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Rules and Regulations

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

[Docket ID: OPM–2023–0028]

RIN 3206–AO64

Prevailing Rate Systems; North American Industry Classification System Based Federal Wage System Wage Surveys

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing this final rule to update the 2017 North American Industry Classification System (NAICS) codes currently used in Federal Wage System (FWS) wage survey industry regulations with the 2022 NAICS revisions published by the Office of Management and Budget (OMB).

DATES:

Effective date: This rule is effective February 23, 2024.

Applicability date: This rule applies for local wage surveys beginning on or after May 8, 2024.

FOR FURTHER INFORMATION CONTACT: Ana Paunoiu, by telephone at (202) 606–2858, or by email at *paypolicy@opm.gov*.

SUPPLEMENTARY INFORMATION: On September 27, 2023, OPM issued a proposed rule (88 FR 66300) to update the 2017 NAICS codes used in FWS wage survey industry regulations with the 2022 NAICS revisions published by OMB. The Federal Prevailing Rate Advisory Committee (FPRAC), the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, recommended these changes by consensus at its May 18, 2023, meeting. The transcript of this meeting can be found on the Federal Wage System website, available at *https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/federal-wage-system/#url=FPRAC*.

The 30-day comment period ended on October 27, 2023. OPM received one comment in reference to the impact of the NAICS revisions on the existing wage schedules and FWS wage areas. We note, however, that this final regulation will have no impact on the existing wage schedules and FWS wage areas because there will be no changes in the types of industrial establishments already included in FWS wage surveys. This final rule updates the wage survey industry regulations by adopting the 2022 NAICS codes published by OMB.

The commenter also stated that no guidance or criteria for selecting the NAICS codes were provided. In 1997, OMB developed NAICS and required its use for Federal statistical purposes. NAICS replaced the 1987 Standard Industrial Classification (SIC) industry classification system. On June 20, 2006, OPM published final regulations (71 FR 35373) replacing SIC codes with NAICS codes, following an FPRAC recommendation. This recommendation was based on FPRAC's Wage Survey Methodology Work Group (Work Group) study of the desirability and feasibility of replacing the SIC codes used in FWS regulations at the time with NAICS codes and the effect of this change on industry coverage for FWS wage surveys. The Work Group recommended to FPRAC that OPM replace all SIC codes in the FWS regulations with the most closely corresponding NAICS codes, while making as few changes as possible in the types of industrial establishments that were already included in FWS wage surveys under the SIC system.

We have not made any changes to the final regulations based on this comment. This final regulation is effective February 23, 2024. However, to provide the Department of Defense (DOD) with sufficient time for planning surveys and implementing changes required by OMB's 2022 NAICS revisions, the regulation is applicable for wage surveys ordered to begin on or after May 8, 2024.

As OMB continues to update NAICS codes periodically, OPM will update these regulations to correspond to the updated NAICS codes after consideration of any recommendations submitted by FPRAC.

Expected Impact of This Rule

OPM is issuing this final rule so that its FWS wage survey industry regulations remain consistent and up to date with OMB's NAICS codes. OPM expects this rule to have no significant impact on whether companies are included or excluded from wage surveys. The expected costs would be de minimis since DOD, the lead agency responsible for conducting FWS wage surveys, will only have to make some minor changes in their computer systems to follow the updated NAICS codes. OPM does not anticipate this rule will have a substantial impact on the local economies or a large impact in the local labor markets. OPM will continue to study the implications of such impacts of this or future rules as needed, as this and future changes in OMB's NAICS codes may have higher impact on wage survey methodology.

Regulatory Review

OPM has examined the impact of this rule as required by Executive Orders 13563, 12866, and 14094, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). This rule is not considered a ''significant regulatory action'' under section 3(f) of Executive Order 12866.

Regulatory Flexibility Act

The Director of OPM certifies that this rule will not have a significant economic impact on a substantial number of small entities because this rule will affect only Federal agencies and employees.

Federalism

OPM examined this rule in accordance with Executive Order 13132, Federalism, and determined that it will not have any negative impact on the rights, roles, and responsibilities of State, local, or tribal governments.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Act of 1995

This rule will not result in the expenditure by State, local, and tribal

governments, in the aggregate, or by the private sector, of $100 million or more in any year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA) (5 U.S.C. 801 *et seq.*) requires most final rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this rule before its effective date. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule is not a major rule as defined by the CRA (5 U.S.C. 804).

