoned foraging in Knik Arm due to pile driving noise or that exposure to pile driving noise has resulted in more than a negligible impact to the CIBW population (*e.g.,* 61N Environmental, 2021, 2022a, 2022b, 2022c; Easley-Appleyard and Leonard, 2022). In light of the mitigation and monitoring measures and scientific data to date, we anticipate the impacts of any Level B harassment to CIBWs will be limited to short-term, mild to moderate behavioral changes and will not affect the fitness of any individuals. Therefore, NMFS' negligible impact determination is well supported and the authorized take for the NES1 project is neither reasonably expected nor likely to adversely affect the stock through effects on annual rates of recruitment or survival and thus, will not contribute to or exacerbate the stock's decline. Additionally, the NMFS Alaska Regional Office issued a Biological Opinion (BiOp) on December 15, 2023, under section 7 of the Endangered Species Act (ESA), on the issuance of an IHA to the POA under section 101(a)(5)(D) of the MMPA by the NMFS Office of Protected Resources (OPR) that determined that the issuance of the IHA is not likely to jeopardize the continued existence of CIBWs.

CBD cited a letter from the Marine Mammal Commission (MMC) submitted to NMFS in response to the issuance of an IHA for the POA's Petroleum and Cement Terminal (PCT) project (MMC, 2020) that specifically recommended for

POA construction activities, that the Service ''defer issuance of the final incidental harassment authorizations to [the POA] or any other applicant proposing to conduct sound-producing activities in Cook Inlet until [it] has a reasonable basis for determining that authorizing any additional incidental harassment takes of Cook Inlet beluga whales would not contribute to or exacerbate the stock's decline.'' NMFS responded to this recommendation in the **Federal Register** notice of the final IHA for the PCT project (*e.g.,* 85 FR 19294, April 1, 2020) and we incorporate that response by reference. In summary, that notice describes how there is no evidence that exposure to pile driving noise in Knik Arm has resulted in more than a negligible impact to the CIBW population. Therefore, NMFS negligible impact determination was well supported and the authorized take for the PCT project was neither reasonably expected nor likely to adversely affect the stock through effects on annual rates of recruitment or survival. Thus NMFS had a reasonable basis for determining that authorizing take incidental to the PCT project would not contribute to or exacerbate the stock's decline. Since the publication of this notice, no new information has become available that would suggest that determination was incorrect. Similarly, NMFS' independent evaluation of the best scientific evidence in this case supports our negligible impact determination and our finding that the authorized take for the NES1 project is neither reasonably expected nor likely to adversely affect the stock through effects on annual rates of recruitment or survival. Thus, NMFS has a reasonable basis for determining that authorizing take incidental to the NES1 project would not contribute to or exacerbate the stock's decline. NMFS did not receive any recommendations from the MMC regarding the proposed IHA for the NES1 project.

Finally, we also note CBD's suggestion that this IHA authorizes the subject construction activities. We note that NMFS does not have authority under the MMPA or other statute to authorize the specified activity. NMFS' authority pertains only to the authorization of marine mammal take incidental to that activity and to the prescription of appropriate mitigation, monitoring, and reporting requirements.

Comment 2: The CBD expressed concern regarding uncertainty in the trends of the CIBW population status. They stated that ''changes in survey methods bring into question the approach of determining any trend in population status.'' They cited scientific studies that confirm a negative trend in the population status of CIBWs.

Response: CBD is incorrect in that survey methods for detecting trends in CIBW population have changed; the survey field methods are essentially unchanged since 2004 (Paul Wade, personal communication, December 11, 2023). The analysis methods used to detect trends in the CIBW population have been updated and implemented in recent studies examining the CIBW population, notably Sheldon and Wade (2019) and Goetz *et al.* (2023).

Results of recent studies, including those cited by CBD, provide evidence that the CIBW population increased between 2004 and 2010, declined after 2010, and increased again from 2016 to 2022 (Jacobsen *et al.,* 2020; Shelden and Wade, 2019; Warlick *et al.,* 2023; Goetz *et al.,* 2023). While there is some uncertainty around CIBW population trend analyses, the results of these four studies are consistent in showing general trends. Thus, while the CBD were correct that some studies confirm a negative trend in beluga whale abundance, recent studies, which NMFS considers the best scientific information available, suggest this trend may now be increasing. Additional data in the coming years will help to inform whether the recent positive trend in the CIBW population will continue.

Comment 3: The CBD states that NMFS must conduct a comprehensive analysis of all CIBW take and asserts that NMFS should place an overall cap on authorizations for CIBW incidental take. They state that the various construction, vessel traffic, oil and gas, and other activities are cumulatively threatening the conservation and recovery of CIBWs. CBD also provides examples for the number of takes authorized by NMFS for various time periods, citing Migura and Bollini (2021) and recent authorizations to the POA.

Response: We note first that the Migura and Bollini (2021) paper cited by CBD seems to have led to a misunderstanding of the takes authorized or permitted by NMFS. In summary, CBD asserts that NMFS authorized nearly 120,000 takes of CIBWs from 2017 to 2025 and that in 2020 alone, NMFS authorized the equivalent of 50 percent of the entire CIBW population to be ''incidentally'' harassed by industrial projects in the Inlet, such as oil and gas development and pile driving activities.

The vast majority of the asserted ~120,000 total takes (99 percent), including all of the very small amount of take by Level A harassment, were authorized under directed research or enhancement permits, which directly support research or actions identified in the Recovery Plan to address CIBW recovery goals. Further, the vast majority (~99 percent) of the total permitted research or enhancement take numbers cited by CBD are low-level MMPA Level B harassment from remote or non-invasive procedures that are considered not likely to adversely affect listed species pursuant to the ESA (*i.e.,* no associated take under the ESA is either expected to occur or exempted for those specific activities).

Regarding the comprehensive evaluation and minimization of permitted takes, we reference the analysis that has already been completed through NMFS' 2019 Biological and Conference Opinion on the Proposed Implementation of a Program for the Issuance of Permits for Research and Enhancement Activities on Cetaceans in the Arctic, Atlantic, Indian, Pacific, and Southern Oceans (NMFS, 2019), which determined that the research and enhancement takes permitted by the program would not jeopardize the existence of any of the affected species. As part of our programmatic framework for permitting directed take of ESA species, the Permits and Conservation Division will continue to closely evaluate the number and manner of CIBW takes requested by each applicant, how the proposed research ties to recovery plan goals, and the collective number of authorized and requested takes to consider the potential cumulative impact of the activities to the population. Each directed take annual report is reviewed to understand how authorized takes were actually used and to closely monitor the impacts that permitted research methods are having on the target animals.

Regarding the incidental takes authorized for 2020, those takes represent instances of exposure above the Level B harassment threshold that could occur within a day. In other words, if those approximately 130 takes were assumed to be 130 separate individual whales, it would mean that those individual whales were each behaviorally disturbed on one day in that year. The more likely scenario is that some of those 130 exposures were takes of the same whale on a few different days, and in fact a lesser number of individuals were taken, but still on only a few days within a year. In all cases, the necessary findings under MMPA and ESA were made prior to the authorization of the take.

Neither the MMPA nor NMFS' codified implementing regulations call for consideration of the take resulting from other activities in the negligible impact analysis. The preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989) states, in response to comments, that the impacts from other past and ongoing anthropogenic activities are to be incorporated into the negligible impact analysis via their impacts on the baseline. Consistent with that direction, NMFS has factored into its negligible impact analysis the impacts of other past and ongoing anthropogenic activities via their impacts on the baseline (*e.g.,* as reflected in the density/distribution and status of the species, population size and growth rate, and other relevant stressors (such as incidental mortality in commercial fisheries, Unusual Mortality Events (UMEs), and subsistence hunting); *see* the Negligible Impact Analyses and Determinations section of this notice of issuance). The 1989 final rule for the MMPA implementing regulations also addressed public comments regarding cumulative effects from future, unrelated activities. There, NMFS stated that such effects are not considered in making findings under section 101(a)(5) concerning negligible impact. In this case, this ITA as well as other ITAs currently in effect or proposed within the specified geographic region, are appropriately considered an unrelated activity relative to the others. The ITAs are unrelated in the sense that they are discrete actions under section 101(a)(5)(D) issued to discrete applicants.

Section 101(a)(5)(D) of the MMPA requires NMFS to make a determination that the take incidental to a ''specified activity'' will have a negligible impact on the affected species or stocks of marine mammals and will not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence uses. NMFS' implementing regulations require applicants to include in their request a detailed description of the specified activity or class of activities that can be expected to result in incidental taking of marine mammals (see 50 CFR 216.104(a)(1)). Thus, the ''specified activity'' for which incidental take coverage is being sought under section 101(a)(5)(D) is generally defined and described by the applicant. Here, the POA was the applicant for the IHA, and we are responding to the specified activity as described in that application (and making the necessary findings on that basis). Therefore, setting limits on the number and types of CIBW takes across all activities in Cook Inlet would not be an appropriate requirement of an MMPA ITA. The take estimates NMFS authorizes represent the upper limits for individuals and some instances of take may represent multiple exposures to a single individual.

Separately, setting blanket take limits may not be meaningful, as the nature and intensity of impacts from a given activity can vary widely. For example, an animal exposed to noise levels just above our harassment threshold in a non-critical area may experience a small behavioral change with no biological consequence while an animal exposed to very loud noise levels (but lower than levels that would result in a permanent threshold shift (PTS)) in an area where active critical foraging occurs could result in behavioral changes that may be more likely to impact fitness. While both of these examples would be characterized as Level B harassment, the resulting impact on the population could be different. Context differences such as these are analyzed in our negligible impact analysis for each application under the MMPA.

Through the response to public comments in the 1989 implementing regulations, NMFS also indicated (1) that we would consider cumulative effects that are reasonably foreseeable when preparing a National Environmental Policy Act (NEPA) analysis, and (2) that reasonably foreseeable cumulative effects would also be considered under section 7 of the ESA for ESA-listed species, as appropriate. Accordingly, NMFS has written an Environmental Assessment (EA) that addressed cumulative impacts of the NES1 project and all past, present and reasonably foreseeable future actions. Additionally, the NMFS Alaska Regional Office issued a BiOp on December 15, 2023, under section 7 of the ESA, on the issuance of an IHA to the POA under section 101(a)(5)(D) of the MMPA by the NMFS OPR that independently considered the reasonably foreseeable cumulative effects of activities on ESA-listed species.

Comment 4: The CBD asserts that NMFS's negligible impact determination is arbitrary and capricious and that the specified activities would have greater than a negligible impact on CIBWs. The CBD claims that NMFS failed to substantiate its assumption that impacts are negligible because CIBWs remained in the area during similar construction activities and that NMFS underestimated the impacts of pile driving on CIBWs. They state that pile driving threatens marine mammals by potentially displacing them from key foraging habitat, causing hearing loss, masking communications, and interfering with natural behaviors. They cite several studies regarding behavioral responses of marine mammals to pile driving.

Response: NMFS disagrees with the CBD's claim that NMFS failed to substantiate our assumptions that impacts to CIBWs are negligible in our determination. In the Negligible Impact Analysis and Determination section of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023) and this notice of issuance, we describe how the take estimated and authorized for the NES1 project will have a negligible impact on all of the affected species, including CIBWs (as discussed above). We discussed how this determination is based upon the authorized number of CIBWs that might be exposed briefly during the 110 nonconsecutive days of activity, the low level of behavioral harassment that might result from an instance of take that could occur within a year, and the likelihood that the mitigation measures required further lessen the likelihood of exposures. NMFS has considered the status of CIBWs in its analysis, as well as the importance of reducing impacts from anthropogenic noise, but nonetheless, there is no evidence that brief exposure to low level noise causing Level B harassment would have a greater than negligible impact on CIBWs.

NMFS' negligible impact finding considers a number of parameters including, but not limited to, the nature of the activities (*e.g.,* duration, sound source), effects/intensity of the taking, the context of takes, and mitigation. For CIBWs, NMFS' finding did account for data demonstrating that CIBWs are not discouraged from entering Knik Arm and traveling to critical foraging grounds to the north when pile driving activities, such as those proposed by NES1, are occurring (*e.g.,* 61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022), but it also relied on other data that show at most, low-level behavioral responses of CIBWs to pile driving activities. For example, during the POA's PCT and South Floating Dock (SFD) pile driving activities, CIBWs were more likely to display no reaction or to continue to move towards the POA during pile installation and removal (61N Environmental, 2021, 2022a, 2022b). In situations during which CIBWs showed a possible reaction to pile driving, individuals were observed either moving away from the pile driving activities or increasing their rate of travel (61N Environmental, 2021, 2022a, 2022b). Other behavioral responses observed in relation to pile driving activities include moving silently through the area, decreased sighting durations, and the formation of more cohesive groups (Kendall and Cornick, 2015).

NMFS understands that marine mammals will have varying responses to elevated noise levels resulting from pile driving activities such as masking of communication and foraging signals, avoidance behaviors, and more. However, NMFS disagrees with CBD that we have underestimated the impacts of pile driving on beluga whales. Marine mammal data collected at the POA during pile driving activities, as described above, provides evidence that effects of pile driving on CIBWs will be limited to temporary modifications in behavior such as increased swim speeds, tighter group formations, and cessation of vocalizations, but not through the loss of foraging capabilities or abandonment of habitat. Further, while masking of CIBW signals can have a profound impact on the communication of CIBWs (*e.g.,* Brewer *et al.,* 2023), the short-term duration and limited areas affected by the NES1 project make it very unlikely that the fitness of individual marine mammals would be impacted. In addition, the frequency range of pile driving activities is typically below 1 kHz (Richardson *et al.,* 1995), which is below the peak frequencies for many CIBW communication signals (Brewer *et al.,* 2023). Therefore, while expected impacts to CIBWs from the NES1 project are considered Level B harassment events, they are events with relatively little consequence for individuals in terms of energetic effects or foregone opportunities to engage in important foraging or social behaviors.

While exposure to elevated noise levels associated with the NES1 project may result in low-level behavioral changes in CIBWs, NMFS' review of the best available scientific evidence, as summarized and cited herein, demonstrates that these responses do not rise to the level of having adverse effects on the reproduction or survival of CIBWs. CBD provides no evidence to the contrary. Therefore, NMFS has appropriately concluded that the activity will have a negligible impact on the CIBW population.

Comment 5: The CBD expressed concern regarding the take estimates for CIBWs proposed by NMFS. They state that the take estimates fail to explain how pods of animals are accounted for and improperly discounts the estimated CIBW take with a 59 percent adjustment. They suggest that this supposed failure may result in a higher take than anticipated. They believe that take should be estimated without considering the demonstrated efficacy of the proposed mitigation requirements, with expected benefits of the mitigation requirements being described only separately.

Response: CBD is concerned that exposure of one pod of whales to harassment by the construction could exceed the take authorized. They cite McGuire *et al.* (2020) which suggests CIBW groups can be between 61 and 313 whales. CBD is correct that there have been large observations of CIBW pods, and that if one very large pod appeared near the POA during pile driving activities, it could result in the POA meeting or exceeding authorized take for this species. However, such large pods are not expected to be observed near the POA based on the best scientific information available, including recent marine mammal monitoring efforts. The mean (median, standard deviation) CIBW group size observed during the 2020 through 2022 POA and NMFS marine mammal monitoring efforts in Knik Arm were 4.28 (3, 4.86) whales (61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022). Further, the 95 percentile group size of CIBWs observed during these years was 12.30 individuals. This means that of the 495 documented CIBW groups in these data sets, 95 percent consisted of fewer than 12.3 whales; 5 percent of the groups consisted of more than 12.3 whales. Lastly, the largest group observed during these efforts was 53 individuals. Therefore, NMFS believes that the 72 takes by Level B harassment authorized for CIBW during the authorized one-year period adequately accounts for the possibility of the POA taking multiple pods (or groups) of CIBWs.

The CBD stated that the 59 percent adjustment is ''based on one data point'' from the PCT project monitoring program. This is incorrect. As described in the Estimated Take sections of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023) and this notice of issuance, this adjustment was calculated by including data from all observations from April to November for each year of the PCT project, the same time frame over which the POA will be conducting the NES1 project. Between the two phases of the PCT project, 90 total Level B harassment takes were authorized and 53 were potentially realized (*i.e.,* 53 CIBWs were observed within estimated Level B harassment zones), equating to an overall percentage of 59 percent (Note that simple occurrence within the estimated harassment zone in and of itself does not demonstrate that a take has occurred). In our calculations for estimating CIBW take in the Estimated Take sections of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023) and this notice of issuance, NMFS did preliminarily calculate take for CIBWs without the 59% adjustment (*i.e.,* 122 instances of take). However, we disagree with the CBD that the adjustment for mitigation requirements should be described separately and not be considered in the take estimation. This 59% adjustment is based on the effectiveness of monitoring during the PCT Phase 1 and PCT Phase 2 projects, which most accurately reflect the current POA marine mammal monitoring program, the current program's effectiveness, and CIBW occurrence in the proposed project area. It is anticipated that the POA monitoring program during the NES1 project will be similar to that of the program implemented during the PCT project. Therefore, NMFS has determined that it is appropriate to include the adjustment in our calculation of authorized take.

Comment 6: The CBD assert that the root mean square (RMS) thresholds of 120-decibels (dB) referenced to 1 micropascal (re 1µPa) for continuous and 160 dB re 1µPa for impulsive or intermittent sources are insufficiently conservative to protect CIBWs. They cite Mooney *et al.* (2018), which suggests that wild beluga whales have highly sensitive hearing. They state that, at a minimum, NMFS should use a 120-dB threshold for all sound sources.

Response: NMFS disagrees that we should apply a 120-dB threshold for Level B harassment from all sound sources based on beluga hearing sensitivity. First, we provide here some necessary background on implementation of acoustic thresholds. NMFS has historically used generalized acoustic thresholds based on received levels to predict the occurrence of behavioral disturbance rising to the level of Level B harassment, given the practical need to use a relatively simple threshold based on information that is available for most activities. Thresholds were selected largely in consideration of measured avoidance responses of mysticete whales to airgun signals and to industrial noise sources, such as drilling. The selected thresholds of 160-dB RMS sound pressure level (SPL) and 120-dB RMS SPL, respectively, have been extended for use for estimation of behavioral disturbance rising to the level of Level B harassment associated with noise exposure from sources associated with other common activities.

Sound sources can be divided into broad categories based on various criteria or for various purposes. As discussed by Richardson *et al.* (1995), source characteristics include strength of signal amplitude, distribution of sound frequency and, importantly in context of these thresholds, variability over time. With regard to temporal properties, sounds are generally considered to be either continuous or transient (*i.e.,* intermittent). Continuous sounds, which are produced by the industrial noise sources (such as vibratory pile driving) for which the 120-dB behavioral threshold was selected, are simply those for which sound pressure levels remain above background sound during the observation period (ANSI, 2005). Intermittent sounds are defined as sounds with interrupted levels of low or no sound (NIOSH, 1998). Simply put, a continuous noise source produces a signal that continues over time, while an intermittent source produces signals of relatively short duration having an obvious start and end with predictable patterns of bursts of sound and silent periods (*i.e.,* duty cycle) (Richardson and Malme, 1993). It is this fundamental temporal distinction that is most important for categorizing sound types in terms of their potential to cause a behavioral response. For example, Gomez *et al.* (2016) found a significant relationship between source type and marine mammal behavioral response when sources were split into continuous (*e.g.,* shipping, icebreaking, drilling) versus intermittent (*e.g.,* sonar, seismic, explosives) types. In addition, there have been various studies noting differences in responses to intermittent and continuous sound sources for other species (*e.g.,* Neo *et al.,* 2014; Radford *et al.,* 2016; Nichols *et al.,* 2015).

Given the existing paradigm—dichotomous thresholds appropriate for generic use in evaluating the potential for behavioral disturbance rising to the level of Level B harassment resulting from exposure to continuous or intermittent sound sources—the CBD does not explain why potential harassment from an intermittent sound source (*i.e.,* impact pile driving) should be evaluated using a threshold developed for use with continuous sound sources. As we have stated in prior responses to this recommendation, consideration of the preceding factors leads to a conclusion that the 160-dB threshold is more appropriate for use for intermittent sources such as impact pile driving than the 120-dB threshold.