Paperwork Reduction Act

This rule does not impose any reporting or record-keeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

Accordingly, OPM amends 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

■ 1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

■ 2. In § 532.213, amend the table in paragraph (a) by revising the column headings, removing the entry for NAICS code 515, and adding in numerical order an entry for NAICS code 516 to read as follows:

§ 532.213 Industries included in regular appropriated fund wage surveys.

(a) * * *

2022 NAICS codes	2022 NAICS industry titles
* * * * *	
516	* Broadcasting and content providers.
* * * * *	

* * * * *

■ 3. In § 532.221, amend the table in paragraph (a) by:

■ a. Revising the column headings;

■ b. Removing the entry for NAICS code 44132;

■ c. Adding in numerical order an entry for NAICS code 44134;

■ d. Removing the entries for NAICS codes 443, 44611, 4471, 44814, 4522, 4523, 45321, and 4542; and

■ e. Adding in numerical order entries for NAICS codes 449210, 4551, 4552, 45611, 4571, 45811, and 45941.

The revisions and additions read as follows:

§ 532.221 Industries included in regular nonappropriated fund surveys.

(a) * * *

2022 NAICS codes	2022 NAICS industry titles
* *	* * * * *
44134	Tire dealers.
* *	* * * * *
449210	Electronics and appliance retailers.
4551	Department stores.
4552	Warehouse clubs, supercenters, and other general merchandise retailers.
45611	Pharmacies and drug stores.
4571	Gasoline stations.
45811	Clothing and clothing accessories retailers.
45941	Office supplies and stationery retailers.
* *	* * * * *

* * * * *

■ 4. In § 532.223, revise paragraph (a) to read as follows:

§ 532.223 Establishments included in regular nonappropriated fund surveys.

(a) All establishments having 20 or more employees in the prescribed industries within a survey area must be included in the survey universe. Establishments in NAICS codes 4571, 71391, and 71395 must be included in the survey universe if they have eight or more employees.

* * * * *

■ 5. In § 532.267, amend the table in paragraph (c)(1) by:

■ a. Revising the column headings;

■ b. Adding in numerical order an entry for NAICS code 333310;

■ c. Removing the entry for NAICS code 333316;

■ d. Adding in numerical order an entry for NAICS code 334610; and

■ e. Removing the entry for NAICS code 334613.

The revisions and additions read as follows:

§ 532.267 Special wage schedules for aircraft, electronic, and optical instrument overhaul and repair positions in Puerto Rico.

* * * * *

(c) * * *

(1) * * *

2022 NAICS codes	2022 NAICS industry titles
333310	Commercial and service industry machinery manufacturing.
* *	* * * * *
334610	Manufacturing and reproducing magnetic and optical media.
* *	* * * * *

* * * * *

■ 6. In § 532.285, amend the table in paragraph (c)(1) by revising the column headings, removing the entry for NAICS code 515, and adding in numerical order an entry for NAICS code 516 to read as follows:

§ 532.285 Special wage schedules for supervisors of negotiated rate Bureau of Reclamation employees.

* * * * *

(c) * * *

(1) * * *

2022 NAICS codes	2022 NAICS industry titles
* * * * * * *	
516	Broadcasting and content providers.
* * * * * * *	

* * * * *

§ 532.287 [Amended]

■ 7. In § 532.287, amend the table in paragraph (c)(4) by:

■ a. Removing the column heading ''2017 NAICS codes'' and adding in its place ''2022 NAICS codes'';

■ b. Removing the column heading ''2017 NAICS industry titles'' and adding in its place ''2022 NAICS industry titles''; and

■ c. Removing the entry for NAICS code 441310.

■ 8. In § 532.313, amend the table in paragraph (a) by:

■ a. Revising the column headings;

■ b. Under the heading ''Artillery and Combat Vehicles Specialized Industry'':

■ i. Revising the entry for NAICS Code 4413;

■ ii. Removing the entry for NAICS Code 44421;

■ iii. Adding in numerical order entries for NAICS Codes 44423 and 5171;

■ iv. Removing the entries for NAICS Codes 5173 and 517911; and

■ v. Adding in numerical order an entry for NAICS Code 517121;

■ c. Under the heading ''Communications Specialized Industry'':

■ i. Removing the entries for NAICS Codes 5151, 5152, and 5173;

■ ii. Adding in numerical order entries for NAICS Codes 5161, 5162, and 5171;