Further, any dB-based threshold itself is a step-function approach (*i.e.,* animals exposed to received levels above the threshold are considered to be ''taken'' and those exposed to levels below the threshold are not); but, in reality, it is in fact intended as a sort of mid-point of likely behavioral responses (which are extremely complex depending on many factors including species, noise source, individual experience, and behavioral context). What this means is that, conceptually, the function recognizes that some animals exposed to levels below the threshold will in fact react in ways that are appropriately considered take, while others that are exposed to levels above the threshold will not. Use of a specific dB threshold allows for a simplistic quantitative estimate of take, while we can qualitatively address the variation in responses across different received levels in our discussion and analysis.

Lastly, NMFS has acknowledged that the scientific evidence indicates that certain species are, in general, more acoustically sensitive than others. In particular, harbor porpoise and beaked whales are considered to be behaviorally sensitive, and it may be appropriate to consider use of lower Level B harassment thresholds for these species. Beluga whales have been observed to have sensitive hearing (<80 dB) in the frequency range of 16 to 100 kilohertz (kHz) (Mooney *et al.,* 2018). However, noise from pile driving activities is typically below 1 kHz (Richardson *et al.,* 1995), well outside this sensitive hearing range. Therefore, based on the best available science (*i.e.,* Mooney *et al.,* 2018), sensitivity in CIBW hearing does not support the application of a 120-dB threshold for Level B harassment from all pile driving sound sources. NMFS is currently engaged in an ongoing effort to develop updated guidance regarding the effects of anthropogenic sound on marine mammal behavior, and in this effort NMFS is considering this issue for assessing Level B harassment. However, until this work is completed and new guidelines are identified (if appropriate), NMFS will continue using the historical Level B harassment thresholds (or derivations thereof) and will appropriately evaluate behavioral disturbance rising to the level of Level B harassment due to intermittent sound sources relative to the 160-dB threshold.

Comment 7: CBD states that NMFS should undertake the analysis using the framework provided by Southall *et al.* (2023) to determine the vulnerability of marine mammals to noise disturbance.

Response: Southall *et al.* (2023) present an analytical framework for assessing the relative risk of anthropogenic disturbances, such as those resulting from noise, on marine vertebrates. This framework is based on both species-specific 'vulnerability' (which accounts for population, life history, auditory communication systems, and environmental factors) and species-specific and scenario-specific 'severity' (which includes population modeling methods for acute (short-term, project specific) exposure events) and a spatial-temporal-spectral algorithm for estimating a disturbance magnitude metric from aggregate events (long-term, multiple years, and or multiple projects). For each species and exposure scenario, a vulnerability and severity risk rating are computed, which allows for the assessment of the overall risk of each scenario for each species. Lastly, in this framework a subjective consideration of confidence in the risk assessment scores is provided. The Southall *et al.* (2023) framework has been used to model results from the construction and operation of wind farms and seismic surveys.

While the framework presented by Southall *et al.* (2023) is a useful tool for evaluating risk of marine mammals to exposure events, such as pile driving activities, it is intended to be used as a complementary tool to use when implementing marine policies. It is ''not intended to replicate or supersede current regulatory guidelines for auditory or behavioral impact'' (Southall *et al.,* 2023). Furthermore, the framework presented by Southall *et al.* (2023) does not estimate defined impacts such as injury (equivalent to Level A harassment) or behavioral disturbance (equivalent to Level B harassment) that would inform take estimates. In the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023) and this notice of issuance, NMFS discusses the anticipated impacts of the NES1 project activities in the context of species status, which included an assessment of species population trends, life history traits, auditory communication systems, and environmental factors as well as estimated impacts of project activities. Thus, for this action, NMFS has determined that the application of the framework proposed by Southall *et al.* (2023) would not provide meaningful additive information in our assessment of take or in our negligible impact determination, and therefore, we do not apply it here.

Comment 8: The CBD states that NMFS' negligible impact determination fails to adequately consider adverse impacts to CIBW critical habitat and biologically important areas (BIAs). In addition, they assert that the proposed NES1 project does not avoid or impose any specific mitigation for the year-round CIBW BIA.

Response: In our analysis, NMFS considered the potential for impacts to CIBWs and their habitat in general (*see* the Potential Effects of Specified Activities on Marine Mammals and their Habitat section of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023). The CIBW Recovery Plan (NMFS, 2016b) determined that CIBWs having waters that do not restrict passage within or between critical habitat areas and having waters with in-water noise levels below levels resulting in abandonment of critical habitat were essential for the conservation of this species. While some marine mammals—largely harbor porpoise, which are generally considered as one of the most behaviorally sensitive marine mammal species—have been observed to abandon or reduce time spent in preferred habitat during periods of increased anthropogenic noise (*e.g.,* Wartzok *et al.,* 2003; Carstensen *et al.,* 2006; Dähne *et al.,* 2012; Forney *et al.,* 2017), CIBW presence in the project area has persisted during numerous periods of pile driving, dredging, and other construction activities at the POA. Previous monitoring data indicates that CIBWs are not abandoning critical habitat and are able to transit through the project area to primary foraging areas north of the Port. Instead, they travel more often and faster past the POA, more quietly, and in tighter groups (Kendall and Cornick, 2015; 61N Environmental, 2021, 2022a, 2022b). Moreover, marine mammal monitoring results from the POA and NMFS (*e.g.,* 61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022) suggest that the areas that are expected to be impacted by noise during the NES1 project are not particularly important feeding or calving areas for CIBWs. Rather CIBWs typically transit through the area adjacent to the POA to foraging areas located to the north (*e.g.,* Six Mile Creek, Eagle River, Eklutna River). For these reasons, NMFS expects the effects that sounds from the NES1 project will have on these essential features will be small (see NMFS, 2023a).

Concerning BIAs, CBD improperly cited Ferguson *et al.* (2015) when referring to the CIBW BIA. This BIA was updated by Wild *et al.* (2023) as part of the BIA II effort, which built upon the 2015 study but used new methodology and structured expert elicitation principles to update existing BIAs, and identify and delineate new BIAs (see Harrison *et al.,* 2023). In this new effort, Wild *et al.* (2023) defined a static, year-round, small and resident BIA for CIBWs whose boundary is consistent with NMFS' critical habitat designation, (including excluding the area adjacent to POA, illustrating that the area is of low value) (Wild *et al.,* 2023).

In regards to specific mitigation requirements for this year-round BIA, the proposed IHA does include a measure that requires the POA to make all practicable efforts to complete construction activities between April and July when CIBWs are typically found in lower numbers near the POA. However, due to the design of the existing sheet pile wall, the need for demolition to occur in a sequential manner to prevent structural failure, and uncertainty regarding construction progress until work is initiated, the POA cannot commit to restricting pile driving to these months. Given that the location and sequencing of the activity cannot be changed, NMFS has prescribed mitigation measures that affect the least practicable adverse impact on the stock. CBD did not provide a specific recommendation for NMFS to consider.

Comment 9: The CBD stresses that NMFS should have analyzed the potential impact on feeding of preferred prey in making its negligible impact determination.

Response: NMFS provided this information in the Acoustic Impacts section of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023), and provides additional discussion in the Negligible Impact Analysis and Determination section for CIBWs of this notice. In summary, the habitat near the POA is not typically considered high quality foraging habitat for CIBWs and feeding is not a predominant behavior observed in CIBWs near the POA. Further, there is no evidence to suggest that CIBWs are restricted in transiting between preferred feeding areas during pile driving activities (*e.g.,* 61N Environmental, 2021, 2022a, 2022b, 2022c; Easley-Appleyard and Leonard, 2022). Lastly, any impacts to preferred prey are anticipated to be temporary, and most likely limited to fish avoiding the action area.

Comment 10: The CBD postulates that NMFS' small numbers determination is flawed because the amount of take proposed to be authorized is greater than 12 percent of the CIBW population and that NMFS' definition of small numbers ''conflates this criterion with the negligible impact requirement.'' CBD claims the incidental harassment authorization here violates the MMPA because it does not guarantee that only small numbers of CIBWs and other marine mammals impacted by the POA's activities will be taken.

Response: CBD suggests that by defining small numbers to be relative to the overall population the criterion ends up being similar to the negligible impact finding and that Congress's intent was that the MMPA protect not only populations, but individual marine mammals. We disagree that our small numbers finding is conflated with our negligible impact finding. While ''small numbers'' is simply a percent of the population, our negligible impact finding considers a number of parameters including, but not limited to, the nature of the activities (*e.g.,* duration, sound source), effects/intensity of the taking, the context of takes, and mitigation.

The reference to a take limit of 12 percent for small numbers comes from a 2003 district court opinion (*Natural Resources Defense Council* v. *Evans,* 279 F.Supp.2d 1129 (N.D. Cal. 2003)). However, given the particular administrative record and circumstances in that case, including the fact that our small numbers finding for the challenged incidental take rule was based on an invalid regulatory definition of small numbers, we view the district court's opinion regarding 12 percent as dicta.

In NMFS' Final Rule for taking of marine mammals incidental to geophysical surveys in the Gulf of Mexico (86 FR 5322, January 19, 2021), NMFS fully describes its interpretation and implementation of ''small numbers''. Included as part of that discussion, NMFS explains the concept of ''small numbers'' in recognition that there could also be quantities of individuals taken that would correspond with ''medium'' and ''large'' numbers. As such, NMFS has established that one-third of the most appropriate population abundance number—as compared with the assumed number of individuals taken—is an appropriate limit with regard to ''small numbers.'' This relative approach is consistent with the statement from the legislative history that ''[small numbers] is not capable of being expressed in absolute numerical limits'' (H.R. Rep. No. 97–228, at 19 (September 16, 1981)), and relevant case law (*Center for Biological Diversity* v. *Salazar,* 695 F.3d 893, 907 (9th Cir. 2012) (holding that the U.S. Fish and Wildlife Service reasonably interpreted ''small numbers'' by analyzing take in relative or proportional terms)).

As described in the Small Numbers section of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023) and this notice of issuance, NMFS is authorizing take of less than 2 percent for eight stocks and 22 percent for one stock (*i.e.,* CIBWs) and based on this analysis, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Comment 11: CBD asserts that NMFS relies on visual monitoring measures that it claims are ''known to be ineffective and inadequate'' to protect marine mammals.

Response: NMFS disagrees the mitigation and monitoring measures included in this authorization are ineffective and inadequate and CBD does not provide additional information to support their claim. The IHA requires a minimum of two Protected Species Observer (PSO) stations, and that at each station, at least two PSOs must be on watch at any given time. Further, the PSO stations must be located so that the PSOs can fully monitor the shutdown zones and call for activities to be delayed when CIBWs are entering or observed within the Level B harassment zones. The POA has a demonstrated history of successfully implementing a rigorous monitoring program during recent construction projects in Knik Arm (*i.e.,* PCT and SFD), and monitoring data from these projects provides evidence that their PSOs are capable of observing belugas out to 11,057-m from the NES1 project site. This distance is dependent on several factors such as visual acuity, sea state, glare, animal behavior/body type, speed of travel for vessel and animal, *etc.*; but this demonstrates that it is possible for PSOs to detect and identify marine mammals to the species level several km from the source, including CIBWs. In addition, Easley-Appleyard and Leonard (2022) reported that PSOs who worked for the PCT monitoring program expressed that they were effective at detecting CIBWs from two monitoring stations despite occasional challenges related to the timing of the detection and the ability to track multiple CIBW groups.

The majority of the work for this project will be the vibratory removal of sheet piles, which has an estimated Level B harassment distance of 1,954-m. The largest zones will be associated with the installation and removal of the temporary steel pipe piles, which could have estimated Level B harassment zones up to 6,861-m. These distances are well within the distances that PSOs at the POA have effectively detected CIBWs as described above. Further, there are mitigation measures preventing pile driving from occurring if visibility in any portion of the shutdown zone (*i.e.,* the Level B harassment zone for CIBWs) is obscured by weather or sea state. Therefore, we find the visual monitoring plan can reasonably be expected to be an effective tool at detecting marine mammals, ensuring the mitigation measures are adhered to.

Comment 12: CBD suggests that construction should be restricted from August through October, and further states that NMFS ''should also consider time area restrictions that would further mitigate impacts to beluga whales and other marine mammals,'' though it provides no recommendations.

Response: Time-area restrictions were considered for this project, in addition to the PSO requirements. We note that August through November are months with high CIBW abundance, and NMFS expects that the POA will likely have to shut down pile driving activities more frequently during that time period due to the increased presence of CIBWs in Knik Arm. NMFS is requiring the POA to complete in-water work as early in the construction season as is practicable. However, the design of the existing sheet pile wall, the safety requirements of the demolition sequencing, and the likely highly adaptive nature of the field work once construction commences do not allow NMFS to practicably restrict pile driving to any specific time periods or areas (*e.g.,* only allowing pile driving April through July). Furthermore, there are potential consequences of pausing or delaying the construction season, including de-rating the structural capacity of the existing docks, a shutdown of dock operations due to deteriorated conditions, or an actual collapse of one or more dock structures. The potential for collapse increases with schedule delays, due to both worsening deterioration and the higher probability of a significant seismic event occurring. Any of these scenarios could have dire consequences for the populations of Anchorage and Alaska who are served by the POA. In this context, NMFS has determined that the current mitigation and monitoring measures affect the least practicable adverse impact on marine mammal species and stocks.

Comment 13: CDB states that NMFS failed to consider other mitigation measures to reduce the proposed activities' impacts to the least practicable level such as bubble curtains placement configurations, pile caps, physical barrier technologies, such as dewatered cofferdams, passive acoustic monitoring (PAM), and sound source verification (SSV) studies.

Response: CBD does not provide any specific information contradicting NMFS' determinations concerning whether these measures should be included in the suite of mitigation requirements determined to provide the means of effecting the least practicable adverse impact on the affected species or stocks of marine mammals. CBD states that bubble curtains were required for previous POA pile driving activities, and recommends that one could be placed beyond the construction area for the NES1 site due to spacing and safety concerns. They also state that NMFS could consider other noise mitigation technologies such as pile caps, dewatered cofferdams, and other physical barrier mitigation. CBD is correct that NMFS has required the POA to use bubble curtains for other POA pile driving activities. During construction of the PCT, two different types of bubble curtain systems were utilized, confined bubble curtain systems and unconfined bubble curtain systems. Both bubble curtain systems were expensive to construct, maintain, and repair. It was necessary to build several versions of each model for each pile size in case of damage and so that two or more piles could be simultaneously staged and prepared for installation, which was done in an effort to save time. Both bubble curtain systems were time-consuming to deploy and retrieve, adding an average of 6 hours (confined) and 4 hours (unconfined) of deployment and retrieval time to each pile. Thus, as described in the Proposed Mitigation section of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023), adding a requirement for a bubble curtain may hinder production of the NES1 project, which could push the in-water construction schedule further into the late summer months, which are known for higher CIBW abundance in lower Knik Arm, thus lengthening the duration of potential interactions between CIBW and in-water works. Lastly, data from prior SSV studies conducted during the PCT project (*i.e.,* Illingworth & Rodkin (I&R), 2021a, 2022b), yielded mixed results regarding the efficacy of bubble curtains for use with vibratory hammers (which makes up the majority of the NES1 project). Therefore, a requirement to use bubble curtains in this case (aside from the cost and safety concerns) would likely have a detrimental impact over the full scope of the project.

Further, dredging associated with the NES1 project will frequently require barges and vessels to maneuver through the area between the sheet pile face and the disposal area located in the middle of Knik Arm. Additional barges to stage air compressors for a bubble curtain would add multiple anchor lines that would present a logistical challenge to the frequent vessel transit and increase the risk of a safety incident, particularly if there were to be an uncontrolled release of sediments from a structure collapse. Additional vessels, air compressors, and crew also increase the cost and potential negative impacts of the project. The POA believes this combination of logistical challenges, time requirements, and safety considerations make it impractical for the POA to use a bubble curtain for this project. NMFS has considered input from the POA, as well as other information, and concurs that use of bubble curtains is not practicable in this case. Additional information regarding practicability and efficacy concerns with using bubble curtains during the NES1 project were included in the Proposed Mitigation section of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023) and the Mitigation section of this notice.

Pile cap cushions are commonly used in conjunction with an impact hammer to reduce stress on a pile during hammer blows. Their efficacy as an underwater sound attenuation measure during pile installation remains uncertain. There are safety and logistical concerns with the use of a pile cap cushion as they have been known to combust from the friction created during impact pile driving. The NES1 project does not involve the installation of piles using an impact hammer. Pile cap cushions are not compatible with vibratory pile installation or removal, or with sheet pile installation or removal. Therefore, the inclusion of pile caps is not a feasible option for this project.

Other physical barrier technologies, such as dewatered cofferdams, would substantially increase project risks, construction schedule and costs. Cofferdams are typically sheet pile structures supported by cylindrical steel piles that would require installation and removal of temporary sheet and cylindrical piles along the entire length of the NES1 face sheets, which would increase potential impacts on CIBWs and other marine species. Other physical barriers installed into Knik Arm would also need to be engineered to a level to resist the tidal forces of Knik Arm, and would likely require pile supports, increasing impacts, duration, and cost. Thus, NMFS has determined that the recommendation of applying other physical barriers to mitigate noise from construction activities is not an appropriate addition to the required suite of mitigation measures for the NES1 project.

In addition, the CBD states that NMFS should require PAM for marine mammals. The use of PAM for real-time mitigation purposes has been used in Cook Inlet for some studies. These efforts have generally not resulted in successful deployment of PAM or useful detections of marine mammals to inform mitigation and monitoring during the activities due to the environmental conditions of the region. For example, a real-time PAM system implemented as part of the 2012 Apache 3D seismic survey program in lower- and mid-Cook Inlet only yielded six confirmed marine mammal detections. One of these detections was of a CIBW, however, it did not result in a shutdown procedure (Lomac-MacNair *et al.,* 2013). Similarly, a real-time PAM program was required in the IHA for the 2015 SAExploration 3D seismic program. This program only detected 15 marine mammal detections (including 2 from CIBWs) over 310 hours. For these reasons, we have determined PAM is not likely to be sufficiently effective at detection for real-time mitigation for the POA's construction activities and, therefore, is not included in the IHA.

Researchers have begun to implement more effective passive acoustic monitors for research purposes at several places in Cook Inlet (*e.g.,* Castellote *et al.,* 2020). However, the framework used by those researchers is impractical, particularly for the POA's planned activity. An article on NOAA's website (*https://www.fisheries.noaa.gov/science-blog/beluga-whale-acoustic-monitoring-survey-post-3*) illustrates the level of customization, expertise, and difficulty required to assemble a passive acoustic mooring to then deploy in the Inlet. Additionally, these instruments are stationary, which means to effectively use these monitors as a means of avoiding harassment of marine mammals during the POA's, the POA would need to build and successfully deploy dozens (or more) of stationary monitors along a route of travel that is subject to change depending upon weather or other environmental and shipping restrictions. Additionally, the data stored on these types of moorings is not accessible until they are retrieved by the researcher who deployed them. In the future, if an established network of passive acoustic monitors with shared access to the data is available, this could be a useful tool for implementing mitigation measures, but is currently not practicable. NMFS looks forward to advances in technology that could make real-time PAM a practicable mitigation measure in these areas in the future.

Lastly, CBD recommends that NMFS should require that in-situ SSV studies be conducted to ensure that the Level A and Level B harassment zones are sufficient. Lessons learned from prior SSV studies carried out at the POA (*e.g.,* I&R, 2021a, 2022b) indicate that Knik Arm is a very challenging environment to collect high quality acoustic data usable by NMFS, the POA, and others due to the presence of strong tidal currents, which can create substantial flow noise in recordings, and prevalent anthropogenic noise, which can mask acoustic signals of interest. Specifically during the NES1 project, multiple barges, tugs, and other support vessels, which can obscure signals of interest, will be within the action area at all times during the project. Further, active dredging and removal of above-water soils, and vessels with generators running will be present at all times. While both the POA and NMFS believe sound source data would be valuable, this measure is not practicable given the known challenges of the area.

Comment 14: CBD asserts that NMFS should require larger exclusion zones.

Response: CBD did not provide any additional information for NMFS to consider to support this recommendation. The exclusion zones proposed in the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023) (referred to as shutdown zones) are equivalent to the estimated Level B harassment zone for CIBWs. This is consistent with shutdown zones required in other recent ITAs issued to the POA for construction activities at the Port including the PCT (85 FR 19284, April 6, 2020) and SFD (86 FR 50057, September 7, 2021) projects, which resulted in the number of CIBWs occurring within estimated harassment zones being 59 percent and 7 percent of the authorized take for each project, respectively. Therefore, NMFS disagrees that the final IHA should include larger exclusion zones and requires the exclusion zones proposed in the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023) in the final IHA.

Comment 15: The CBD asserts that a 1-year renewal should require new permitting and programmatic analysis of impacts.

Response: NMFS disagrees with this assertion. NMFS' IHA Renewal process meets all statutory requirements. All IHAs issued, whether an initial IHA or a Renewal IHA, are valid for a period of not more than 1-year. Renewal IHAs are limited to another year of identical or nearly identical activities in the same location or the same activities that were not completed within the 1-year period of the initial IHA. Should a Renewal request be made, additional documentation would be required from the POA that NMFS would make publicly available and would use to verify that the activities are identical to those in the initial IHA, are nearly identical such that the changes would have either no effect on impacts to marine mammals or decrease those impacts, or are a subset of activities already analyzed and authorized but not completed under the initial IHA. NMFS would also confirm, among other things, that the activities would occur in the same location; involve the same species and stocks; provide for continuation of the same mitigation, monitoring, and reporting requirements; and that no new information had been received that would alter the prior analysis. If new information has been received that would alter the prior analysis, that information would be analyzed in the notice of the proposed Renewal IHA. A Renewal request would also contain a preliminary monitoring report, specifically to verify that effects from the activities do not indicate impacts of a scale or nature not previously analyzed. Any Renewal request is subject to an additional 15-day public comment period that provides the public an opportunity to review these few documents, provide any additional pertinent information and comment on whether they think the criteria for a Renewal have been met. Between the initial 30-day comment period on these same activities and the additional 15 days, the total comment period for a Renewal is 45 days.

In addition to the IHA Renewal process being consistent with all requirements under section 101(a)(5)(D), it is also consistent with Congress' intent for issuance of IHAs to the extent reflected in statements in the legislative history of the MMPA. Through the provision for Renewals in the regulations, description of the process and express invitation to comment on specific potential Renewals in the Request for Public Comments section of each proposed IHA, the description of the process on NMFS' website, further elaboration on the process through responses to comments such as these, posting of substantive documents on the agency's website, and provision of 30 or 45 days for public review and comment on all proposed initial IHAs and Renewals respectively, NMFS has ensured that the public ''is invited and encouraged to participate fully in the agency decision-making process.''

Regarding a programmatic analysis, we refer to our response to Comment 3.

Comment 16: CBD asserts that the proposed activities will have an unmitigable adverse impact on subsistence uses. CBD states that the proposed activities may have an adverse impact on the availability of beluga whales, harbor seals, and Steller sea lions for Native Alaskan subsistence harvest. They also state that the IHA should require consultation with Native Alaskan communities to ensure adequate mitigation for subsistence harvest for harbor seals and Steller sea lions.

Response: The POA sent letters to and conducted follow-up calls with the Kenaitze, Tyonek, Knik, Eklutna, Ninilchik, Salamatof, and Chickaloon Tribes informing them of the proposed project (*i.e.,* timing, location, and features), the availability of the notice of proposed IHA for public comment, and inquiring about any marine mammal subsistence concerns they have. The POA also explained the measures that have been taken or will be taken to minimize any adverse effects of NES1 on the availability of marine mammals for subsistence uses. No Tribes or affected subsistence communities/users expressed concern over subsistence use during the 30-day public comment period for the proposed IHA. One letter was received from Eklutna Inc. requesting that Alaska Native residents with traditional knowledge about marine mammals and the local marine environment be involved in the monitoring and support roles related to the project (*i.e.,* as PSOs) (see Comment 22 Response), but it did not suggest concerns regarding unmitigable adverse impact on subsistence uses. The POA adequately communicated with representative Alaska Native subsistence users and Tribal members to ensure any concerns they had regarding marine mammal subsistence uses would be addressed, hence fulfilling any requirements provided by the MMPA.

Overall, there is little subsistence use of marine mammals near the project area. There has been no subsistence harvest of CIBWs since 2005 (NMFS, 2022d) and subsistence harvest of other marine mammals in upper Cook Inlet is limited to harbor seals. Steller sea lions are rare in upper Cook Inlet; therefore, subsistence use of this species is not common. Residents of the Native Village of Tyonek are the primary subsistence users in the upper Cook Inlet area, however no NES1 activities will take place in or near Tyonek's identified traditional subsistence hunting areas. Additionally, the harvest of marine mammals in upper Cook Inlet is historically a small portion of the total subsistence harvest, and the number of marine mammals harvested in upper Cook Inlet is expected to remain low. The potential impacts from harassment on stocks that are harvested in Cook Inlet would be limited to minor behavioral changes (*e.g.,* increased swim speeds, changes in dive time, temporary avoidance near the POA) within the vicinity of the POA or slight PTS. NMFS has found that the taking of marine mammals incidental to the NES1 project would have a negligible impact on the population, meaning we do not anticipate there to be adverse impacts on the annual rates of recruitment or survival. Therefore, the taking would not impede recovery of CIBW for potential future subsistence use. The full explanation and support for this finding is described further in the Unmitigable Adverse Impact Determination section of this notice.

NMFS has required rigorous mitigation and monitoring measures in the IHA to reduce impacts to CIBWs, Steller sea lions, and harbor seals including shutdown measures at the Level B harassment zone for CIBWs and Level A harassment zone for harbor seals and Steller sea lions if pile driving is occurring and an animal enters the zone. These measures are expected to reduce both the scope and severity of potential harassment takes by reducing the potential for exposure above harassment thresholds. In addition to the mitigation measures, the POA will monitor from elevated platforms at a minimum of two locations dispersed throughout lower Knik Arm. All stations will have at least two NMFS-approved observers on-watch at any given time. Therefore, marine mammal detection effectiveness is expected to be high. In accordance with our implementing regulations at 50 CFR 216.104(c), we use the best available scientific evidence to determine whether the taking by the specified activity within the specified geographic region will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses. Based on the scientific evidence available, NMFS determined that the impacts of the authorized take incidental to pile driving would result in a negligible impact and no unmitigable adverse impact on availability of marine mammals for subsistence uses.

Comment 17: CBD states that NMFS must prepare a programmatic environmental impact statement (EIS) for its CIBW take authorizations. They state that at a minimum, NMFS should analyze the PAMP in a single NEPA review that considers all cumulative, indirect, and direct environmental effects.

Response: For clarity, NMFS' authorization does not ''approve activities''; that permitting responsibility lies with the United States Army Corps of Engineers (USACE). Rather, NMFS authorizes unintentional take of marine mammals incidental to specified activities. Therefore, under NEPA, NMFS must evaluate the impacts of our issuance of the ITA to the POA for the NES1 activities.

NMFS originally declared its intent to prepare an EIS for oil and gas activities in Cook Inlet, Alaska (79 FR 61616, October 14, 2014). However, in a 2017 **Federal Register** notice (82 FR 41939, September 5, 2017), NMFS indicated that due to a reduced number of ITA requests in the region, combined with funding constraints at that time, we were postponing any potential preparation of an EIS for oil and gas activities in Cook Inlet. As stated in the 2017 **Federal Register** notice, should the number of ITA requests, or anticipated requests, noticeably increase, NMFS will re-evaluate whether preparation of an EIS is necessary. Currently, the number of ITA requests for activities that may affect marine mammals in Cook Inlet is at such a level that preparation of an EIS is not yet necessary. Nonetheless, under NEPA, NMFS is required to consider cumulative effects of other potential activities in the same geographic area, and these are discussed in greater detail in the Final EA prepared for this issuance of an IHA to the POA for the NES1 project, which supports our finding that NMFS' issuance of the POA IHA will not have a significant impact on the human environment.

CBD assert that NMFS should analyze the PAMP in a single NEPA review and comment that ''[NMFS] has already segmented analysis of the [PCT] and [SFD] and, here, the NES1 construction''. NMFS has appropriately analyzed and captured all past, present and reasonably foreseeable future actions under NEPA. This includes the projects associated with the PAMP, which each have independent utility and require separate authorizations and NEPA analyses. The EAs for each PAMP activity appropriately analyze the cumulative, indirect, and direct environmental effects of each specified action. They include an evaluation of each action's affected area, the scale and geographic extent of each action, and the degree of cumulative effects on resources (including the duration of impact, and whether the impacts were adverse and/or beneficial and their magnitude) under NEPA.

CBD is correct that Federal agencies generally prepare an EIS for a major Federal action significantly affecting the quality of the human environment. While CBD acknowledges that significance is determined by considering the potential affected environment and the degree of the action (40 CFR 1501.3(b)), CBD argues that if this factor is met, then the agency must prepare an EIS. CBD further argues that, ''the impacts on an endangered species like the environmentally and culturally significant Cook Inlet beluga and its designated critical habitat is sufficient to trigger a full EIS.'' NMFS disagrees. NMFS can prepare an EA so long as the record supports the conclusion that potential impacts are not ''significant'' per 40 CFR 1501.3(b) for the purposes of NEPA. Based on the information presented in the application and NMFS' Policy and Procedures for Compliance with the NEPA and Related Authorities (Companion Manual (CM) for NOAA Administrative Order (NAO) 216–6A) (NOAA 2017), sections 3 and 7, NMFS' determination to prepare an EA is appropriate and in compliance with NEPA and 40 CFR 1501.3. NMFS appropriately signed a Finding of No Significant Impact (FONSI) for the issuance of the IHA for incidental take associated with the POA's NES1 project in support of this determination. The FONSI concluded that NMFS' proposed action, the issuance of an IHA to the POA, will not meaningfully contribute to significant impacts to specific resources, given the limited scope of NMFS' action and required mitigation measures. Accordingly, preparation of an EIS for this action is not necessary.

Comment 18: CBD believes the draft EA for the NES1 project fails to comply with the requirements of NEPA. They stipulate that the draft EA fails to consider a reasonable range of alternatives and lacks a meaningful environmental and cumulative impacts analysis.

Response: In accordance with the NEPA and the Council on Environmental Quality (CEQ) Regulations, NMFS is required to consider a reasonable range of alternatives to a Proposed Action, as well as a No Action Alternative. Reasonable alternatives are viable options for meeting the purpose and need for the proposed action. The evaluation of alternatives under NEPA assists NMFS with understanding, and as appropriate, minimizing impacts through an assessment of alternative ways to achieve the purpose and need for our Proposed Action. Reasonable alternatives are carried forward for detailed evaluation under NEPA while alternatives considered but determined not to meet the purpose and need are not carried forward. For the purposes of this EA, an alternative will only meet the purpose and need if it satisfies the requirements of section 101(a)(5)(D) of the MMPA.

In accordance with NOAA's implementing procedures, the CM for NAO 216–6A, Section 6.B.i, NMFS is defining the No Action alternative as not authorizing the requested incidental take of marine mammals under Section 101(a)(5)(D) of the MMPA. This is consistent with our statutory obligation under the MMPA to either: (1) Deny the requested authorization; or (2) grant the requested authorization and prescribe mitigation, monitoring, and reporting requirements. The Preferred Alternative (*i.e.,* issuance of the IHA) includes mandatory mitigation, monitoring, and reporting requirements for POA to achieve the MMPA standard of effecting the least practicable adverse impact on each species or stock of marine mammal and their habitat, paying particular attention to rookeries, mating grounds, and other areas of similar significance. Since NMFS is required to prescribe mitigation to effect the least practicable adverse impact on marine mammals, mitigation that reduces impacts on marine mammals is inherently included in Alternative 2 (the proposed action) and is included as part of the analysis of alternative(s) in the Environmental Consequences chapter in the EA. NMFS described both the No Action Alternative and Preferred Alternative in the EA. We have also included an ''Alternatives Considered but Eliminated from Further Consideration'' section in the final EA that considered whether other alternatives could meet the purpose and need while supporting this applicant's proposal to demolish the NES. There is no requirement under NEPA to consider more than two alternatives, or to consider alternatives that are substantially similar to other alternatives or which have substantially similar consequences. NMFS' range of alternatives is based on the proposed action and the purpose and need, which are linked to NMFS' authorities under the MMPA. For the purposes of analysis under NEPA in the EA, an alternative will only meet the purpose and need if it satisfies the requirements under section 101(a)(5)(D) of the MMPA. Therefore, NMFS determined that, based on our authorities and criteria under the MMPA, which included criteria regarding mitigation measures, appropriate considerations were applied to identify which alternatives to carry forward for analysis.

CBD comments that the environmental and cumulative impacts section of the EA is not sufficient. CBD asserts that NMFS does not evaluate what the level of take will have on individual whales or the population, and fails to take into account any impact to CIBW pods. In addition, they state that NMFS does not include the most recent available information regarding the impacts of noise on marine mammals, and new information about CIBWs. In the draft EA, NMFS described both the general effects to marine mammals from exposure to noise (*e.g.,* pile driving) and scientific literature identifying responses of CIBWs to pile driving at the POA in Chapter 4 of the EA. This includes, as described in the **Federal Register** notice of proposed IHA (88 FR 76576, November 6, 2023) and in our response to *Comment 1,* data from several years of recent scientific monitoring at the POA during previous work involving pile driving (*e.g.,* Kendall and Cornick, 2016; 61N Environmental, 2021, 2022a, 2022b, 2022c; Easley-Appleyard and Leonard, 2022). In Chapter 3 of the EA we also describe anticipated impacts on marine mammal habitat and their prey. We believe these descriptions are sufficient with regard to the requirements of NEPA and the CEQ regulations.

NMFS disagrees that we did not include the most recent available information about noise on marine mammals or new information about CIBWs. As described above, the EA includes an analysis of CIBW observations directly in relation to in-water construction, including pile driving activities from 2020 through 2021 that took place at the POA (61N Environmental, 2021, 2022a, 2022b, 2022c; Easley-Appleyard and Leonard, 2022). Chapter 4 of the EA also includes an assessment on the impacts on marine mammals to noise that includes recent information on permanent and temporary threshold shifts, avoidance or abandonment behaviors, changes in vocalizations, and the masking of communication and foraging signals. The impacts of the NES1 project on marine mammals, including CIBWs, are expected to represent short-term, localized, negligible, adverse, direct impacts. For CIBWs, NMFS anticipates these impacts will manifest as whales moving more quickly and silently through the area, in more cohesive groups, but not by habitat abandonment or ceasing traveling through Knik Arm.

CBD also states that the draft EA fails to evaluate the cumulative impacts of other proposed projects and ongoing activities in Cook Inlet. In Chapter 4 of the draft EA, NMFS evaluated the cumulative impacts of the past, present, and reasonably foreseeable future actions in the action area, including projects associated with PAMP and the Alaska LNG project, which the CBD mentioned should be included, and research activities. These instances do not change NMFS' overall determination regarding the cumulative impacts of the NES1 project on marine mammals or marine mammal habitat. As stated in the draft EA, while consideration of activities in sum suggests an increase in industrialization of Cook Inlet, many of the past, present, and reasonably foreseeable future actions are spatially and temporally limited and do not permanently reduce or degrade the habitat available to marine mammals or their prey species. While the NES1 project would add an incremental contribution to the combined environmental impacts of other past, present, and reasonably foreseeable future actions; those direct and indirect adverse impacts are expected to be mainly short-term, localized, and minor, as described in the draft EA. None of the harassment authorized by NMFS in other ITAs would overlap in time or space with impacts from the NES1 Project.

The CBD postulates that NMFS' consideration of climate change is inadequate. However, CBD improperly states that the proposed project is for cement and petroleum. That is incorrect as the proposed project is for the demolition of portions of the failed NES sheet pile structure and reconfiguration and realignment of the shoreline within the North Extension. NMFS considers climate change in its EA. However, as mentioned above NMFS does not authorize any of the POA's activities but rather take of marine mammals incidental to the POA's activities. While changes in environmental conditions due to climate change could result in prey distribution changes or loss for beluga whales or other marine mammals, the NES1 project is planned to occur during a 1-year period, during which time the impacts of climate change on marine mammals are likely to remain at baseline levels.

Comment 19: CBD states that NMFS must comply with the ESA but asserts that NMFS should not issue take authorization under the ESA because such taking would jeopardize the continued existence of CIBWs.

Response: In the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023), NMFS indicated that we requested section 7 consultation under the ESA. CBD indicates they believe the proposed taking would jeopardize the recovery and survival of CIBWs but did not further explain how they reached this conclusion. NMFS has fully complied with the ESA. NMFS Alaska Region issued a BiOp on December 15, 2023 concluding that issuance of take, by harassment, of CIBW, humpback whales (Mexico Distinct Population Segment (DPS) and Western DPS), and Steller sea lions would not jeopardize the continued existence of those stocks and the takings would not adversely modify critical habitat. The full analysis supporting these conclusions can be found in the BiOp (NMFS, 2023a).

Comment 20: In their letter, CBD stated they did not believe NMFS should authorize take of CIBWs and other marine mammals but, if NMFS did take action to do so, we must impose stringent mitigation measures to ensure the least practicable adverse impact on protected species.

Response: The proposed IHA included a suite of mitigation measures, which have been carried forward into the final IHA, which NMFS determined to effect the least practicable adverse impact on marine mammals, in accordance with the MMPA (see the Mitigation section).

Comment 21: A commenter from Eklutna, Inc. representing the indigenous Dena'ina people of the Anchorage, Alaska area requested that Dena'ina individuals from the local area be trained and employed as NMFS-approved PSOs. They stated that the Dena'ina people possess a deep-seated knowledge and understanding of the local marine ecosystem, particularly concerning the marine mammals that NMFS aims to protect through its monitoring efforts. Given the significance of these species to their way of life and the potential impacts of the NES1 project, the commenter proposed that members of their community be actively involved in the monitoring and support roles related to the project. They stressed that this initiative would not only ensure effective monitoring of marine mammals, but also foster a sense of ownership and participation among the indigenous community in the conservation efforts.

Response: NMFS agrees that Alaska Native residents with traditional knowledge about marine mammals and the local marine environment hold valuable knowledge and skills that are critical to the effectiveness of a PSO. In the final IHA, NMFS requires at least one PSO to have at least 1-year of prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA or Letter of Concurrence. Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA. For this project, in consideration of valuable traditional ecological knowledge that many community members hold, PSOs may also substitute relevant Alaska native traditional knowledge for experience. Regarding hiring preference for regional residents with traditional ecological knowledge, NMFS cannot require an IHA-holder to employ certain individuals, though it does require that an applicant request NMFS approval for all PSOs so that NMFS can confirm that they meet the requirements outlined in the IHA. NMFS has passed this recommendation on to the POA for its consideration and has suggested that the POA send letters to the Kenaitze, Tyonek, Knik, Eklutna, Ninilchik, Salamatof, and Chickaloon Tribes informing them of the hiring process when known.

Changes From the Proposed IHA to Final IHA

As a result of the public comments received from CBD and Eklutna, Inc. (and summarized above), provisions were added to the final IHA and this **Federal Register** notice of issuance that incorporates additional discussion regarding impacts to CIBW preferred prey, and our clarification of requirements related to PSO qualifications (*i.e.,* making clear that relevant Alaska native traditional knowledge can be considered as a substitute for relevant experience when considering prospective PSOs for the NES1 project).

Since the **Federal Register** notice of the proposed IHA was published (88 FR 76576, November 6, 2023), NMFS became aware of an error in the calculation of the RMS SPLs that were used as proxies for unattenuated vibratory pile removal of steel pipe piles for this project. NMFS has recalculated these levels and has revised the Estimated Take section accordingly. Specifically, the RMS SPL proxy for the vibratory removal of 24-inch (61-cm) piles changed from 168-dB to 169-dB. The RMS SPL for the vibratory removal of 36-inch (91-cm) piles did not change (*i.e.,* it remains 159-dB RMS). As a result of the change to the 24-inch (61-cm) RMS SPL, the Level B harassment zone for this activity increased from 5,967-m to 6,861-m, and the Level A harassment zones for low-frequency cetaceans, mid-frequency cetaceans, high-frequency cetaceans, and phocid pinniped increased slightly (*i.e.,* between 1-m to 7-m increases). Given the shutdown zone for CIBWs is equivalent to the Level B harassment zone (see the Mitigation section of this **Federal Register** notice of issuance), the shutdown zone for this activity has increased from 6,000-m to 6,900-m (6,861-m rounded up) for this species. The shutdown zone for low-frequency cetaceans also increased from 40-m to 50-m due to this change.