■ iii. Removing the entry for NAICS Code 517911; and

■ iv. Adding in numerical order an entry for NAICS code 517121;

■ d. Under the heading ''Electronics Specialized Industry'':

■ i. Adding in numerical order an entry for NAICS Code 333310;

■ ii. Removing the entry for NAICS Code 333316;

■ iii. Adding in numerical order an entry for NAICS Code 334610; and

■ iv. Removing the entry for NAICS Code 334613;

■ e. Under the heading ''Guided Missiles Specialized Industry'':

■ i. Adding in numerical order an entry for NAICS Code 333310;

■ ii. Removing the entry for NAICS Code 333316;

■ iii. Adding in numerical order an entry for NAICS Code 334610; and

■ iv. Removing the entry for NAICS Code 334613; and

■ f. Under the heading ''Sighting and Fire Control Equipment Specialized Industry'':

■ i. Adding in numerical order an entry for NAICS Code 333310;

■ ii. Removing the entries for NAICS Codes 333314 and 333316;

■ iii. Adding in numerical order an entry for NAICS Code 334610; and

■ iv. Removing the entry for NAICS Code 334613.

The revisions and additions read as follows:

§ 532.313 Private sector industries.

(a) * * *

2022 NAICS codes	2022 NAICS industry titles
* * * * * * *	
Artillery and Combat Vehicles Specialized Industry	
* * * * * * *	
4413	Automotive parts, accessories, and tire retailers.
44423	Outdoor power equipment retailers.
* * * * * * *	
5171	Wired and wireless telecommunications carriers (except Satellite).
517121	Telecommunications resellers.
* * * * * * *	
Communications Specialized Industry	
* * * * * * *	
5161	Radio and television broadcasting stations.
5162	Media streaming distribution services, social networks, and other media networks and content providers.
5171	Wired and wireless telecommunications carriers (except Satellite).
* * * * * * *	
517121	Telecommunications resellers.

2022 NAICS codes	2022 NAICS industry titles
* * * * * * *	
Electronics Specialized Industry	
333310	Commercial and service industry machinery manufacturing.
* * * * * * *	
334610	Manufacturing and reproducing magnetic and optical media.
* * * * * * *	
Guided Missiles Specialized Industry	
* * * * * * *	
333310	Commercial and service industry machinery manufacturing.
* * * * * * *	
334610	Manufacturing and reproducing magnetic and optical media.
* * * * * * *	
* * * * * * *	
Sighting and Fire Control Equipment Specialized Industry	
333310	Commercial and service industry machinery manufacturing.
* * * * * * *	
334610	Manufacturing and reproducing magnetic and optical media.
* * * * * * *	
* * * * * * *	

* * * * *

[FR Doc. 2024–01086 Filed 1–23–24; 8:45 am]

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 143

RIN 3038–AF32

Annual Adjustment of Civil Monetary Penalties To Reflect Inflation—2024

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission) is amending its rule that governs the maximum amount of civil monetary penalties imposed under the Commodity Exchange Act (CEA), to adjust for inflation. This rule sets forth the maximum, inflation-adjusted dollar amount for civil monetary penalties (CMPs) assessable for violations of the CEA and Commission rules, regulations and orders thereunder. The rule, as amended, implements the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

DATES: This rule is effective on January 24, 2024 and is applicable to penalties assessed after January 15, 2024.

FOR FURTHER INFORMATION CONTACT: Edward J. Riccobene, Associate Chief Counsel, Division of Enforcement, at (202) 418–5327 or *ericcobene@cftc.gov,* Commodity Futures Trading Commission, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA) [1] requires the head of each Federal agency to periodically adjust for inflation the minimum and maximum amount of CMPs provided by law within the jurisdiction of that agency.[2] A 2015 amendment to the FCPIAA [3] required agencies to make an initial ''catch-up'' adjustment to its civil monetary penalties effective no later than August 1, 2016.[4] For every year thereafter effective not later than January 15th, the FCPIAA, as amended, requires agencies to make annual adjustments for inflation, with guidance from the Director of the Office of Management and Budget.[5]

II. Commodity Exchange Act Civil Monetary Penalties

The following sections of the CEA provide for CMPs that meet the FCPIAA

[1] The FCPIAA, Public Law 101–410 (1990), as amended, is codified at 28 U.S.C. 2461 note. The FCPIAA states that the purpose of the FCPIAA is to establish a mechanism that shall (1) allow for regular adjustment for inflation of civil monetary penalties; (2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and (3) improve the collection by the Federal Government of civil monetary penalties.