In the proposed IHA, NMFS proposed to require the POA to submit interim weekly and monthly monitoring reports (that include raw electronic data sheets) during the NES1 construction season. Since the **Federal Register** notice of the proposed IHA published (88 FR 76576, November 6, 2023), the POA has expressed concern that the inclusion of raw electronic data sheets with weekly and monthly reports will not be feasible for their monitoring program. In addition, the raw data will need to be reviewed and corrected for any errors. Rather, the POA has agreed to submit the final electronic data sheets with the final draft summary report. NMFS has accepted this request and has revised the final IHA to indicate that the final electronic data sheets must be submitted with the final draft summary report instead of with the required weekly and monthly monitoring reports. This is consistent with reporting requirements for the PCT and SFD IHAs.

Typographical errors identified in tables 2 and 13 in the **Federal Register** notice of the proposed IHA have been corrected in this **Federal Register** notice of issuance (see tables 1 and 10, respectively). In addition, some clarifying language regarding source levels proposed for impact pile removal and pile splitting has been added to the Estimated Take section. Lastly, in the Endangered Species Act section of the **Federal Register** notice of the proposed IHA, NMFS omitted reference to the Western North Pacific DPS of humpback whales as a listed species under the ESA for which NMFS OPR was requesting ESA section 7 consultation. However, this species was considered in the formal consultation and is assessed in the BiOp issued by the NMFS Alaska Regional Office on December 15, 2023. No other changes have been made from the proposed IHA to the final IHA.

Description of Marine Mammals in the Area of Specified Activities

There are seven species of marine mammals that may be found in upper Cook Inlet during the planned construction and demolition activities. Sections 3 and 4 of the IHA application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Additional information on CIBWs may be found in NMFS' 2016 Recovery Plan for the CIBW, available online at *https://www.fisheries.noaa.gov/resource/document/recovery-plan-cook-inlet-beluga-whale-delphinapterus-leucas,* and NMFS' 2023 report on the abundance and trend of CIBWs in Cook Inlet in June 2021 and June 2022, available online at *https://www.fisheries.noaa.gov/resource/document/abundance-and-trend-belugas-delphinapterus-leucas-cook-inlet-alaska-june-2021-and.*

Table 2 lists all species or stocks for which take is expected and authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Alaska and Pacific SARs (*e.g.,* Carretta, *et al.,* 2023; Young *et al.,* 2023). Values presented in table 2 are the most recent available at the time of publication and are available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* The most recent abundance estimate for CIBWs, however, is available from Goetz *et al.* (2023) and available online at *https://www.fisheries.noaa.gov/feature-story/new-abundance-estimate-endangered-cook-inlet-beluga-whales.*

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Table 2 -- Species Likely Impacted by the Specified Activities

Common name	Scientific name	MMPA Stock	ESA/MMPA status; Strategic (Y/N)[1]	Stock abundance N_{best}, (CV, N_{min}, most recent abundance survey)[2]	PBR	Annual M/SI[3]
Order Cetartiodactyla – Cetacea – Superfamily Mysticeti (baleen whales)						
Family Eschrichtiidae						
Gray whale	*Eschrichtius robustus*	Eastern North Pacific	-/-; N	26,960 (0.05, 25,849, 2016)	801	131
Family Balaenopteridae (rorquals)						
Humpback whale	*Megaptera novaeangliae*	Hawaii	-, -, N	11,278 (0.56, 7,265, 2020)	127	27.09
		Mexico-North Pacific	T, D, Y	N/A (N/A, N/A, 2006)	UND[5]	0.57
Order Cetartiodactyla – Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae						
Beluga whale	*Delphinapterus leucas*	Cook Inlet	E/D; Y	331 (0.076, 290, 2022)[4]	0.53	0
Killer whale	*Orcinus orca*	Eastern North Pacific Alaska Resident	-/-; N	1,920 (N/A, 1,920, 2019)	19	1.3

		Eastern North Pacific Gulf of Alaska, Aleutian Islands and Bering Sea Transient	-/-; N	587 (N/A, 587, 2012)	5.9	0.8
Family Phocoenidae (porpoises)						
Harbor porpoise	*Phocoena phocoena*	Gulf of Alaska	-/-; Y	31,046 (0.214, N/A, 1998)	UND [5]	72
Order Carnivora – Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions)						
Steller sea lion	*Eumetopias jubatus*	Western	E/D; Y	52,932 (N/A, 52,932 2019)	318	255
Family Phocidae (earless seals)						
Harbor seal	*Phoca vitulina*	Cook Inlet/ Shelikof Strait	-/-; N	28,411 (N/A, 26,907, 2018)	807	107

1 - ESA status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

2 - NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable (N.A.).

3 - These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury (M/SI) from all sources combined (*e.g.*, commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

4 - This abundance estimate is from Goetz *et al.* (2023).

5 - UND means undetermined.

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On June 15, 2023, NMFS released an updated abundance estimate for endangered CIBWs in Alaska (Goetz *et al.,* 2023) that incorporates aerial survey data from June 2021 and 2022, but which is not included in the most recent SAR (Young *et al.,* 2023). Data collected during NMFS recent aerial survey effort suggest that the whale population is stable or may be increasing slightly. Goetz *et al.* (2023) estimated that the population size is currently between 290 and 386, with a median best estimate of 331. In accordance with the MMPA, this population estimate will be incorporated into the next draft CIBW SAR, which will be reviewed by an independent panel of experts, the Alaska Scientific Review Group. After this review, the SAR will be made available as a draft for public review before being finalized. We have determined that it is appropriate to consider the CIBW estimate of abundance reported by Goetz *et al.* (2023) in our analysis rather than the older estimate currently available from the Alaska SAR (Young *et al.,* 2023) because it is based on the most recent and best available science.

As indicated above, all seven species (with nine managed stocks) in table 2 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. Minke whales (*Balaenoptera acutorostrata*) and Dall's porpoises (*Phocoenoides dalli*) also occur in Cook Inlet; however, the spatial occurrence of these species is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here. Data from the Alaska Marine Mammal Stranding Network database (NMFS, unpublished data) provide additional support for these determinations. From 2011 to 2020, only one minke whale and one Dall's porpoise were documented as stranded in the portion of Cook Inlet north of Point Possession. Both were dead upon discovery; it is unknown if they were alive upon their entry into upper Cook Inlet or drifted into the area with the tides. With very few exceptions, minke whales and Dall's porpoises do not occur in upper Cook Inlet, and therefore take of these species is considered unlikely.

In addition, sea otters (*Enhydra lutris*) may be found in Cook Inlet. However, sea otters are managed by the U.S. Fish and Wildlife Service (USFWS) and are not considered further in this document.

A detailed description of the species likely to be affected by the NES1 project, including a brief introduction to the affected stock as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023). Since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. Please also refer to NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65-dB threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in table 3. Specific to this action, gray whales and humpback whales are considered low-frequency (LF) cetaceans, CIBWs, and killer whales are considered mid-frequency (MF) cetaceans, harbor porpoises are considered high-frequency (HF) cetaceans, Steller sea lions are otariid pinnipeds, and harbor seals are phocid pinnipeds.

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Table 3 -- Marine Mammal Hearing Groups (NMFS, 2018)

Hearing Group	Generalized Hearing Range*
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz
High-frequency (HF) cetaceans (true porpoises, *Kogia*, river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*)	275 Hz to 160 kHz
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz

* Represents the generalized hearing range for the entire group as a composite (*i.e.*, all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65-dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.*, 2007) and PW pinniped (approximation).

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The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013). This division between phocid and otariid pinnipeds is now reflected in the updated hearing groups proposed in Southall *et al.* (2019).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from the POA's construction activities have the potential to result in harassment of marine mammals in the vicinity of the POA. The **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from the POA's construction activities on marine mammals and their habitat. That information and analysis is referenced in this notice of issuance of the final IHA and is not repeated here; please refer to the notice of the proposed IHA (88 FR 76576, November 6, 2023).

Estimated Take

This section provides an estimate of the number of incidental takes authorized through the IHA, which will inform both NMFS' consideration of ''small numbers,'' and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of 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).

Authorized takes will primarily be by Level B harassment, as use of the acoustic sources (*i.e.,* vibratory and impact pile driving) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for HF cetaceans and phocids because predicted auditory injury zones are larger than for MF cetaceans and otariids. Auditory injury is unlikely to occur for mysticetes, MF cetaceans, and otariids due to measures described in the Mitigation section. The mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable. As described previously, no serious injury or mortality is anticipated or authorized for this activity. Below we describe how the take numbers were estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021; Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above RMS SPL of 120-dB re 1 μPa for continuous (*e.g.,* vibratory pile driving, drilling) and above RMS SPL 160-dB re 1 μPa for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by temporary threshold shift (TTS) as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

The POA's planned activity includes the use of continuous (vibratory pile driving) and intermittent (impact pile driving) noise sources, and therefore the RMS SPL thresholds of 120- and 160-dB re 1 μPa are applicable.

Level A Harassment. NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0; NMFS, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The POA's planned activity includes the use of impulsive (impact pile driving) and non-impulsive (vibratory driving) sources.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

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Table 4 -- Thresholds Identifying the Onset of Permanent Threshold Shift

	PTS Onset Acoustic Thresholds* (Received Level)	
Hearing Group	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1* $L_{pk,flat}$: 219 dB $L_{E,LF,24h}$: 183 dB	*Cell 2* $L_{E,LF,24h}$: 199 dB
Mid-Frequency (MF) Cetaceans	*Cell 3* $L_{pk,flat}$: 230 dB $L_{E,MF,24h}$: 185 dB	*Cell 4* $L_{E,MF,24h}$: 198 dB
High-Frequency (HF) Cetaceans	*Cell 5* $L_{pk,flat}$: 202 dB $L_{E,HF,24h}$: 155 dB	*Cell 6* $L_{E,HF,24h}$: 173 dB
Phocid Pinnipeds (PW) (Underwater)	*Cell 7* $L_{pk,flat}$: 218 dB $L_{E,PW,24h}$: 185 dB	*Cell 8* $L_{E,PW,24h}$: 201 dB
Otariid Pinnipeds (OW) (Underwater)	*Cell 9* $L_{pk,flat}$: 232 dB $L_{E,OW,24h}$: 203 dB	*Cell 10* $L_{E,OW,24h}$: 219 dB

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa^{2}s. In this table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI, 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for NMFS' 2018 Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.*, varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

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Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss (*TL*) coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the planned project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile removal and vibratory pile installation and removal). Calculation of the area ensonified by the specified action is dependent on the background sound levels at the project site, the source levels of the planned activities, and the estimated transmission loss coefficients for the planned activities at the site. These factors are addressed in order, below.

Background Sound Levels at the Port of Alaska. As noted in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023), the POA is an industrial facility in a location with high levels of commercial vessel traffic, port operations (including dredging), and extreme tidal flow. Previous measurements of background noise at the POA have recorded a background SPL of 122.2-dB RMS (Austin *et al.,* 2016). NMFS concurred that this SPL reasonably represents background noise near the project area, and therefore we have used 122.2-dB RMS as the threshold for Level B harassment (instead of 120-dB RMS).

Sound Source Levels of Specified Activities. The intensity of pile driving sounds is greatly influenced by factors such as the type of piles (material and diameter), hammer type, and the physical environment (*e.g.,* sediment type) in which the activity takes place. In order to calculate the distances to the Level A harassment and the Level B harassment sound thresholds for the methods and piles being used in this project, the POA used acoustic monitoring data from sound source verification studies to develop proxy source levels for the various pile types, sizes and methods (table 5). While site-specific sound source verification studies have been conducted at the POA, the vast majority of the measurements recorded in those studies were made when bubble curtains were deployed around the sound source, which act to attenuate sound levels (Austin *et al.,* 2016; I&R, 2021a, 2021b). Bubble curtains are not a feasible mitigation measure for the NES1 project due to the demolition and sequencing nature of the project (see the Mitigation section of this notice for additional discussion), and therefore the majority of the proxy values for this project are based on measurements recorded from locations other than the POA.

Underwater sound was measured in 2008 at the POA for the Marine Terminal Redevelopment Project (MTRP) during installation of sheet piles to assess potential impacts of sound on marine species. Sound levels for installation of sheet piles measured at 10-m typically ranged from 147- to 161-dB RMS, with a mean of approximately 155-dB RMS (James Reyff, unpublished data). An SPL of 162-dB RMS was reported in (California Department of Transportation (CALTRANS), 2020) summary tables for 24-inch (61-cm) steel sheet piles. This is a more rigid type of sheet pile that requires a large vibratory driver (James Reyff, personal communication, August 26, 2020). Based on the 2008 measurements at the POA and the CALTRANS data, a value of 160-dB RMS was assumed for vibratory removal of sheet piles.

NMFS concurred that the source levels proposed by the POA for all pile sizes during impact removal and vibratory installation of all pile types are appropriate to use for calculating harassment isopleths for the POA's planned NES1 activities (table 5). Impact removal is the process of hitting a pile with an impact hammer with a small number of strikes (up to 50 per pile) to loosen it from the soil so that it can be removed via other means such as direct pulling or with a vibratory hammer. There are no data to our knowledge available on impact removal of this nature. The POA proposed to use SPL values measured during the impact installation of 24-inch (61-cm) AZ steel sheet piles from the Berth 23, Port of Oakland Project (CALTRANS, 2020) for this activity. Given this is the best available information, NMFS has accepted the POA's proposed SPLs for this activity.

However, the source levels proposed by the POA for vibratory pile removal were based on limited data collected at the POA. Therefore, NMFS considered and evaluated all data related to unattenuated vibratory removal of 24-inch (61-cm) and 36-inch (91-cm) steel pipe piles available, including sound source verification data measured at the POA during the PCT project (Reyff *et al.,* 2021a) and elsewhere (*i.e.,* Coleman, 2011; U.S. Navy, 2012; I&R, 2017). NMFS gathered data from publicly available reports that reported driving conditions and specified vibratory removal for certain piles. If vibratory removal was not specifically noted for a given pile, we excluded that data from the analysis. Mean RMS SPLs reported by these studies were converted into pressure values, and pressure values for piles from each project were averaged to give a single SPL for each project. The calculated project means were then averaged and converted back into dBs to give a single recommended SPL (rounded to the nearest whole dB) for each pile type.

Ten measurements were available for unattenuated vibratory removal of 24-inch (61-cm) piles: 3 from Columbia River Crossing in Oregon (mean RMS SPL of 173-dB; Coleman, 2011), 5 from Joint Expeditionary Base Little Creek in Norfolk, Virginia (mean RMS SPL of 148-dB; I&R, 2017), and 2 from the PCT project at the POA (mean RMS SPL of 169-dB; I&R, 2021a, 2023). The calculated average SPL for unattenuated vibratory removal of 24-inch (61-cm) steel pipe piles from these studies was 169-dB RMS (table 5). Forty measurements were available for unattenuated vibratory removal of 36-inch (91-cm) piles: 38 from the U.S. Navy Test Pile Program at Naval Base Kitsap in Bangor, Washington (mean RMS SPL of 160-dB; U.S. Navy, 2012), and 2 from the PCT project at the POA (mean RMS SPL of 159-dB; I&R, 2021, 2023). The calculated average SPL for unattenuated vibratory removal of 36-inch (91-cm) steel pipe piles from these studies was 159-dB RMS (table 5). Note that the proxy values in table 5 represent SPL referenced at a distance of 10- m from the source.

Interestingly, the RMS SPLs for the unattenuated vibratory removal of 24-inch (61-cm) piles were much louder than the unattenuated vibratory removal of 36-inch (91-cm) piles, and even louder than the unattenuated vibratory installation of 24-inch piles. I&R (2023) suggest that at least for data recorded at the POA, the higher 24-inch (61-cm) removal levels are likely due to the piles being removed at rates of 1,600 to 1,700 revolutions per minute (rpm), while 36-inch (91-cm) piles, which are significantly heavier than 24-inch (61-cm) piles), were removed at a rate of 1,900 rpm. The slower rates combined with the lighter piles would cause the hammer to easily ''jerk'' or excite the 24-inch (61-cm) piles as they were extracted, resulting in a louder rattling sound and louder sound levels. This did not occur for the 36-inch (91-cm) piles, which were considerably heavier due to increased diameter, longer length, and greater thickness.

Table 5 -- Summary of Unattenuated In-Water Pile Driving Proxy Levels (at 10 m)

Pile Type	Installation or Removal	Peak SPL (re 1 μPa)	RMS SPL (re 1 μPa)	SEL[1] (re 1 μPa²-sec)	Source
Impact driving					
Sheet pile	Removal	205	189	179	CALTRANS (2020)
Vibratory driving					
Sheet pile	Removal (hammer or splitter)	NA	160	NA	CALTRANS (2015, 2020)
24-inch (61-cm) steel pipe	Installation		161		U.S. Navy (2015)
	Removal		169		Coleman (2011), I&R (2017, 2021, 2023)
36-inch (91-cm steel pipe	Installation		166		U.S. Navy (2015)
	Removal		159		U.S. Navy (2012), I&R (2021, 2023)

[1]Sound Exposure Level

A splitter will be used in conjunction with a vibratory hammer to make vertical cuts in sheet piles as necessary to help with their removal. The POA assumes that a pile splitter will produce the same or similar sound levels as a vibratory hammer without the splitter attachment; therefore, the POA combined use of a vibratory hammer to remove sheet pile and use of a splitter into a single category (*i.e.,* vibratory hammer removal). NMFS is currently unaware of any hydroacoustic measurements of pile splitting with a vibratory hammer. NMFS specifically requested comments on the proposed SPL values for vibratory pile splitting in the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023). No additional data or recommendations for proxy SPLs for these activities were received during the public comment period. Given this is the best available information, NMFS has accepted the POA's proposed SPLs and assessments.

Transmission Loss. For unattenuated impact pile driving, the POA proposed to use 15 as the *TL* coefficient, meaning they assumed practical spreading loss (*i.e.,* the POA assumes $TL = 15*Log_{10}(range)$); NMFS concurred with this value and has used the practical spreading loss model for impact driving in this analysis.

The *TL* coefficient that the POA proposed for unattenuated vibratory installation and removal of piles is 16.5 (*i.e.,* $TL = 16.5*Log_{10}(range)$). This value is an average of measurements obtained from two 48-inch (122-cm) piles installed via an unattenuated vibratory hammer in 2016 (Austin *et al.,* 2016). To assess the appropriateness of this *TL* coefficient to be used for the NES1 project, NMFS examined and analyzed additional *TL* measurements recorded at the POA. This included a *TL* coefficient of 22 (deep hydrophone measurement) from the 2004 unattenuated vibratory installation of one 36-inch (91-cm) pile in Knik Arm (Blackwell, 2004), as well as *TL* coefficients ranging from 10.3 to 18.2 from the unattenuated vibratory removal of 24-inch (61 cm) and 36-inch (91-cm) piles and the unattenuated vibratory installation of one 48-inch (122-cm) pile at the POA in 2021 (I&R 2021, 2023). To account for statistical interdependence due to temporal correlations and equipment issues across projects, values were averaged first within each individual project, and then across projects. The mean and median value of the measured *TL* coefficients for unattenuated vibratory piles in Knik Arm by project were equal to 18.9 and 16.5, respectively. NMFS used the project median *TL* coefficient of 16.5 during unattenuated vibratory installation and removal of all piles during the NES1 project. This value is representative of all unattenuated vibratory measurements in the Knik Arm. Further, 16.5 is the mean of the 2016 measurements, which were made closer to the NES1 project area than other measurements and were composed of measurements from multiple directions (both north and south/southwest).

Estimated Harassment Isopleths. All estimated Level B harassment isopleths are reported in table 6. At POA, Level B harassment isopleths from the NES1 project will be limited by the coastline along Knik Arm along and across from the project site. The maximum predicted isopleth distance is 6,861-m during vibratory removal of 24-inch (61-cm) steel pipe piles.

The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources such as pile driving, the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the User Spreadsheet are reported in table 6 and the resulting isopleths and ensonified areas are reported in table 7.

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Table 6 -- NMFS User Spreadsheet Inputs

	Impact Pile Driving	Vibratory Pile Driving					
	Sheet Pile	Sheet Pile	24-inch (61-cm) steel pipe		36-inch (91-cm) steel pipe		
	Removal	Removal	Installation	Removal	Installation	Removal
Spreadsheet Tab Used	E.1) Impact pile driving	A.1) Non-Impul, Stat, Cont.	A.1) Non-Impul, Stat, Cont.	A.1) Non-Impul, Stat, Cont.	A.1) Non-Impul, Stat, Cont.	A.1) Non-Impul, Stat, Cont.
Source Level (SPL)	179 dB SEL	160 dB RMS	161 dB RMS	169 dB RMS	166 dB RMS	159 dB RMS
Transmission Loss Coefficient	15	16.5	16.5	16.5	16.5	16.5
Weighting Factor Adjustment (kHz)	2	2.5	2.5	2.5	2.5	2.5
Time to install / remove single pile (minutes)	--	5	15	15	15	15
Number of strikes per pile	50	--	--	--	--	--
Piles per day	3	24	12	12	12	12
Distance of sound pressure level measurement (m)	10	10	10	10	10	10

Table 7 -- Calculated Distance and Areas of Level A and Level B Harassment Per Pile Type and Pile Driving Method

Activity	Pile Type / Size	Level A harassment distance (m)					Level B harassment distance (m) all hearing groups	Level B harassment area (km^2) all hearing groups
		LF	MF	HF	PW	OW		
Impact Removal	Sheet pile	153	6	182	82	6	858	1.44
Vibratory Installation	24-inch (61-cm)	14	2	20	9	1	2,247	8.39
	36-inch (91-cm)	28	4	40	18	2	4,514	26.13
Vibratory or Splitter Removal	Sheet pile	10	1	14	6	1	1,954	6.47
Vibratory Removal	24-inch (61-cm)	42	5	60	27	3	6,861	37.64
	36-inch (91-cm)	11	2	15	7	1	1,700	4.99

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Marine Mammal Occurrence and Take Estimation

In this section we provide information about the occurrence of marine mammals, including density or other relevant information which informed the take calculation. We also describe how the information provided above was synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and is authorized.

Gray Whale

Sightings of gray whales in the project area are rare. Few, if any, gray whales are expected to approach the project area. However, based on three separate sightings of single gray whales near the POA in 2020 and 2021 (61N Environmental, 2021, 2022a; Easley-Appleyard and Leonard, 2022), the POA anticipates that up to six individuals could be within estimated harassment zones during NES1 project activities. Therefore, NMFS authorized six takes by Level B harassment for gray whales during the NES1 project. Take by Level A harassment is not anticipated or authorized. The Level A harassment zones (table 7) are smaller than the required shutdown zones (see the Mitigation section). It is unlikely that a gray whale will enter and remain within the Level A harassment zone long enough to incur PTS.

Humpback Whale

Sightings of humpback whales in the project area are rare, and few, if any, humpback whales are expected to approach the project area. However, there have been a few observations of humpback whales near the POA as described in the Description of Marine Mammals in the Area of Specified Activities section of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023). Based on the two sightings in 2017 of what was likely a single individual at the Anchorage Public Boat Dock at Ship Creek (ABR, Inc., 2017) south of the project area, the POA requested authorization of six takes of humpback whales. However, given the maximum number of humpback whales observed within a single construction season was two (in 2017), NMFS instead anticipates that only up to four humpback whales could be exposed to project-related underwater noise during the NES1 project. Therefore, NMFS authorized four takes by Level B harassment for humpback whales during the NES1 project. Take by Level A harassment is not anticipated or authorized. The Level A harassment zones (table 7) are smaller than the required shutdown zones (see the Mitigation section), therefore, it is unlikely that a humpback whale will enter and remain within the Level A harassment zone long enough to incur PTS.

Killer Whale

Few, if any, killer whales are expected to approach the NES1 project area. No killer whales were sighted during previous monitoring programs for POA construction projects, including the 2016 TPP, 2020 PCT, and 2022 SFD projects (Prevel-Ramos *et al.,* 2006; Markowitz and McGuire, 2007; Cornick and Saxon-Kendall, 2008, 2009; Cornick *et al.,* 2010, 2011; ICRC, 2009, 2010, 2011, 2012; Cornick and Pinney, 2011; Cornick and Seagars, 2016; 61N Environmental, 2021, 2022b), until PCT construction in 2021, when two killer whales were sighted (61N Environmental, 2022a). Previous sightings of transient killer whales have documented pod sizes in upper Cook Inlet between one and six individuals (Shelden *et al.,* 2003). Therefore, the POA conservatively estimated that no more than one small pod (assumed to be six individuals) could be within estimated harassment zones during NES1 project activities.

Take by Level A harassment is not anticipated or authorized due to the implementation of shutdown zones, which will be larger than the Level A harassment zones (described below in the Mitigation section), and the low likelihood that killer whales will approach this distance for sufficient duration to incur PTS. Therefore, NMFS authorized six takes by Level B harassment for killer whales.

Harbor Porpoise

Monitoring data recorded from 2005 through 2022 were used to evaluate hourly sighting rates for harbor porpoises in the NES1 project area (see table 4–3 in the POA's application). During most years of monitoring, no harbor porpoises were observed. However, there has been an increase in harbor porpoise sightings in upper Cook Inlet in recent decades (*e.g.,* 61N Environmental, 2021, 2022a; Shelden *et al.,* 2014). The highest sighting rate for any recorded year during in-water pile installation and removal was an average of 0.037 harbor porpoises per hour during PCT construction in 2021, when observations occurred across most months. Given the uncertainty around harbor porpoise occurrence at the POA and potential that occurrence is increasing, it is estimated that approximately 0.07 harbor porpoises per hour (the 2021 rate of 0.037 harbor porpoises per hour doubled) may be observed near the NES1 project area per hour of hammer use. With 246.5 hours of in-water pile installation and removal, the POA estimated that there could be 18 instances where harbor porpoises (0.07 harbor porpoises per hour * 246.5 hours = 17.3 harbor porpoises rounded up to 18 harbor porpoises) could be within estimated harassment zones during NES1 project activities.

Harbor porpoises are small, lack a visible blow, have low dorsal fins, an overall low profile, and a short surfacing time, making them difficult to observe (Dahlheim *et al.,* 2015). To account for the possibility that a harbor porpoise could enter a Level A harassment zone and remain there for sufficient duration to incur PTS before activities were shut down, the POA assumed that 5 percent of estimated harbor porpoise takes (1 take of harbor porpoise; 5 percent of 18 = 0.9, rounded up to 1) could be taken by Level A harassment. In its request, the POA rounded this estimate up to two to account for the average group size of this species, However, NMFS has determined such adjustments are generally unnecessary for purposes of estimating potential incidents of Level A harassment and did not concur with the request. At relatively close distances, NMFS believes it unlikely that groups will necessarily adhere to each other for sufficient duration for the entire group to incur PTS. While it is unlikely that a harbor porpoise could enter a Level A harassment zone for sufficient duration to incur PTS given the required shutdown measures (see the Mitigation section for more information) and potential for avoidance behavior, this species moves quickly and can be difficult to detect and track, therefore, NMFS authorized 1 take by Level A harassment and 17 takes by Level B harassment for harbor porpoises, for a total of 18 instances of take.

Steller Sea Lion

Steller sea lions are anticipated to occur in low numbers within the NES1 project area as summarized in the Description of Marine Mammals in the Area of Specified Activities section of the **Federal Register** of the proposed IHA (88 FR 76576, November 6, 2023). Similar to the approach used above for harbor porpoises, the POA used previously recorded sighting rates of Steller sea lions near the POA to estimate requested take for this species. During SFD construction in May and June of 2022, the hourly sighting rate for Steller sea lions was 0.028. The hourly sighting rate for Steller sea lions in 2021, the most recent year with observations across most months, was approximately 0.01. Given the uncertainty around Steller sea lion occurrence at the POA and potential that occurrence is increasing, the POA estimated that approximately 0.06 Steller sea lions per hour (the May and June 2022 rate of 0.028 Steller sea lions per hour doubled) may be observed near the NES1 project areas per hour of hammer use. With 246.5 hours of in-water pile installation and removal, the POA estimates that 15 Steller sea lions (0.06 sea lions per hour * 246.5 hours = 14.79 sea lions rounded up to 15) could be within estimated harassment zones during NES1 project activities. However, the highest number of Steller sea lions that have been observed during the 2020–2022 monitoring efforts at the POA was nine individuals (eight during PCT Phase 1 monitoring and one during NMFS 2021 monitoring). Given the POA's estimate assumes a higher Steller sea lion sighting rate (0.06) than has been observed at the POA and results in an estimate that is much larger than the number of Steller sea lions observed in a year, NMFS believed that the 15 estimated takes requested by the POA overestimated potential exposures of this species. NMFS instead authorized nine takes by Level B harassment for Steller sea lions during the NES1 project.

The largest Level A harassment zone for Steller sea lions is 6-m. While it is unlikely that a Steller sea lion will enter a Level A harassment zone for sufficient duration to incur PTS, the POA is aware of a Steller sea lion that popped up next to a work skiff during the TPP in 2016, which was documented as a potential take by Level A harassment by the PSOs on duty at the time. Pile driving, however, was not occurring at the time the event was recorded and a brief observation of an animal within a Level A harassment zone does not necessarily mean the animal experienced Level A harassment (other factors such as duration within the harassment zone need to be taken into consideration). However, as a result of the aforementioned event, the POA requested authorization of an additional two takes of Steller sea lions by Level A harassment. Given the small Level A harassment zone (6-m), and shutdown zones of ≥ 10-m (see the Mitigation section), NMFS believes that it is unlikely that a Steller sea lion will be within the Level A harassment zone for sufficient duration to incur PTS. Therefore, NMFS did not authorize take by Level A harassment for Steller sea lions. Rather, all nine estimated takes are authorized as Level B harassment.

Harbor Seal

No known harbor seal haulout or pupping sites occur in the vicinity of the POA. In addition, harbor seals are not known to reside in the NES1 project area, but they are seen regularly near the mouth of Ship Creek when salmon are running, from July through September. With the exception of newborn pups, all ages and sexes of harbor seals may occur in the NES1 project area. Any harassment of harbor seals during in-water pile installation and removal will involve a limited number of individuals that may potentially swim through the NES1 project area or linger near Ship Creek.

The POA evaluated marine mammal monitoring data to calculate hourly sighting rates for harbor seals in the NES1 project area (see table 4–1 in the POA's application). Of the 524 harbor seal sightings in 2020 and 2021, 93.7 percent of the sightings were of single individuals; only 5.7 percent of sightings were of 2 individual harbor seals, and only 0.6 percent of sightings reported 3 harbor seals. Sighting rates of harbor seals were highly variable and appeared to have increased during monitoring between 2005 and 2022. It is unknown whether any potential increase was due to local population increases or habituation to ongoing construction activities. The highest individual hourly sighting rate recorded for a previous year was used to quantify take of harbor seals for in-water pile installation and removal associated with NES1. This occurred in 2021 during PCT Phase 2 construction, when harbor seals were observed from May through September. A total of 220 harbor seal sightings were observed over 734.9 hours of monitoring, at an average rate of 0.30 harbor seal sightings per hour. The maximum monthly sighting rate occurred in September 2020 and was 0.51 harbor seal sightings per hour. Based on these data, the POA estimated that approximately one harbor seal (the maximum monthly sighting rate (0.51) rounded up) may be observed near the NES1 project per hour of hammer use. This approximate sighting rate of one harbor seal per hour was also used to calculate potential exposures of harbor seals for the SFD project (86 FR 50057, September 7, 2021). Therefore, the POA estimated that during the 246.5 hours of anticipated in-water pile installation and removal, up to 247 harbor seals (1 harbor seal per hour * 246.5 hours = 246.5 harbor seals, rounded up to 247) could be within estimated harassment zones.

Harbor seals often appear curious about onshore activities and may approach closely. The mouth of Ship Creek, where harbor seals linger, is about 2,500-m from the southern end of the NES1 and is therefore outside of the Level A harassment zones calculated for harbor seals (table 7). However, given the potential difficulty of tracking individual harbor seals along the face of the NES1 site and their consistent low-level use of the POA area, NMFS anticipates the potential for some take by Level A harassment for harbor seals. For the SFD project, NMFS authorized 8.6 percent of estimated harbor seal takes as potential Level A harassment based on the proportion of previous harbor seal sightings within the estimated Level A harassment zones for that project (86 FR 50057, September 7, 2021), but the NES1 Project is more distant from Ship Creek than SFD. NMFS therefore anticipated that a smaller proportion of takes by Level A harassment may occur during the NES1 project, and reduced this percentage to 5 percent. Therefore, NMFS authorized 13 harbor seal takes (5 percent of 247 exposures) by Level A harassment and 234 takes (247 exposures minus 13) by Level B harassment, for a total of 247 takes.

Beluga Whale

For the POA's PCT and SFD projects, NMFS used a sighting rate methodology to calculate potential exposure (equated to take) of CIBWs to sound levels above harassment criteria produced by the POA's construction activities (85 FR 19294, April 6, 2020; 86 FR 50057, September 7, 2021, respectively). For the PCT project, NMFS used data collected during marine mammal observations from 2005 to 2009 (Kendall and Cornick, 2015) and the total number of monthly observation hours during these efforts to derive hourly sighting rates of CIBWs per month of observation (April through November) (85 FR 19294, April 6, 2020). For the SFD project, observation data from 2020 PCT construction were also incorporated into the analysis (86 FR 50057, September 7, 2021; 61N Environmental, 2021).

The marine mammal monitoring programs for the PCT and SFD projects produced a unique and comprehensive data set of CIBW locations and movements (table 8; 61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022) that is the most current data set available for Knik Arm. During the PCT and SFD projects, the POA's marine mammal monitoring programs included 11 PSOs working from 4 elevated, specially designed monitoring stations located along a 9-km stretch of coastline surrounding the POA. The number of days data was collected varied among years and project, with 128 days during PCT Phase 1 in 2020, 74 days during PCT Phase 2 in 2021, and 13 days during SFD in 2022 (see table 6–7 in the POA's application for additional information regarding CIBW monitoring data). PSOs during these projects used 25-power ''big-eye'' and hand-held binoculars to detect and identify marine mammals, and theodolites to track movements of CIBW groups over time and collect location data while they remained in view.

These POA monitoring programs were supplemented in 2021 with a NMFS-funded visual marine mammal monitoring project that collected data during non-pile driving days during PCT Phase 2 (table 8; Easley-Appleyard and Leonard, 2022). NMFS replicated the POA monitoring efforts, as feasible, including use of 2 of the POA's monitoring platforms, equipment (Big Eye binoculars, theodolite, 7x50 reticle binoculars), data collection software, monitoring and data collection protocol, and observers; however, the NMFS-funded program utilized only 4 PSOs and 2 observation stations along with shorter (4- to 8-hour) observation periods compared to PCT or SFD data collection, which included 11 PSOs, 4 observation stations, and most observation days lasting close to 10 hours. Despite the differences in effort, the NMFS dataset fills in gaps during the 2021 season when CIBW presence began to increase from low presence in July and is thus valuable in this analysis. NMFS' PSO's monitored for 231.6 hours on 47 non-consecutive days in July, August, September, and October.

Distances from CIBW sightings to the project site from the POA and NMFS-funded monitoring programs ranged from less than 10-m up to nearly 15-km during these monitoring programs. These robust marine mammal monitoring programs in place from 2020 through 2022 located, identified, and tracked CIBWs at greater distances from the NES1 project site than previous monitoring programs (*i.e.,* Kendall and Cornick, 2015), and contributed to a better understanding of CIBW movements in upper Cook Inlet (*e.g.,* Easley-Appleyard and Leonard, 2022).

Given the evolution of the best available data of CIBW presence in upper Cook Inlet, particularly regarding the distances at which CIBWs were being observed and documented (which increased during the PCT and SFD compared to earlier monitoring efforts), the POA proposed, and NMFS concurred, that the original sighting rate methodology used for the PCT and SFD projects was no longer the best approach for calculating potential take of CIBWs for the NES1 project. The recent and comprehensive data set of CIBW locations and movements from the PCT and SFD projects (61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022) provided the opportunity for refinement of the previously used sighting rate methodology with updated data. Data for 2020, 2021, and 2022 were selected for the updated sighting rate analysis for the NES1 project because they are the most current data available and are therefore most likely to accurately represent future CIBW occurrence at the project site, which may be affected by CIBW population size, CIBW movement patterns through Knik Arm, environmental change (including climate change), differences in salmon and other prey abundance among years, and other factors (table 8). The data from 2005 to 2009 (Kendall and Cornick, 2015), which were used by NMFS for the sighting rate analyses for the PCT and SFD IHAs, were not included in this analysis due to the changes in observation programs and age of the data collected. Monitoring data from the 2016 TPP (Cornick and Seagars, 2016) were also not included in the analysis because of limited hours observed, limited seasonal coverage, and differences in the observation programs.

Table 8 -- Marine Mammal Monitoring Data Used for CIBW Sighting Rate Calculations

Year	Monitoring Type and Data Source	Number of CIBW group fixes	Number of CIBW groups	Number of CIBWs
2020	PCT: POA Construction Monitoring 61N Environmental, 2021	2,653	245	987
2021	PCT: NMFS Monitoring Easley-Appleyard and Leonard, 2022	694	109[1]	575
2021	PCT: POA Construction Monitoring 61N Environmental, 2021, 2022a	1,339	132	517
2022	SFD: POA Construction Monitoring 61N Environmental, 2022b	151	9	41

[1] This number differs slightly from table 6-8 in the POA's application due to our removal of a few duplicate data points in the NMFS data set.

The sighting rate methodology used for the PCT (85 FR 19294, April 6, 2020) and SFD (86 FR 50057, September 7, 2021) projects used observations of CIBWs recorded in Knik Arm, regardless of observation distance to the POA, to produce a single monthly sighting rate that was then used to calculate potential CIBW take for all activities, regardless of the size of the ensonified areas for the project activities (*i.e.,* take was calculated solely based on the monthly sighting rates and the estimated hours of planned activities, and did not consider the estimated sizes of the ensonified areas). This method may have overestimated potential CIBW takes when harassment zones were small because distant CIBWs will have been included in the sighting rate. This method also resulted in takes estimates that were identical for installation and removal of all pile sizes, regardless of pile driving method used (*e.g.,* vibratory, impact) or implementation of attenuation systems, since the calculation did not consider the size of the ensonified areas.

NMFS and the POA collaboratively developed a new sighting rate methodology for the NES1 project that incorporated a spatial component for CIBW observations, which allows for more accurate estimation of potential take of CIBWs for this project. NMFS proposes to use this approach to estimate potential takes of CIBW for authorization. During the POA's and NMFS' marine mammal monitoring programs for the PCT and SFD projects, PSOs had an increased ability to detect, identify, and track CIBWs groups at greater distances from the project work site when compared with previous years because of the POA's expanded monitoring program as described above. This meant that observations of CIBWs in the 2020–2022 dataset (table 8) include sightings of individuals at distances far outside the ensonified areas estimated for the NES1 project (table 7). Therefore, it is not appropriate to group all CIBW observations from these datasets into a single sighting rate as was done for the PCT and SFD projects. Rather, CIBW observations should be considered in relation to their distance to the NES1 project site when determining appropriate sighting rates to use when estimating take for this project. This helps to ensure that the sighting rates used to estimate take are representative of CIBW presence in the NES1 ensonified areas.

To incorporate a spatial component into the sighting rate methodology, the POA calculated each CIBW group's closest point of approach (CPOA) relative to the NES1 project site. The 2020–2022 marine mammal monitoring programs (table 8) enabled the collection, in many cases, of multiple locations of CIBW groups as they transited through Knik Arm, which allowed for track lines to be interpolated for many groups. The POA used these track lines, or single recorded locations in instances where only one sighting location was available, to calculate each group's CPOA. CPOAs were calculated in ArcGIS software using the Global Positioning System (GPS) coordinates provided for documented sightings of each group (for details on data collection methods, see 61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022) and the NES1 location midpoint, centered on the project site. A CIBW group was defined as a sighting of one or more CIBWs as determined during data collection. The most distant CPOA location to NES1 was 11,057-m and the closest CPOA location was 15-m.