[2] For the relevant CMPs within the Commission's jurisdiction, the Act provides only for maximum amounts that can be assessed for each violation of the Act or the rules, regulations and orders promulgated thereunder; the Act does not set forth any minimum penalties. Therefore, the remainder of this release will refer only to CMP maximums.

[3] Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, 129 Stat. 584 (2015) (2015 Act), title VII, Section 701.

[4] FCPIAA Sections 4 and 5. See also, Adjustment of Civil Monetary Penalties for Inflation, 81 FR 41435 (June 27, 2016).

[5] FCPIAA Sections 4 and 5. See also, Executive Office of the President, Office of Management and Budget Memorandum, M–24–07, Implementation of Penalty Inflation Adjustments for 2024 (Dec. 19, 2023) (2023 OMB Guidance) (*https://www.whitehouse.gov/wp-content/uploads/2023/12/M-24-07-Implementation-of-Penalty-Inflation-Adjustments-for-2024.pdf*).

definition [6] and these CMPs are, therefore, subject to the inflation adjustment: Sections 6(c), 6b, and 6c of the CEA.[7]

III. Annual Inflation Adjustment for Commodity Exchange Act Civil Monetary Penalties

A. Methodology

The FCPIAA annual inflation adjustment, in the context of the CFTC's CMPs, is determined by increasing the maximum penalty by a ''cost-of-living adjustment'', rounded to the nearest multiple of one dollar.[8] Annual inflation adjustments are based on the percent change between the October Consumer Price Index for all Urban Consumers (CPI–U) preceding the date of the adjustment, and the prior year's October CPI–U.[9] In this case, the October 2023 CPI–U (307.671)/October 2022 CPI–U (298.012) = 1.03241.[10] In order to complete the 2024 annual adjustment, the CFTC must multiply each of its most recent CMP amounts by the multiplier, 1.03241, and round to the nearest dollar.[11]

B. Civil Monetary Penalty Adjustments

Applying the FCPIAA annual inflation adjustment methodology results in the following amended CMPs:

U.S. Code citation	Civil monetary penalty description		Violations occurring on or after 11/02/2015		
			Penalty amount in 2023 final rule [12]	CPI–U multiplier	New adjusted penalty amount
Civil Monetary Penalty Imposed by the Commission in an Administrative Action					
7 U.S.C. 9 (Section 6(c) of the Commodity Exchange Act).	For any person other than a registered entity[1].	Other Than Manipulation or Attempted Manipulation.	$194,710	1.03241	$201,021
	For any person other than a registered entity [1].	Manipulation or Attempted Manipulation.	1,404,520	1.03241	1,450,040
7 U.S.C. 13a (Section 6b of the Commodity Exchange Act).	For a registered entity [1] or any of its directors, officers or employees.	Other Than Manipulation or Attempted Manipulation.	1,072,570	1.03241	1,107,332
	For a registered entity [1] or any of its directors, officers or employees.	Manipulation or Attempted Manipulation.	1,404,520	1.03241	1,450,040
Civil Monetary Penalty Imposed by a Federal District Court in a Civil Injunctive Action					
7 U.S.C. 13a–1 (Section 6c of the Commodity Exchange Act).	Any Person	Other Than Manipulation or Attempted Manipulation.	214,514	1.03241	221,466
	Any Person	Manipulation or Attempted Manipulation.	1,404,520	1.03241	1,450,040

[1] The term ''Registered Entity'' is defined in 7 U.S.C. 1a (Section 1a of the Commodity Exchange Act).

The FCPIAA provides that any increase under the FCPIAA in a civil monetary penalty shall apply only to civil monetary penalties, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect.[13] Thus, the new CMP amounts established by this rulemaking shall apply to penalties assessed after January 15, 2024, for violations that occurred on or after November 2, 2015, the effective date of the FCPIAA amendment requiring annual adjustments, the 2015 Act.