The cumulative density distribution of CPOA values represents the percentage of CIBW observations that were within various distances to the NES1 action site (figure 1). This distribution shows how CIBW observations differed with distances to the NES1 site and was used to infer appropriate distances within which to estimate spatially-derived CIBW sighting rates (figure 1). The POA implemented a piecewise regression model that detected breakpoints (*i.e.,* points within the CPOA data at which statistical properties of the sequence of observational distances changed) in the cumulative density distribution of the CPOA locations, which they proposed to represent spatially-based sighting rate bins for use in calculating CIBW sighting rates. The POA used the ''Segmented'' package (Muggeo, 2020) in the R Statistical Software Package (R Core Team, 2022) to determine statistically significant breakpoints in the linear distances of the CIBW data using this regression method (see section 6.5.5.3 of the POA's application for more details regarding this statistical analysis). This analysis identified breakpoints in the CPOA locations at 74-, 1,651-, 2,808-, and 7,368-m (figure 1).

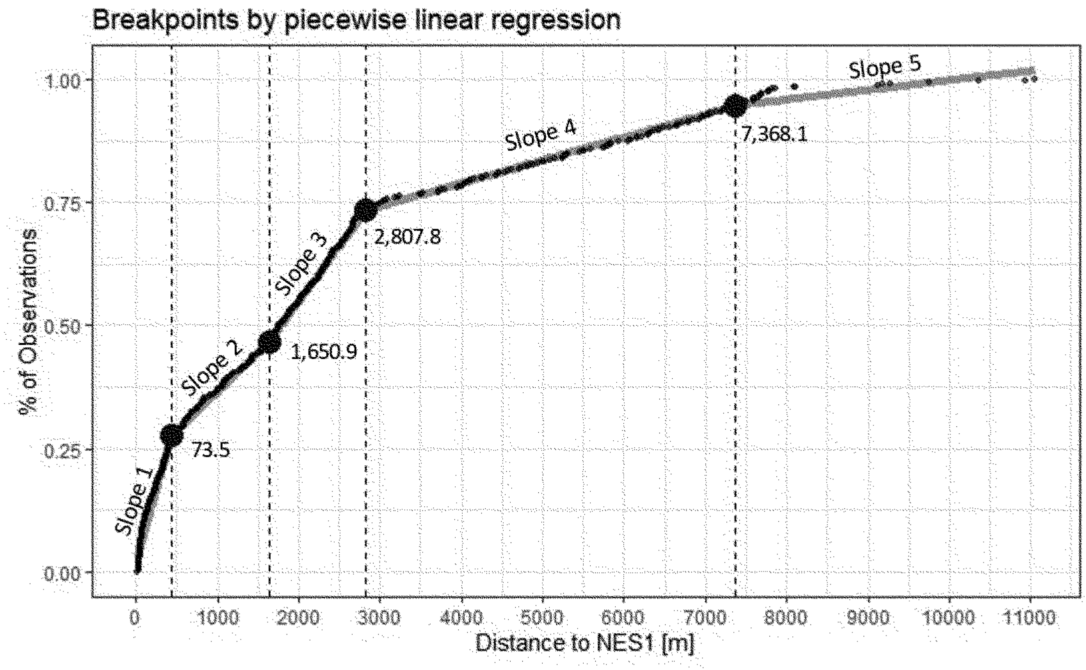

Figure 1 -- Percent of CIBW CPOA Observations in Relation to Distance from the NES1 Project Site and Associated Breakpoints Determined by Piecewise Linear Regression

Piecewise regression is a common tool for modeling ecological thresholds (Lopez *et al.,* 2020; Whitehead *et al.,* 2016; Atwood *et al.,* 2016). In a similar scenario to the one outlined above, Mayette *et al.* (2022) used piecewise regression methods to model the distances between two individual CIBWs in a group in a nearshore and a far shore environment. For the POA's analysis, the breakpoints (*i.e.,* 74-, 1,651-, 2,808-, and 7,368-m) detect a change in the frequency of CIBW groups sighted and the slope of the line between two points indicates the magnitude of change. A greater positive slope indicates a greater accumulation of sightings over the linear distance (x-axis) between the defining breakpoints, whereas a more level slope (*i.e.,* closer to zero) indicates a lower accumulation of sightings over that linear distance (x-axis) between those defining breakpoints (figure 1; see table 6–8 in the POA's application for the slope estimates for the empirical cumulative distribution function).

The breakpoints identified by the piecewise regression analysis are in agreement with what is known about CIBW behavior in Knik Arm based on recent monitoring efforts (61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022). Observation location data collected during POA monitoring programs indicate that CIBWs were consistently found in higher numbers in the nearshore areas, along both shorelines, and were found in lower numbers in the center of the Arm. Tracklines of CIBW group movements collected from 2020 to 2022 show that CIBWs displayed a variety of movement patterns that included swimming close to shore past the POA on the east side of Knik Arm (defined by breakpoint 1 at 74-m), with fewer CIBWs swimming in the center of Knik Arm (breakpoints 1 to 2, at 74- to 1,651-m). CIBWs commonly swam past the POA close to shore on the west side of Knik Arm, with no CIBWs able to swim farther from the POA in that area than the far shore (breakpoints 2 to 3, at 1,651- to 2,808-m). Behaviors and locations beyond breakpoint 4 (7,368-m) include swimming past the mouth of Knik Arm between the Susitna River area and Turnagain Arm; milling at the mouth of Knik Arm but not entering the Arm; and milling to the northwest of the POA without exiting Knik Arm. The shallowness of slope 5, at distances greater than 7,368-m, could be due to detection falloff from a proximity (distance) bias, which occurs when PSOs are less likely to detect CIBW groups that are farther away than groups that are closer.

The POA, in collaboration with NMFS, used the distances detected by the breakpoint analysis to define five sighting rate distance bins for CIBWs in the NES1 project area. Each breakpoint (74-, 1,651-, 2,808-, and 7,368-m, and the complete data set of observations [>7,368-m]) was rounded to the nearest meter and considered the outermost limit of each sighting rate bin, resulting in five identified bins (table 9). All CIBW observations less than or equal to each bin's breakpoint distance were used to calculated that bin's respective monthly sighting rates (*e.g.,* all sightings from 0- to 74-m are included in the sighting rates calculated for bin number 1, all sightings from 0 to 1,651-m are included in the sighting rates calculated for bin number 2, and so on). NES1 construction is anticipated to take place from April through November 2024, therefore monthly sighting rates were only derived for these months (table 9).

Table 9 -- CIBW Monthly Sighting Rates for Different Spatially-Based Bin Sizes

		CIBW/Hour[1]							
Bin Number	Distance (m)	April	May	June	July	August	September	October	November
1	≤ 74	0.09	0.06	0.10	0.04	0.83	0.62	0.51	0.11
2	≤ 1,651	0.25	0.14	0.13	0.06	1.43	1.32	1.15	0.70
3	≤ 2,808	0.36	0.22	0.21	0.07	2.08	1.90	2.04	0.73
4	≤ 7,368	0.67	0.33	0.29	0.13	2.25	2.19	2.42	0.73
5	> 7,368	0.71	0.39	0.30	0.13	2.29	2.23	2.56	0.73

[1] Observation hours have been totaled from the PCT 2020 and 2021 programs, the NMFS 2021 data collection effort, and the SFD 2022 program (61N Environmental 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022).

Potential exposures (equated with takes) of CIBWs were calculated by multiplying the total number of vibratory installation or removal hours per month for each sized/shaped pile based on the anticipated construction schedule (table 1) with the corresponding sighting rate month and sighting rate distance bin (table 10). For example, the Level B harassment isopleth distance for the vibratory installation of 24-inch (61-cm) piles is 2,245-m, which falls within bin number 3 (table 9). Therefore, take for this activity was calculated by multiplying the total number of hours estimated each month to install 24-inch (61-cm) piles via a vibratory hammer by the monthly CIBW sighting rates calculated for bin number 3 (table 10). The resulting estimated CIBW exposures were totaled for all activities in each month (table 11).

In their calculation of CIBW take, the POA assumed that only 24-inch (61-cm) template piles will be installed (rather than 36-inch (91-cm)) and removed during the project. If 36-inch (91-cm) piles are used for temporary stability template piles, it is assumed that the potential impacts of this alternate construction scenario and method on marine mammals are fungible (*i.e.,* that potential impacts of installation and removal of 36-inch (91-cm) steel pipe piles will be similar to the potential impacts of installation and removal of 24-inch (61-cm) steel pipe piles based on the estimated ensonified areas and relevant sighting rate bins). Using the monthly activity estimates in hours (table 1) and monthly calculated sighting rates (CIBWs/hour) for the spatially derived distance bins (table 10), the POA estimated that there could be up to 122 (121.1 rounded up to 122) instances of CIBW take where during the NES1 project (table 11).

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Table 10 -- Allocation of Each Level B Harassment Isopleth to a Sighting Rate Bin and CIBW Monthly Sighting Rates for Different Pile Sizes and Hammer Types

	Level B Harassment Isopleth Distance (m)	Sighting Rate Bin Number and Distance	CIBWs/Hour							
			April	May	June	July	August	September	October	November
24-inch Vibratory Installation	2,247	3 (2,808 m)	0.36	0.22	0.21	0.07	2.08	1.90	2.04	0.73
24-inch Vibratory Removal	6,861	4 (7,368 m)	0.67	0.33	0.29	0.13	2.25	2.19	2.42	0.73
36-inch Vibratory Installation	4,514	4 (7,368 m)	0.67	0.33	0.29	0.13	2.25	2.19	2.42	0.73
36-inch Vibratory Removal	1,699	3 (2,808 m)	0.36	0.22	0.21	0.07	2.08	1.90	2.04	0.73
Sheet Pile Vibratory Removal	1,954	3 (2,808 m)	0.36	0.22	0.21	0.07	2.08	1.90	2.04	0.73
Observation Hours/Month[1]:			87.9	615.1	571.6	246.9	224.5	326.2	109.5	132.0

[1] Observation hours have been totaled from the PCT 2020 and 2021 programs, the NMFS 2021 data collection effort, and the SFD 2022 program (61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022).

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For the PCT (85 FR 19294, April 6, 2020) and SFD (86 FR 50057, September 7, 2021) projects, NMFS accounted for the implementation of mitigation measures (e.g., shutdown procedures implemented when CIBWs entered or approached the estimated Level B harassment zone) by applying an adjustment factor to CIBW take estimates. This was based on the assumption that some Level B harassment takes will likely be avoided based on required shutdowns for CIBWs at the Level B harassment zones (see the Mitigation section of those notices for more information). For the PCT project, NMFS compared the number of realized takes at the POA to the number of authorized takes for previous projects from 2008 to 2017 and found the percentage of realized takes ranged from 12 to 59 percent with an average of 36 percent (85 FR 19294, April 6, 2020). NMFS then applied the highest percentage of previous realized takes (59 percent during the 2009–2010 season) to ensure potential takes of CIBWs were fully evaluated. In doing so, NMFS assumed that approximately 59 percent of the takes calculated would be realized during PCT and SFD construction (85 FR 19294, April 6, 2020; 86 FR 50057, September 7, 2021) and that 41 percent of the calculated CIBW Level B harassment takes would be avoided by successful implementation of required mitigation measures.

The POA calculated the adjustment for successful implementation of mitigation measures for NES1 using the percentage of realized takes for the PCT project (see table 6–12 in the POA's application). The recent data from PCT Phase 1 and PCT Phase 2 most accurately reflected the current marine mammal monitoring program, the current program's effectiveness, and CIBW occurrence in the NES1 project area. Between the 2 phases of the PCT project, 90 total Level B harassment takes were authorized and 53 were potentially realized (*i.e.,* number of CIBWs observed within estimated Level B harassment zones), equating to an overall percentage of 59 percent. The SFD Project, during which only 7 percent of authorized take was potentially realized, represented installation of only 12 piles during a limited time period and does not represent the much higher number of piles and longer construction season anticipated for NES1.

NMFS has determined that the 59-percent adjustment accurately accounts for the efficacy of the POA's marine mammal monitoring program and required shutdown protocols. NMFS therefore assumes that approximately 59 percent of the takes calculated for NES1 may actually be realized. This adjusts the potential takes by Level B harassment of CIBWs authorized from 122 to 72 (table 11). Take by Level A harassment is not anticipated or authorized because the POA will be required to shutdown activities when CIBWs approach and or enter the Level B harassment zone (see the Mitigation section for more information).

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Table 11 -- Estimated Monthly CIBW Level B Harassment Exposures

	April	May	June	July	August	September	October	November	Total
24-inch Vibratory Installation and Removal	2.4	3.0	1.7	0.6	12.5	6.9	4.0	0.2	31.3
Sheet Pile Removal	3.6	9.9	12.6	4.2	27.0	22.8	8.2	1.5	89.8
Total Estimated Level B Harassment Exposures for All Activities:									121.1
Total Estimated Level B Harassment Exposures with 59% Correction Factor (Rounded):									72

In summary, the total amount of Level A harassment and Level B harassment authorized for each marine mammal stock is presented in table 12.

Table 12 -- Amount of Take Authorized as a Percentage of Stock Abundance, by Stock and Harassment Type

	Authorized Take				
Species	Level A	Level B	Total	Stock	Percent of Stock
Gray whale	0	6	6	Eastern North Pacific	0.02
Humpback whale	0	4	4	Hawai'i	0.04[1]
				Mexico-North Pacific	UNK[1,2]
Beluga whale	0	72	72	Cook Inlet	21.75
Killer whale	0	6	6	Eastern North Pacific Alaska Resident	0.31[1]
				Eastern North Pacific Gulf of Alaska, Aleutian Islands and Bering Sea Transient	1.02[1]
Harbor porpoise	1	17	18	Gulf of Alaska	0.06
Steller sea lion	0	9	9	Western	0.02
Harbor seals	13	234	247	Cook Inlet/ Shelikof Strait	0.87

[1] NMFS conservatively assumes that all takes occur to each stock
[2] NMFS does not have an official abundance estimate for this stock and the minimum population estimate is considered to be unknown (Young *et al.*, 2023)

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Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for ITAs to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, and impact on operations.

The POA presented mitigation measures in section 11 of their application that were modeled after the requirements included in the IHAs issued for Phase 1 and Phase 2 PCT construction (85 FR 19294, April 6, 2020) and for SFD construction (86 FR 50057, September 7, 2021), which were designed to minimize the total number, intensity, and duration of harassment events for CIBWs and other marine mammal species during those projects (61N Environmental, 2021, 2022a, 2022b). NMFS concurred that these proposed measures reduce the potential for CIBWs, and other marine mammals, to be adversely impacted by the planned activity.

The POA must employ the following mitigation measures:

• Ensure that construction supervisors, crews, contractors, other personnel operating at the site, the monitoring team, and relevant POA staff are trained on all mitigation, monitoring, and reporting requirements, and all implementing protocols or procedures, as relevant to their respective role or position prior to the start of all pile installation and removal activities, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project must be trained prior to commencing work;

• Employ PSOs and establish monitoring locations as described in section 5 of the IHA and the POA's Marine Mammal Monitoring and Mitigation Plan (see appendix B of the POA's application). The POA must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions;

• The POA, construction supervisors and crews, PSOs, and relevant POA staff must avoid direct physical interaction with marine mammals during construction activities. If a marine mammal comes within 10-m of such activity, operations shall cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction;

• Monitoring must take place from 30 minutes prior to initiation of pile driving (*i.e.,* pre-start clearance monitoring) through 30 minutes post-completion of pile driving;

• Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones indicated in table 13 are clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals or when the mitigation measures required specifically for CIBWs (below) are satisfied;

• For all construction activities, shutdown zones must be established following table 13. The purpose of a shutdown zone is generally to define an area within which shutdown of activity will occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). In addition to the shutdown zones specified in table 13 and the minimum shutdown zone of 10-m described above, requirements included in NMFS' IHA, the POA will implement a minimum 100-m shutdown zone around the active NES1 project work site, including around activities other than pile installation or removal that NMFS has determined do not present a reasonable potential to cause take of marine mammals. Shutdown zones for pile installation and removal will vary based on the type of construction activity and by marine mammal hearing group (table 13). Here, shutdown zones are larger than or equal to the calculated Level A harassment isopleths shown in table 6 for species other than CIBW and are equal to the estimated Level B harassment isopleths for CIBWs;

Table 13 -- Shutdown Zones during Project Activities

Activity	Pile Type / Size	Shutdown Zone (m)					
		LF cetaceans	Non-CIBW MF cetaceans	CIBWs	HF cetaceans	PW	OW
Impact Removal	Sheet pile	160	10	900	190	90	10
Vibratory Installation	24-inch (61-cm)	20	10	2,300	20	10	10
	36-inch (91-cm)	30	10	4,600	40	20	10
Vibratory Removal	Sheet pile	10	10	2,000	20	10	10
	24-inch (61-cm)	50	10	6,900	60	30	10
	36-inch (91-cm)	20	10	1,700	20	10	10

Notes: cm = centimeter(s), m = meter(s)

• Marine mammals observed anywhere within visual range of the PSO must be tracked relative to construction activities. If a marine mammal is observed entering or within the shutdown zones indicated in table 13, pile driving must be delayed or halted. If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone (table 13, or 15 minutes (non-CIBWs) or 30 minutes (CIBWs) have passed without re-detection of the animal;

• The POA must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer. PSOs shall begin observing for marine mammals 30 minutes before "soft start" or in-water pile installation or removal begins; and

• Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone.

The following additional mitigation measures are required for CIBWs:

• The POA must make all practicable efforts to complete construction activities between April and July, when CIBWs are typically found in lower numbers near the NES1 site;

• Prior to the onset of pile driving or removal, should a CIBW be observed within the estimated Level B harassment zone (table 7) (*i.e.* the CIBWs shutdown zone column in table 13), pile driving must not commence until the whale(s) has voluntarily traveled at least 100-m beyond the estimated Level B harassment zone and is on a path away from such zone, or the whale has not been re-sighted within 30 minutes;

• If pile installation or removal has commenced, and a CIBW(s) is observed within or likely to enter the estimated Level B harassment zone, pile installation or removal must be delayed. Pile driving may not commence until the whale has voluntarily traveled at least 100-m beyond the Level B harassment zone and is on a path away from such zone, or until no CIBW has been observed in the Level B harassment zone for 30 minutes; and

• If during installation and removal of piles, PSOs can no longer effectively monitor the entirety of the CIBW Level B harassment zone due to environmental conditions (*e.g.,* fog, rain, wind), pile driving may continue only until the current segment of the pile is driven; no additional sections of pile or additional piles may be driven until conditions improve such that the Level B harassment zone can be effectively monitored. If the Level B harassment zone cannot be monitored for more than 15 minutes, the entire Level B harassment zone will be cleared again for 30 minutes prior to pile driving.

In addition to these additional mitigation measures, NMFS had requested that the POA restrict all pile driving and removal work to April to July, when CIBWs are typically found in lower numbers. However, given the safety and environmental concerns of collapse of the Northern Extension once removal work commences, required sequencing of pile installation and removal and fill removal, and uncertainties and adaptive nature of the work, the POA stated that it cannot commit to restricting pile driving and removal to April to July. Instead, as required in the mitigation measures, NMFS will require the POA to complete as much work as is practicable in April to July to reduce the amount of pile driving and removal activities needed in August through November.

For previous IHAs issued to the POA (PCT: 85 FR 19294, April 6, 2020; SFD: 86 FR 50057, September 7, 2021), the use of a bubble curtain to reduce noise has been required as a mitigation measure for certain pile driving scenarios. The POA did not propose to use a bubble curtain system during the NES1 project, stating that it is not a practicable mitigation measure for this demolition project. NMFS concurred with this determination. Practicability concerns include the following:

• NES1 construction activities include installation of round, temporary, stability template piles to shore up the filled NES1 structure while fill material and sheet piles are removed. Stability template piles that will be required for demolition of the sheet pile structure are located in proximity of the sheet piles. A bubble curtain will not physically fit between the sheet piles and the template piles;

• Bubble curtains cannot be installed around the sheet piles as they are removed because the structure consists of sheet piles that are connected to one another and used to support fill-material. It will not be possible to place a bubble curtain system along the sheet pile face for similar reasons, including lack of space for the bubble curtain and the structures and equipment that will be needed to install and operate it, and the high likelihood that it could not function or be retrieved; and

• NES1 is a failed structure, and has been deemed ''globally unstable'' and poses significant risk for continued deterioration and structural collapse. If the existing structure were to collapse during deconstruction and sheet pile removal, there is risk of a significant release of impounded fill material into CIBW habitat, the POA's vessel operating and mooring areas, and the USACE Anchorage Harbor Project. Due to the stability risk of the existing impounded material, it is expected that construction and demolition means and methods will be highly adaptive once actual field work commences, and use of a bubble curtain with deconstruction will limit operations in the field and create significant health and safety issues.