IV. Administrative Compliance

A. Notice Requirement

The FCPIAA specifically exempted from the Administrative Procedure Act (APA) the rulemakings required to implement annual inflation adjustments.[14] This means that the public procedure the APA generally requires—notice, an opportunity for comment, and a delay in effective date—is not required for agencies to issue regulations implementing the annual adjustment.[15] The Commission further notes that the notice and comment procedures of the APA do not apply to this rulemaking because the Commission is acting herein pursuant to statutory language that mandates that the Commission act in a nondiscretionary matter.[16]

B. Regulatory Flexibility Act

The Regulatory Flexibility Act [17] requires agencies with rulemaking authority to consider the impact of certain of their rules on small businesses. A regulatory flexibility analysis is only required for rules for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) or any other law.[18] Because, as discussed above, the Commission is not obligated by section 553(b) or any other law to publish a general notice of proposed rulemaking with respect to the revisions being made to Rule 143.8, the Commission additionally is not obligated to conduct a regulatory flexibility analysis.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA),[19] which imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA, does not apply to this rule. This rule amendment does not contain information collection requirements that

[6] FCPIAA Section 3(2).

[7] 7 U.S.C. 9, 13a–1, 13b. Criminal authorities may also seek fines for criminal violations of the CEA (see 7 U.S.C. 13, 13(c), 13(d), 13(e), and 13b). The FCPIA does not affect the amounts of these criminal penalties.

[8] FCPIAA Sections 4 and 5.

[9] FCPIAA Section 5(b)(1).

[10] The CPI–U is published by the Department of Labor. Interested parties may find the relevant Consumer Price Index on the internet. To access this information, go to the Consumer Price Index Home Page at: *http://www.bls.gov/cpi/*. Click the ''CPI Data/Databases'' heading, and select ''All Urban Consumers (Current Series)'', ''Top Picks.'' Then check the box for ''U.S. city average, All items—CUUR0000SA0'', and click the ''Retrieve data'' button.

[11] FCPIAA Section 5(a). See also, 2023 OMB Guidance at 1.

[12] Annual Adjustment of Civil Monetary Penalties to Reflect Inflation—2023, 88 FR 1501 (Jan. 11, 2023); *https://www.cftc.gov/sites/default/files/2023/01/2023-00396a.pdf*.

[13] FCPIAA Section 6.

[14] FCPIAA Section 4(b)(2).

[15] 2023 OMB Guidance at 3–4.

[16] *Lake Carriers' Ass'n* v. *E.P.A.,* 652 F.3d 1, 10 (D.C. Cir. 2011).

[17] 5 U.S.C. 601–612.

[18] 5 U.S.C. 603(a).

[19] 44 U.S.C. 3507(d).

require the approval of the Office of Management and Budget.

D. Consideration of Costs and Benefits

Section 15(a) of the CEA [20] requires the Commission to consider the costs and benefits of its action before issuing a new regulation. Section 15(a) of the CEA further specifies that 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.

The Commission believes that benefits of this rulemaking greatly outweigh the costs, if any. As the Commission understands, the statutory provisions by which it is making cost-of-living adjustments to the CMPs in Rule 143.8 were enacted to ensure that CMPs do not lose their deterrence value because of inflation. An analysis of the costs and benefits of these adjustments were made before enactment of the statutory provisions under which the Commission is operating, and limit the discretion of the Commission to the extent that there are no regulatory choices the Commission could make that would supersede the pre-enactment analysis with respect to the five factors enumerated in Section 15(a) of the CEA, or any other factors.

List of Subjects in 17 CFR Part 143

Claims, Penalties.

For the reasons set forth in the preamble, the Commodity Futures Trading Commission amends part 143 of chapter I of title 17 of the Code of Federal Regulations as follows:

PART 143—COLLECTION OF CLAIMS OWED THE UNITED STATES ARISING FROM ACTIVITIES UNDER THE COMMISSION'S JURISDICTION

■ 1. The authority citation for part 143 continues to read as follows:

Authority: 7 U.S.C. 9, 9a, 12a(5), 13a, 13a–1(d), 13(a), 13b; 31 U.S.C. 3701–3720E; 28 U.S.C. 2461 note.

■ 2. Amend § 143.8 by revising paragraph (b) to read as follows:

§ 143.8 Inflation-adjusted civil monetary penalties.

* * * * *

(b) *2024 Inflation adjustment.* The maximum amount of each civil monetary penalty in the following charts applies to penalties assessed after January 15, 2024:

(1) For violations, other manipulation, or attempted manipulation:

TABLE 1 TO PARAGRAPH (b)(1)

U.S. Code citation	Civil monetary penalty description	Date of violation and corresponding penalty			
		10/23/2004 through 10/22/2008	10/23/2008 through 10/22/2012	10/23/2012 through 11/01/2015	11/02/2015 to present
Civil Monetary Penalty Imposed by the Commission in an Administrative Action					
7 U.S.C. 9 (Section 6(c) of the Commodity Exchange Act).	For any person other than a registered entity [1]	$130,000	$140,000	$140,000	$201,021
7 U.S.C. 13a (Section 6b of the Commodity Exchange Act).	For a registered entity [1] or any of its directors, officers or employees.	625,000	675,000	700,000	1,107,332
Civil Monetary Penalty Imposed by a Federal District Court in a Civil Injunctive Action					
7 U.S.C. 13a–1 (Section 6c of the Commodity Exchange Act).	Any Person	130,000	140,000	140,000	221,466

[1] The term ''Registered Entity'' is defined in 7 U.S.C. 1a (Section 1a of the Commodity Exchange Act).

(2) For manipulation or attempted manipulation violations:

TABLE 2 TO PARAGRAPH (b)(2)

U.S. Code citation	Civil monetary penalty description	Date of violation and corresponding penalty			
		10/23/2004 through 05/21/2008	05/22/2008 through 08/14/2011	08/15/2011 through 11/01/2015	11/02/2015 to present
Civil Monetary Penalty Imposed by the Commission in an Administrative Action					
7 U.S.C. 9 (Section 6(c) of the Commodity Exchange Act).	For any person other than a registered entity [1]	$130,000	$1,000,000	$1,025,000	$1,450,040
7 U.S.C. 13a (Section 6b of the Commodity Exchange Act).	For a registered entity [1] or any of its directors, officers or employees.	625,000	1,000,000	1,025,000	1,450,040
Civil Monetary Penalty Imposed by a Federal District Court in a Civil Injunctive Action					
7 U.S.C. 13a–1 (Section 6c of the Commodity Exchange Act).	Any Person	130,000	1,000,000	1,025,000	1,450,040

[1] The term ''Registered Entity'' is defined in 7 U.S.C. 1a (Section 1a of the Commodity Exchange Act).

[20] 7 U.S.C. 19(a).

Issued in Washington, DC, on January 19, 2024, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

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

Appendix to Annual Adjustment of Civil Monetary Penalties To Reflect Inflation—2024—Commission Voting Summary

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

[FR Doc. 2024–01341 Filed 1–23–24; 8:45 am]

BILLING CODE 6351–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33–11259; 34–99193; 39–2553; IC–35068]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to Volume II of the Electronic Data Gathering, Analysis, and Retrieval system Filer Manual (''EDGAR Filer Manual'' or ''Filer Manual'') and related rules and forms. EDGAR Release 23.4 will be deployed in the EDGAR system on December 18, 2023.

DATES: *Effective date:* January 24, 2024.

Incorporation by reference: The incorporation by reference of the revised Filer Manual is approved by the Director of the Federal Register as of January 24, 2024.

FOR FURTHER INFORMATION CONTACT: For questions regarding the amendments to Volume II of the Filer Manual, please contact Rosemary Filou, Deputy Director and Chief Counsel, Jane Patterson, Senior Special Counsel, or Lidian Pereira, Senior Special Counsel, in the EDGAR Business Office at (202) 551–3900. For questions regarding new Item 1.05 in Forms 8–K, 8–K12B, 8–K12G3, 8–K15D5, 8–K/A, 8–K12B/A, 8–K12G3/A, and 8–K15D/A, please contact Nabeel Cheema, Senior Counsel, in the Division of Corporation Finance at (202) 551–5512. For questions regarding updates to disclosures in Schedules 13D and 13G related to beneficial ownership or interests in security-based swaps, please contact Nicholas Panos, Senior Special Counsel, or Valian Afshar, Senior Special Counsel, in the Division of Corporation Finance at (202) 551–3440. For questions regarding new tagging requirements for Forms N–8B–2 and S–6, please contact Heather Fernandez, Financial Analyst, in the Division of Investment Management at (202) 551–6708. For questions concerning taxonomies or schemas, please contact the Office of Structured Disclosure in the Division of Economic and Risk Analysis at (202) 551–5494.

SUPPLEMENTARY INFORMATION: We are adopting an updated Filer Manual, Volume II: ''EDGAR Filing,'' Version 68 (December 2023) and amendments to 17 CFR 232.301 (''Rule 301''). The updated Filer Manual is incorporated by reference into the Code of Federal Regulations.