The POA also has efficacy concerns about requiring a bubble curtain for NES1 construction activities. Adding a requirement for a bubble curtain may hinder production, due to the time required to install and remove the bubble curtain itself. This has the potential to drive the in-water construction schedule further into the late summer months, which are known for higher CIBW abundance in lower Knik Arm, thus lengthening the duration of potential interactions between CIBW and in-water work. Therefore, NMFS is concerned that use of a bubble curtain may not be an effective measure, given the potential that bubble curtain use could ultimately result in increased impacts to CIBW, in addition to the aforementioned practicability issues.

Based on our evaluation of the applicant's planned measures, as well as other measures considered by NMFS, NMFS has determined that the mitigation measures required herein provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

• Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);

• Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);

• Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;

• How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

• Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and

• Mitigation and monitoring effectiveness.

The POA will implement a marine mammal monitoring and mitigation strategy intended to avoid and minimize impacts to marine mammals (see appendix B of the POA's application for their Marine Mammal Monitoring and Mitigation Plan). Marine mammal monitoring will be conducted at all times when in-water pile installation and removal is taking place. Additionally, PSOs will be on-site monitoring for marine mammals during in-water cutting of sheet piles with shears or an ultrathermic torch.

The marine mammal monitoring and mitigation program that is planned for NES1 construction is modeled after the stipulations outlined in the IHAs for Phase 1 and Phase 2 PCT construction (85 FR 19294, April 6, 2020) and the IHA for SFD construction (86 FR 50057, September 7, 2021).

Visual Monitoring

Monitoring must be conducted by qualified, NMFS-approved PSOs, in accordance with the following:

• PSOs must be independent of the activity contractor (*e.g.,* employed by a subcontractor) and have no other assigned tasks during monitoring periods. At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA or Letter of Concurrence. Other PSOs may substitute other relevant experience (including relevant Alaska native traditional knowledge), education (degree in biological science or related field), or training for prior experience performing the duties of a PSO. PSOs must be approved by NMFS prior to beginning any activity subject to this IHA;

• The POA must employ PSO stations at a minimum of two locations from which PSOs can effectively monitor the shutdown zones (table 13). Concerns about the stability of the NES1 project area preclude determination of the exact number and locations of PSO stations until the Construction Contractor develops their Construction Work Plan. PSO stations must be positioned at the best practical vantage points that are determined to be safe. Likely locations include the Anchorage Public Boat Dock at Ship Creek to the south of the NES1 project site, and a location to the north of the project site, such as the northern end of POA property near Cairn Point (see North Extension area on figure 12–1 in the POA's application) or at Port MacKenzie across Knik Arm (see figure 12–1 in the POA's application for potential locations of PSO stations). A location near the construction activity may not be possible given the risk of structural collapse as outlined in the POA's IHA application. Placing a PSO on the northernmost portion of Terminal 3 will also be considered if deemed safe. Areas near Cairn Point or Port MacKenzie have safety, security, and logistical issues, which will need to be considered. Cairn Point proper is located on military land and has bear presence, and restricted access does not allow for the location of an observation station at this site. Tidelands along Cairn Point are accessible only during low tide conditions and have inherent safety concerns of being trapped by rising tides. Port MacKenzie is a secure port that is relatively remote, creating safety, logistical, and physical staffing limitations due to lack of nearby lodging and other facilities. The roadway travel time between port sites is approximately 2–3 hours. An adaptive management measure is planned for a monitoring location north of the project site, once the Construction Contractor has been selected and more detailed discussions can occur. Temporary staffing of a northerly monitoring station during peak marine mammal presence time periods and/or when shutdown zones are large will be considered;

• PSOs stations must be elevated platforms constructed on top of shipping containers or a similar base that is at least 8′ 6″ high (*i.e.,* the standard height of a shipping container) that can support up to three PSOs and their equipment. The platforms must be stable enough to support use of a theodolite and must be located to optimize the PSO's ability to observe marine mammals and the harassment zones;

• Each PSO station must have at least two PSOs on watch at any given time; one PSO must be observing, one PSO must be recording data (and observing when there are no data to record). Teams of three PSOs must include at least one PSO who must be observing and one PSO who must be recording data (and observing when there are no data to record). The third PSO may help to observe, record data, or rest. In addition, if POA is conducting non-NES1-related in-water work that includes PSOs, the NES1 PSOs must be in real-time contact with those PSOs, and both sets of PSOs must share all information regarding marine mammal sightings with each other;

• A designated lead PSO must always be on site. The lead observer must have prior experience performing the duties of a PSO during in-water construction activities pursuant to a NMFS-issued ITA or Letter of Concurrence. Each PSO station must also have a designated lead PSO specific to that station and shift;

• PSOs will use a combination of equipment to perform marine mammal observations and to verify the required monitoring distance from the project site, including 7 by 50 binoculars, 20x/40x tripod mounted binoculars, 25 by 150 ''big eye'' tripod mounted binoculars, and theodolites; and

• PSOs must record all observations of marine mammals, regardless of distance from the pile being driven. PSOs shall document any behavioral responses in concert with distance from piles being driven or removed.

PSOs must have the following additional qualifications:

• Ability to conduct field observations and collect data according to assigned protocols;

• Experience or training in the field identification of marine mammals, including the identification of behaviors;

• Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

• Writing skills sufficient to record required information including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and

• Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

Reporting

NMFS will require the POA to submit interim weekly and monthly monitoring reports during the NES1 construction season. These reports must include a summary of marine mammal species and behavioral observations, construction shutdowns or delays, and construction work completed. They also must include an assessment of the amount of construction remaining to be completed (*i.e.,* the number of estimated hours of work remaining), in addition to the number of CIBWs observed within estimated harassment zones to date.

A draft summary marine mammal monitoring report (that includes final electronic data sheets) must be submitted to NMFS within 90 days after the completion of all construction activities, or 60 days prior to a requested date of issuance of any future ITA for projects at the same location, whichever comes first. The report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. PSO data sheets should be submitted in a format that can be queried such as a spreadsheet or database (*i.e.,* digital images of data sheets are not sufficient). Specifically, the report must include:

• Dates and times (begin and end) of all marine mammal monitoring;

• Construction activities occurring during each daily observation period, including the number and type of piles driven or removed and by what method (*i.e.,* impact or vibratory), the total equipment duration for vibratory installation and removal, and the total number of strikes for each pile during impact driving;

• PSO locations during marine mammal monitoring;

• Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;

• Upon observation of a marine mammal, the following information: name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; time of sighting; identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; distance and bearing of each marine mammal observed relative to the pile being driven for each sighting (if pile driving was occurring at time of sighting); estimated number of animals (minimum, maximum, and best estimate); estimated number of animals by cohort (adults, juveniles, neonates, group composition, sex class, *etc.*); animal's closest point of approach and estimated time spent within the harassment zone; group spread and formation (for CIBWs only); description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses that may have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);

• Number of marine mammals detected within the harassment zones and shutdown zones, by species; and

• Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

Reporting Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the IHA-holder must immediately cease the specified activities and report the incident to OPR, NMFS (*PR.ITP.MonitoringReports@noaa.gov*), and to the Alaska Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the POA must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHA. The POA must not resume their activities until notified by NMFS. The report must include the following information:

• Time, date, and location (latitude and longitude) of the first discovery (and updated location information if known and applicable);

• Species identification (if known) or description of the animal(s) involved;

• Condition of the animal(s) (including carcass condition if the animal is dead);

• Observed behaviors of the animal(s), if alive;

• If available, photographs or video footage of the animal(s); and

• General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact 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 (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, this introductory discussion of our analysis applies to all the species listed in table 12, except CIBWs, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. For CIBWs, there are meaningful differences in anticipated individual responses to activities, impact of expected take on the population, or impacts on habitat; therefore, we provide a separate detailed analysis for CIBWs following the analysis for other species for which we authorize take.

NMFS has identified key factors which may be employed to assess the level of analysis necessary to conclude whether potential impacts associated with a specified activity should be considered negligible. These include (but are not limited to) the type and magnitude of taking, the amount and importance of the available habitat for the species or stock that is affected, the duration of the anticipated effect to the species or stock, and the status of the species or stock. The potential effects of the specified actions on gray whales, humpback whales, killer whales, harbor porpoises, Steller sea lions, and harbor seals are discussed below. Some of these factors also apply to CIBWs; however, a more detailed analysis for CIBWs is provided in a separate sub-section below.

Pile driving associated with the project, as outlined previously, has the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment and, for some species, Level A harassment, from underwater sounds generated by pile driving. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level B harassment or Level A harassment, identified above, while activities are underway.

The POA's planned activities and associated impacts will occur within a limited, confined area of the stocks' range. The work will occur in the vicinity of the NES1 site and sound from the planned activities will be blocked by the coastline along Knik Arm along the eastern boundaries of the site, and for those harassment isopleths that extend more than 3,000-m (*i.e.,* the vibratory installation of 36-inch (91-cm) piles and vibratory removal of 24-inch (61-inch) piles), directly across the Arm along the western shoreline (see figure 6–4 in the POA's application)). The intensity and duration of take by Level A and Level B harassment will be minimized through use of mitigation measures described herein. Further the amount of take authorized is small when compared to stock abundance (see table 12). In addition, NMFS does not anticipate that serious injury or mortality will occur as a result of the POA's planned activity given the nature of the activity, even in the absence of required mitigation.

Exposures to elevated sound levels produced during pile driving may cause behavioral disturbance of some individuals. Behavioral responses of marine mammals to pile driving at the NES1 project site are expected to be mild, short term, and temporary. Effects on individuals that are taken by Level B harassment, as enumerated in the Estimated Take section, on the basis of reports in the literature as well as monitoring from other similar activities at the POA and elsewhere, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring; *e.g.,* Ridgway *et al.,* 1997; Nowacek *et al.,* 2007; Thorson and Reyff, 2006; Kendall and Cornick, 2015; Goldbogen *et al.,* 2013b; Piwetz *et al.,* 2021). Marine mammals within the Level B harassment zones may not show any visual cues they are disturbed by activities or they could become alert, avoid the area, leave the area, or display other mild responses that are not observable such as changes in vocalization patterns or increased haul out time (*e.g.,* Tougaard *et al.,* 2003; Carstensen *et al.,* 2006; Thorson and Reyff, 2006; Parks *et al.,* 2007; Brandt *et al.,* 2011; Graham *et al.,* 2017). However, as described in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023), marine mammals, excepting CIBWs, observed within Level A and Level B harassment zones related to recent POA construction activities have not shown any acute observable reactions to pile driving activities that have occurred during the PCT and SFD projects (61N Environmental, 2021, 2022a, 2022b).

Some of the species present in the region will only be present temporarily based on seasonal patterns or during transit between other habitats. These temporarily present species will be exposed to even smaller periods of noise-generating activity, further decreasing the impacts. Most likely, individual animals will simply move away from the sound source and be temporarily displaced from the area. Takes may also occur during important feeding times. The project area though represents a small portion of available foraging habitat and impacts on marine mammal feeding for all species should be minimal.

The activities analyzed here are similar to numerous other construction activities conducted in Alaska (*e.g.,* 86 FR 43190, August 6, 2021; 87 FR 15387, March 18, 2022), including the PCT and SFD projects within Upper Knik Arm (85 FR 19294, April 6, 2020; 86 FR 50057, September 7, 2021, respectively) which have taken place with no known long-term adverse consequences from behavioral harassment. Any potential reactions and behavioral changes are expected to subside quickly when the exposures cease and, therefore, no such long-term adverse consequences should be expected (*e.g.,* Graham *et al.,* 2017). For example, harbor porpoises returned to a construction area between pile-driving events within several days during the construction of offshore wind turbines near Denmark (Carstensen *et al.,* 2006). The intensity of Level B harassment events will be minimized through use of mitigation measures described herein, which were not quantitatively factored into the take estimates. The POA will use PSOs stationed strategically to increase detectability of marine mammals during in-water construction activities, enabling a high rate of success in implementation of shutdowns to avoid or minimize injury for most species. Further, given the absence of any major rookeries and haulouts within the estimated harassment zones, we assume that potential takes by Level B harassment will have an inconsequential short-term effect on individuals and will not result in population-level impacts.

As stated in the mitigation section, the POA will implement shutdown zones that equal or exceed the Level A harassment isopleths shown in table 7. Take by Level A harassment is authorized for some species (harbor seals and harbor porpoises) to account for the potential that an animal could enter and remain within the Level A harassment zone for a duration long enough to incur PTS. Any take by Level A harassment is expected to arise from, at most, a small degree of PTS because animals will need to be exposed to higher levels and/or longer duration than are expected to occur here in order to incur any more than a small degree of PTS.

Due to the levels and durations of likely exposure, animals that experience PTS will likely only receive slight PTS, *i.e.,* minor degradation of hearing capabilities within regions of hearing that align most completely with the frequency range of the energy produced by POA's in-water construction activities (*i.e.,* the low-frequency region below 2 kHz), not severe hearing impairment or impairment in the ranges of greatest hearing sensitivity. If hearing impairment does occur, it is most likely that the affected animal will lose a few dBs in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics. There are no data to suggest that a single instance in which an animal accrues PTS (or TTS) and is subject to behavioral disturbance will result in impacts to reproduction or survival. If PTS were to occur, it will be at a lower level likely to accrue to a relatively small portion of the population by being a stationary activity in one particular location. Additionally, and as noted previously, some subset of the individuals that are behaviorally harassed could also simultaneously incur some small degree of TTS for a short duration of time. Because of the small degree anticipated, though, any PTS or TTS potentially incurred here is not expected to adversely impact individual fitness, let alone annual rates of recruitment or survival.

Theoretically, repeated, sequential exposure to pile driving noise over a long duration could result in more severe impacts to individuals that could affect a population (via sustained or repeated disruption of important behaviors such as feeding, resting, traveling, and socializing; Southall *et al.,* 2007). Alternatively, marine mammals exposed to repetitious construction sounds may become habituated, desensitized, or tolerant after initial exposure to these sounds (reviewed by Richardson *et al.,* 1995; Southall *et al.,* 2007). Given that marine mammals still frequent and use Knik Arm despite being exposed to pile driving activities across many years, these severe population level impacts are not anticipated. The absence of any pinniped haulouts or other known non-CIBW home-ranges in the NES1 action area further decreases the likelihood of severe population level impacts.

The NES1 project is also not expected to have significant adverse effects on any marine mammal habitat. The project activities will occur within the same footprint as existing marine infrastructure, and when construction is complete, subtidal and intertidal habitats previously lost at the project site will be restored. Impacts to the immediate substrate are anticipated, but these will be limited to minor, temporary suspension of sediments, which can impact water quality and visibility for a short amount of time but which will not be expected to have any effects on individual marine mammals. While the area is generally not high quality habitat, it is expected to be of higher quality to marine mammals and fish after NES1 construction is complete as the site returns to its natural state and is colonized by marine organisms. Further, there are no known BIAs near the project zone, except for CIBWs, that will be impacted by the POA's planned activities.

Impacts to marine mammal prey species are also expected to be minor and temporary and to have, at most, short-term effects on foraging of individual marine mammals, and likely no effect on the populations of marine mammals as a whole. Overall, the area impacted by the NES1 project is very small compared to the available surrounding habitat, and does not include habitat of particular importance. The most likely impact to prey will be temporary behavioral avoidance of the immediate area. During construction activities, it is expected that some fish and marine mammals will temporarily leave the area of disturbance, thus impacting marine mammals' foraging opportunities in a limited portion of their foraging range. But, because of the relatively small area of the habitat that may be affected, and lack of any habitat of particular importance, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences. Further, as described above, additional habitat for marine mammal prey will be available after the completion of the POA's construction activities likely providing additional foraging, migrating, and rearing habitats to fish and foraging habitat to marine mammals.

In summary and as described above, the following factors support our negligible impact determinations for the affected stocks of gray whales, humpback whales, killer whales, harbor porpoises, Steller sea lions, and harbor seals:

- No takes by mortality or serious injury are anticipated or authorized;
- Any acoustic impacts to marine mammal habitat from pile driving (including to prey sources as well as acoustic habitat, and including resulting behavioral impacts *e.g.,* from masking) are expected to be temporary and minimal;
- Take will not occur in places and/or times where take will be more likely to accrue to impacts on reproduction or survival, such as within ESA-designated or proposed critical habitat, BIAs, or other habitats critical to recruitment or survival (*e.g.,* rookery);
- The project area represents a very small portion of the available foraging area for all potentially impacted marine mammal species;
- Take will only occur within upper Cook Inlet—a limited, confined area of any given stock's home range;
- Monitoring reports from similar work in Knik Arm have documented little to no observable effect on individuals of the same species impacted by the specified activities;
- The required mitigation measures (*i.e.,* soft starts, pre-clearance monitoring, shutdown zones) are expected to be effective in reducing the effects of the specified activity by minimizing the numbers of marine mammals exposed to injurious levels of sound, and by ensuring that any take by Level A harassment is, at most, a small degree of PTS and of a lower degree that will not impact the fitness of any animals; and
- The intensity of anticipated takes by Level B harassment is low for all stocks consisting of, at worst, temporary modifications in behavior, and will not be of a duration or intensity expected to result in impacts on reproduction or survival.

Cook Inlet Beluga Whales. For CIBWs, we further discuss our negligible impact findings in the context of potential impacts to this endangered stock based on our evaluation of the take authorized (table 12).

As described in the Recovery Plan for the CIBW (NMFS, 2016b), NMFS determined the following physical or biological features are essential to the conservation of this species: (1) Intertidal and subtidal waters of Cook Inlet with depths less than 9-m mean lower low water and within 8-km of high and medium flow anadromous fish streams; (2) Primary prey species consisting of four species of Pacific salmon (Chinook, sockeye, chum, and coho), Pacific eulachon, Pacific cod, walleye pollock, saffron cod, and yellowfin sole; (3) Waters free of toxins or other agents of a type and amount harmful to CIBWs; (4) Unrestricted passage within or between the critical habitat areas; and (5) Waters with in-water noise below levels resulting in the abandonment of critical habitat areas by CIBWs. The NES1 project will not impact essential features 1–3 listed above. All construction will be done in a manner implementing best management practices to preserve water quality, and no work will occur around creek mouths or river systems leading to prey abundance reductions. In addition, no physical structures will restrict passage; however, impacts to the acoustic habitat are relevant and discussed here.

Monitoring data from the POA suggest pile driving does not discourage CIBWs from entering Knik Arm and traveling to critical foraging grounds such as those around Eagle Bay (*e.g.,* 61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022). As described in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023), sighting rates were not different in the presence or absence of pile driving (Kendall and Cornick, 2015). In addition, large numbers of CIBWs have continued to use Knik Arm and pass through the area during pile driving projects that have taken place at the POA during the past two decades (Funk *et al.,* 2005; Prevel-Ramos *et al.,* 2006; Markowitz and McGuire, 2007; Cornick and Saxon-Kendall, 2008, 2009; ICRC, 2009, 2010, 2011, 2012; Cornick *et al.,* 2010, 2011; Cornick and Pinney, 2011; Cornick and Seagars, 2016; POA, 2019), including during the recent PCT and SFD construction projects (61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022). These findings are not surprising as food is a strong motivation for marine mammals. As described in Forney *et al.* (2017), animals typically favor particular areas because of their importance for survival (*e.g.,* feeding or breeding), and leaving may have significant costs to fitness (reduced foraging success, increased predation risk, increased exposure to other anthropogenic threats). Consequently, animals may be highly motivated to maintain foraging behavior in historical foraging areas despite negative impacts (*e.g.,* Rolland *et al.,* 2012). Previous monitoring data indicates CIBWs are responding to pile driving noise, but not through abandonment of critical habitat, including primary foraging areas north of the port. Instead, they travel more often and faster past the POA, more quietly, and in tighter groups (Kendall and Cornick, 2015; 61N Environmental, 2021, 2022a, 2022b).

While the habitat near the POA is not typically considered high quality foraging habitat for CIBWs and feeding is not a predominant behavior observed in CIBWs near the POA (61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022), CIBWs have been observed exhibiting foraging behaviors during pile driving activities in the action area. For example, Saxon-Kendall *et al.* (2013) recorded echolocation clicks (which can be indicative of feeding behavior) during the MTRP both while pile driving was occurring and when it was not. While the action area is located within designated essential fish habitat (EFH) for chum, coho, Chinook, sockeye, and pink salmon; there are no designated areas of particular concern in the vicinity of the POA. Still, increased turbidity, elevation in noise levels during pile driving, and small spills have the potential to impact fish, including preferred prey of CIBWs including Pacific salmon (Chinook, sockeye, chum, and coho), Pacific eulachon, Pacific cod, walleye pollock, saffron cod, and yellowfin sole. However, CIBWs are known to typically forage in or near river mouths (*e.g.,* Six Mile Creek, Eagle River, Eklutna River) from late spring through summer, which contain predictable salmon runs, and in nearshore bays and estuaries in the fall, when anadromous fish runs decline. Further, there is no evidence to suggest that CIBWs are restricted in transiting between preferred feeding areas during pile driving activities (*e.g.,* 61N Environmental, 2021, 2022a, 2022b, 2022c; Easley-Appleyard and Leonard, 2022). Thus, while there may be some impacts to CIBW prey and CIBW foraging behaviors in the action area, NMFS anticipates that these impacts would be temporary, and most likely related to fish avoiding the action area. NMFS does not anticipate that these impacts would rise to the level of adversely impacting annual rates of recruitment or survival.

During PCT and SFD construction monitoring, little variability was evident in CIBW behaviors recorded from month to month, or between sightings that coincided with in-water pile installation and removal and those that did not (61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022). Of the 386 CIBWs groups sighted during PCT and SFD construction monitoring, 10 groups were observed during or within minutes of in-water impact pile installation and 56 groups were observed during or within minutes of vibratory pile installation or removal (61N Environmental, 2021, 2022a, 2022b). In general, CIBWs were more likely to display no reaction or to continue to move towards the PCT or SFD during pile installation and removal. In the situations during which CIBWs showed a possible reaction (6 groups during impact driving and 13 groups during vibratory driving), CIBWs were observed either moving away immediately after the pile driving activities started or were observed increasing their rate of travel.

NMFS funded a visual marine mammal monitoring project in 2021 (described in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat of the **Federal Register** notice of the proposed IHA; 88 FR 76576, November 6, 2023) to supplement sighting data collected by the POA monitoring program during non-pile driving days in order to further evaluate the impacts of anthropogenic activities on CIBWs (Easley-Appleyard and Leonard, 2022). Preliminary results suggest that group size ranged from 1 to 34 whales, with an average of 3 to 5.6, depending on the month. September had the highest sighting rate with 4.08 whales per hour, followed by October and August (3.46 and 3.41, respectively). Traveling was recorded as the primary behavior for 80 percent of the group sightings and milling was the secondary behavior most often recorded. Sighting duration varied from a single surfacing lasting less than 1 minute to 380 minutes. Preliminary findings suggest these results are consistent with the results from the POA's PCT and SFD monitoring efforts. For example, group sizes ranged from 2.38 to 4.32 depending on the month and the highest sighting rate was observed in September (1.75). In addition, traveling was the predominant behavior observed for all months and categories of construction activity (*i.e.,* no pile driving, before pile driving, during pile driving, between pile driving, or after pile driving), being recorded as the primary behavior for 86 percent of all sightings, and either the primary or secondary behavior for 95 percent of sightings.

Easley-Appleyard and Leonard (2022) also asked PSOs to complete a questionnaire post-monitoring that provided NMFS with qualitative data regarding CIBW behavior during observations. Specifically during pile driving events, the PSOs noted that CIBW behaviors varied; however, multiple PSOs noted seeing behavioral changes specifically during impact pile driving (which will only be used when necessary to loosen piles for vibratory removal or direct pulling during the NES1 project) and not during vibratory pile driving. CIBWs were observed sometimes changing direction, turning around, or changing speed during impact pile driving. There were numerous instances where CIBWs were seen traveling directly towards the POA during vibratory pile driving before entering the Level B harassment zone (POA was required to shutdown prior to CIBWs entering the Level B harassment zone), which is consistent with findings during the POA's PCT and SFD monitoring efforts (61N Environmental, 2021, 2022a, 2022b). The PSOs also reported that it seemed more likely for CIBWs to show more cryptic behavior during pile driving (*e.g.,* surfacing infrequently and without clear direction), though this seemed to vary across months (Easley-Appleyard and Leonard, 2022).

We anticipate that disturbance to CIBWs will manifest in the same manner when they are exposed to noise during the NES1 project: whales will move quickly and silently through the area in more cohesive groups. We do not believe exposure to elevated noise levels during transit past the POA has adverse effects on reproduction or survival as the whales continue to access critical foraging grounds north of the POA, even if having shown a potential reaction during pile driving, and tight associations help to mitigate the potential for any contraction of communication space for a group. We also do not anticipate that CIBWs will abandon entering or exiting Knik Arm, as this is not evident based on previous years of monitoring data (*e.g.,* Kendall and Cornick, 2015; 61N Environmental, 2021, 2022a, 2022b; Easley-Appleyard and Leonard, 2022), and the pre-pile driving clearance mitigation measure is designed to further avoid any potential abandonment. Finally, as described in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat of the **Federal Register** notice of the proposed IHA (88 FR 76576, November 6, 2023), both telemetry (tagging) and acoustic data suggest CIBWs likely stay in upper Knik Arm (*i.e.,* north of the NES1 project site) for several days or weeks before exiting Knik Arm. Specifically, a CIBW instrumented with a satellite link time/depth recorder entered Knik Arm on August 18, 1999 and remained in Eagle Bay until September 12, 1999 (Ferrero *et al.,* 2000). Further, a recent detailed re-analysis of the satellite telemetry data confirms how several tagged whales exhibited this same movement pattern: whales entered Knik Arm and remained there for several days before exiting through lower Knik Arm (Shelden *et al.,* 2018). This longer-term use of upper Knik Arm will avoid repetitive exposures from pile driving noise.

There is concern that exposure to pile driving at the POA could result in CIBWs avoiding Knik Arm and thereby not accessing the productive foraging grounds north of POA such as Eagle River flats thus, impacting essential feature number five above. Although the data previously presented demonstrate CIBWs are not abandoning the area (*i.e.,* no significant difference in sighting rate with and without pile driving), results of an expert elicitation (EE) at a 2016 workshop, which predicted the impacts of noise on CIBW survival and reproduction given lost foraging opportunities, helped to inform our assessment of impacts on this stock. The 2016 EE workshop used conceptual models of an interim population consequences of disturbance (PCoD) for marine mammals (NRC, 2005; New *et al.,* 2014; Tollit *et al.,* 2016) to help in understanding how noise-related stressors might affect vital rates (survival, birth rate and growth) for CIBW (King *et al.,* 2015). NMFS (2016b) suggests that the main direct effects of noise on CIBW are likely to be through masking of vocalizations used for communication and prey location and habitat degradation. The 2016 workshop on CIBWs was specifically designed to provide regulators with a tool to help understand whether chronic and acute anthropogenic noise from various sources and projects are likely to be limiting recovery of the CIBW population. The full report can be found at *https://www.smruconsulting.com/publications/* with a summary of the EE portion of the workshop below.

For each of the noise effect mechanisms chosen for EE, the experts provided a set of parameters and values that determined the forms of a relationship between the number of days of disturbance a female CIBW experiences in a particular period and the effect of that disturbance on her energy reserves. Examples included the number of days of disturbance during the period April, May, and June that would be predicted to reduce the energy reserves of a pregnant CIBW to such a level that she is certain to terminate the pregnancy or abandon the calf soon after birth, the number of days of disturbance in the period April–September required to reduce the energy reserves of a lactating CIBW to a level where she is certain to abandon her calf, and the number of days of disturbance where a female fails to gain sufficient energy by the end of summer to maintain themselves and their calves during the subsequent winter. Overall, median values ranged from 16 to 69 days of disturbance depending on the question. However, for this elicitation, a ''day of disturbance'' was defined as any day on which an animal loses the ability to forage for at least one tidal cycle (*i.e.,* it forgoes 50–100 percent of its energy intake on that day). The day of disturbance considered in the context of the report is notably more severe than the Level B harassment expected to result from these activities, which as described is expected to be comprised predominantly of temporary modifications in the behavior of individual CIBWs (*e.g.,* faster swim speeds, more cohesive group structure, decreased sighting durations, cessation of vocalizations). Also, NMFS authorized 72 instances of takes, with the instances representing disturbance events within a day—this means that either 72 different individual CIBWs are disturbed on no more than 1 day each, or some lesser number of individuals may be disturbed on more than 1 day, but with the product of individuals and days not exceeding 72. Given the overall anticipated take, it is unlikely that any one CIBW will be disturbed on more than a few days. Further, the mitigation measures NMFS has prescribed for the NES1 project are designed to avoid the potential that any animal will lose the ability to forage for one or more tidal cycles should they be foraging in the NES1 project area, which is not known to be a particularly important feeding area for CIBWs. While Level B harassment (behavioral disturbance) will be authorized, the POA's mitigation measures will limit the severity of the effects of that Level B harassment to behavioral changes such as increased swim speeds, tighter group formations, and cessation of vocalizations, not the loss of foraging capabilities. Regardless, this elicitation recognized that pregnant or lactating females and calves are inherently more at risk than other animals, such as males. NMFS has determined all CIBWs warrant pile driving shutdown to be protective of potential vulnerable life stages, such as pregnancy, that cannot be determined from observations, and to avoid more severe behavioral reaction.

NMFS has prescribed mitigation measures to minimize exposure to CIBWs, specifically, shutting down pile driving should a CIBW approach or enter the Level B harassment zone. These measures are designed to ensure CIBWs will not abandon critical habitat and exposure to pile driving noise will not result in adverse impacts on the reproduction or survival of any individuals. The location of the PSOs will allow for detection of CIBWs and behavioral observations prior to CIBWs entering the Level B harassment zone. Further, impact driving appeared to cause behavioral reactions more readily than vibratory hammering (61N Environmental, 2021, 2022a, 2022b), which will only be used in situations where sheet piles remain seized in the sediments and cannot be loosened or broken free with a vibratory hammer, which is expected to be uncommon during the NES1 project. If impact driving does occur, the POA must implement soft starts, which ideally allows animals to leave a disturbed area before the full-power driving commences (Tougaard *et al.,* 2012). Although NMFS does not anticipate CIBWs will abandon entering Knik Arm in the presence of pile driving with the required mitigation measures, PSOs will be integral to identifying if CIBWs are potentially altering pathways they would otherwise take in the absence of pile driving. Finally, take by mortality, serious injury, or Level A harassment of CIBWs is not anticipated or authorized.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the CIBWs through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- The area of exposure will be limited to habitat primarily used as a travel corridor. Data demonstrates Level B harassment of CIBWs typically manifests as increased swim speeds past the POA, tighter group formations, and cessation of vocalizations, rather than through habitat abandonment;
- No critical foraging grounds (*e.g.,* Eagle Bay, Eagle River, Susitna Delta) will be impacted by pile driving; and
- While animals may be harassed more than once, exposures are not likely to exceed more than a few per year for any given individual and are not expected to occur on sequential days; thereby decreasing the likelihood of physiological impacts caused by chronic stress or masking.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the required monitoring and mitigation measures, NMFS finds that the total marine mammal take from the specified activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

For all stocks, except for the Mexico-North Pacific stock of humpback whales whose abundance estimate is unknown, the amount of taking is less than one-third of the best available population abundance estimate (in fact it is less than 2 percent for all stocks, except for CIBWs whose authorized take is 22 percent of the stock; table 12). The number of animals authorized to be taken from these stocks would be considered small relative to the relevant stock's abundances even if each estimated take occurred to a new individual. The amount of take authorized likely represents smaller numbers of individual harbor seals and Steller sea lions. Harbor seals tend to concentrate near Ship Creek and have small home ranges. It is possible that a single individual harbor seal may linger near the POA, especially near Ship Creek, and be counted multiple times each day as it moves around and resurfaces in different locations. Previous Steller sea lion sightings identified that if a Steller sea lion is within Knik Arm, it is likely lingering to forage on salmon or eulachon runs and may be present for several days. Therefore, the amount of take authorized likely represents repeat exposures to the same animals. For all species, PSOs will count individuals as separate unless they cannot be individually identified.

Abundance estimates for the Mexico-North Pacific stock of humpback whales are based upon data collected more than 8 years ago and, therefore, current estimates are considered unknown (Young *et al.,* 2023). The most recent minimum population estimates (N_{MIN}) for this population include an estimate of 2,241 individuals between 2003 and 2006 (Martinez-Aguilar, 2011) and 766 individuals between 2004 and 2006 (Wade, 2021). NMFS' Guidelines for Assessing Marine Mammal Stocks suggest that the N_{MIN} estimate of the stock should be adjusted to account for potential abundance changes that may have occurred since the last survey and provide reasonable assurance that the stock size is at least as large as the estimate (NMFS, 2023b). The abundance trend for this stock is unclear; therefore, there is no basis for adjusting these estimates (Young *et al.,* 2023). Assuming the population has been stable, the 4 takes of this stock authorized represents small numbers of this stock (0.18 percent of the stock assuming a N_{MIN} of 2,241 individuals and 0.52 percent of the stock assuming an N_{MIN} of 766 individuals).

Based on the analysis contained herein of the planned activity (including the required mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

In order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

While no significant subsistence activity currently occurs within or near the POA, Alaska Natives have traditionally harvested subsistence resources, including marine mammals, in upper Cook Inlet for millennia. CIBWs are more than a food source; they are important to the cultural and spiritual practices of Cook Inlet Native communities (NMFS, 2008b). Dena'ina Athabascans, currently living in the communities of Eklutna, Knik, Tyonek, and elsewhere, occupied settlements in Cook Inlet for the last 1,500 years and have been the primary traditional users of this area into the present.

NMFS estimated that 65 CIBWs per year (range 21–123) were killed between 1994 and 1998, including those successfully harvested and those struck and lost. NMFS concluded that this number was high enough to account for the estimated 14 percent annual decline in population during this time (Hobbs *et al.,* 2008); however, given the difficulty of estimating the number of whales struck and lost during the hunts, actual mortality may have been higher. During this same period, population abundance surveys indicated a population decline of 47 percent, although the reason for this decline should not be associated solely with subsistence hunting and likely began well before 1994 (Rugh *et al.,* 2000).

In 1999, a moratorium was enacted (Pub. L. 106–31) prohibiting the subsistence harvest of CIBWs except through a cooperative agreement between NMFS and the affected Alaska Native organizations. NMFS began working cooperatively with the Cook Inlet Marine Mammal Council (CIMMC), a group of tribes that traditionally hunted CIBWs, to establish sustainable harvests. CIMMC voluntarily curtailed its harvests in 1999. In 2000, NMFS designated the Cook Inlet stock of beluga whales as depleted under the MMPA (65 FR 34590, May 31, 2000). NMFS and CIMMC signed Co-Management of the Cook Inlet Stock of Beluga Whales agreements in 2000, 2001, 2002, 2003, 2005, and 2006. CIBW harvests between 1999 and 2006 resulted in the strike and harvest of five whales, including one whale each in 2001, 2002, and 2003, and two whales in 2005 (NMFS, 2008b). No hunt occurred in 2004 due to higher-than-normal mortality of CIBWs in 2003, and the Native Village of Tyonek agreed to not hunt in 2007. Since 2008, NMFS has examined how many CIBWs could be harvested during 5-year intervals based on estimates of population size and growth rate and determined that no harvests would occur between 2008 and 2012 and between 2013 and 2017 (NMFS, 2008b). The CIMMC was disbanded by unanimous vote of the CIMMC member Tribes' representatives in June 2012, and a replacement group of Tribal members has not been formed to date. There has been no subsistence harvest of CIBWs since 2005 (NMFS, 2022d).

Subsistence harvest of other marine mammals in upper Cook Inlet is limited to harbor seals. Steller sea lions are rare in upper Cook Inlet; therefore, subsistence use of this species is not common. However, Steller sea lions are taken for subsistence use in lower Cook Inlet. Residents of the Native Village of Tyonek are the primary subsistence users in the upper Cook Inlet area. While harbor seals are hunted for subsistence purposes, harvests of this for traditional and subsistence uses by Native peoples have been low in upper Cook Inlet (*e.g.,* 33 harbor seals were harvested in Tyonek between 1983 and 2013; see table 8–1 in the POA's application), although these data are not currently being collected and summarized. As the POA's planned project activities will take place within the immediate vicinity of the POA, no activities will occur in or near Tyonek's identified traditional subsistence hunting areas. As the harvest of marine mammals in upper Cook Inlet is historically a small portion of the total subsistence harvest, and the number of marine mammals using upper Cook Inlet is proportionately small, the number of marine mammals harvested in upper Cook Inlet is expected to remain low.

The potential impacts from harassment on stocks that are harvested in Cook Inlet will be limited to minor behavioral changes (*e.g.,* increased swim speeds, changes in dive time, temporary avoidance near the POA, *etc.*) within the vicinity of the POA. Some PTS may occur; however, the shift is likely to be slight due to the implementation of mitigation measures (*e.g.,* shutdown zones, pre-clearance monitoring, soft starts) and the shift will be limited to lower pile driving frequencies, which are on the lower end of phocid and otariid hearing ranges. In summary, any impacts to harbor seals will be limited to those seals within Knik Arm (outside of any hunting area) and the very few takes of Steller sea lions in Knik Arm will be far removed in time and space from any hunting in lower Cook Inlet.

The POA will communicate with representative Alaska Native subsistence users and Tribal members to identify and explain the measures that have been taken or will be taken to minimize any adverse effects of NES1 on the availability of marine mammals for subsistence uses. In addition, the POA will adhere to the following procedures during Tribal consultation regarding marine mammal subsistence use within the Project area:

(1) Send letters to the Kenaitze, Tyonek, Knik, Eklutna, Ninilchik, Salamatof, and Chickaloon Tribes informing them of the planned project (*i.e.,* timing, location, and features). Include a map of the planned project area; identify potential impacts to marine mammals and mitigation efforts, if needed, to avoid or minimize impacts; and inquire about possible marine mammal subsistence concerns they have;

(2) Follow up with a phone call to the environmental departments of the seven Tribal entities to ensure that they received the letter, understand the project, and have a chance to ask questions. Inquire about any concerns they might have about potential impacts to subsistence hunting of marine mammals;

(3) Document all communication between the POA and Tribes; and

(4) If any Tribes express concerns regarding project impacts to subsistence hunting of marine mammals, propose a Plan of Cooperation between the POA and the concerned Tribe(s).

The NES1 project features and activities, in combination with a number of actions to be taken by the POA during project implementation, should avoid or mitigate any potential adverse effects on the availability of marine mammals for subsistence uses. Furthermore, although construction will occur within the traditional area for hunting marine mammals, the project area is not currently used for subsistence activities. In-water pile installation and removal will follow mitigation procedures to minimize effects on the behavior of marine mammals, and impacts will be temporary.

The POA has expressed, if desired, regional subsistence representatives may support project marine mammal biologists during the monitoring program by assisting with collection of marine mammal observations and may request copies of marine mammal monitoring reports.

Based on the description of the specified activity, the measures described to minimize adverse effects on the availability of marine mammals for subsistence purposes, and the required mitigation and monitoring measures, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from the POA's planned activities.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS OPR consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the NMFS Alaska Regional Office.

There are three marine mammal species (the Mexico DPS and Western North Pacific DPS of humpback whale, CIBWs, and western DPS Steller sea lion) with confirmed occurrence in the project area that are listed as endangered or threatened under the ESA. The NMFS Alaska Regional Office issued a BiOp on December 15, 2023, under section 7 of the ESA, on the issuance of an IHA to the POA under section 101(a)(5)(D) of the MMPA by the NMFS OPR. The BiOp concluded that the specified action is not likely to jeopardize the continued existence of the Mexico DPS and Western North Pacific DPS of humpback whale, CIBWs, or western DPS Steller sea lions, and is not likely to destroy or adversely modify CIBW critical habitat. There is no critical habitat designated for humpback whales or Steller sea lions in the action area.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NAO 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment. Accordingly, NMFS prepared an Environmental Assessment (EA). The EA supported a FONSI. A copy of the EA and FONSI is available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.*

Authorization

NMFS has issued an IHA to the POA for the potential harassment of small numbers of seven marine mammal species incidental to the NES1 project in Anchorage, Alaska, that includes the previously explained mitigation, monitoring and reporting requirements.

Dated: January 8, 2024.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

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