I. Background

The Filer Manual contains information needed for filers to make submissions on EDGAR. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[1] Filers must consult the Filer Manual in conjunction with our rules governing mandated electronic filings when preparing documents for electronic submission.

II. EDGAR System Changes and Associated Modifications to Volume II of the Filer Manual

EDGAR is being updated in EDGAR Release 23.4, and corresponding amendments to Volume II of the Filer Manual are being made to reflect these changes, as described below.[2]

Public Company Cybersecurity Incident Disclosure

On July 26, 2023, the Commission adopted new rules to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and incidents by public companies that are subject to the reporting requirements of the Securities Exchange Act of 1934.[3] The new rules require registrants to disclose material cybersecurity incidents on new Item 1.05 of Forms 8–K, 8–K12B, 8–K12G3, 8–K15D5, 8–K/A, 8–K12B/A, 8–K12G3/A, and 8–K15D/A, and describe certain aspects of the incident's nature, scope, and timing, as well as its material impact or reasonably likely material impact on the registrant, within four business days after a registrant determines the cybersecurity incident is material. EDGAR will be modified to add new Item 1.05 to the relevant forms to allow registrants to disclose the required information.

Rule Amendments Modernizing Beneficial Ownership Reporting

On October 10, 2023, the Commission adopted amendments to certain rules that govern beneficial ownership reporting. These rule revisions both shorten filing deadlines for initial and amended reports and require that all information disclosed within the reports, excluding exhibits, be filed using structured, machine-readable language.[4] To the extent that a beneficial owner wishes to submit an amendment to a Schedule 13D on EDGAR as a combined filing with a Schedule TO, however, the combined filing would not be required or allowed to be filed using structured, machine-readable language. EDGAR will be modified accordingly.

In addition, EDGAR will be modified such that when the amendments become effective on February 5, 2024, a Schedule 13D, Schedule 13D/A, Schedule 13G, and Schedule 13G/A filed before 10 p.m. eastern time on a day that EDGAR is operating will receive a filing date identical to the EDGAR received date and will be disseminated until 10 p.m. eastern time.

Investment Company Name Clarification

On September 20, 2023, the Commission amended rules under the Investment Company Act of 1940 to clarify certain broad categories of investment company names that are likely to mislead investors about an investment company's investments and risks.[5] To implement this rulemaking, EDGAR will be updated to support a new taxonomy—FND—with 2023 and 2022 versions. EDGAR will also be updated to accept Inline XBRL submissions on Forms N–8B–2 and S–6.

Removal of Certain Defunct and Discontinued Forms

EDGAR will be updated to remove the following obsolete forms from the

[1] *See* Rule 301 of Regulation S–T.

[2] EDGAR Release 23.4 will be deployed on [December 18, 2023].

[3] Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Release No. 33–11216 (July 26, 2023) [88 FR 51896 (Aug. 4, 2023)].

[4] Modernization of Beneficial Ownership Reporting, Release No. 33–11253 (Oct. 10, 2023) [88 FR 76986 (Nov. 7, 2023)].

[5] Investment Company Names, Release No. 33–11238A (Sep. 20, 2023) [88 FR 70436 (Oct. 11, 2023)].

EDGARLink Online Form Submission Types list:

• N–LIQUID and N–LIQUID/A—On November 2, 2020, the Commission revised and changed the name of Form N–LIQUID to Form N–RN.[6] As a result, EDGAR was updated to add new Form N–RN submission types. The N–LIQUID submission types will be retired since that version of the form is no longer in effect. Filers, instead, should submit Form N–RN.

• 24F–2NT and 24F–2NT/A—On April 8, 2020, the Commission required filers to file Form 24F–2 in XML instead of ASCII/HTML.[7] Beginning February 1, 2022, filers have been required to submit submission types 24F–2NT and 24F–2NT/A in a structured XML format. The links to the invalid ASCII/HTML versions of the form are being removed.

• F–4EF and F–4 POS—The submission types F–4EF and F–4POS are being removed as Form F–4 does not have an automatically effective provision. This change will also streamline the implementation of a fee payment validation function, which is being implemented as part of the Commission's Filing Fee Disclosure and Payment Methods Modernization Rule.

On October 13, 2021, the Commission adopted amendments to modernize filing fee disclosure and payment methods.[8] EDGAR will be updated to allow filers to voluntarily choose to comply with the rule's requirements to disclose filing fee calculation table(s) and related information in the EX–FILING FEES exhibit in Inline XBRL format for 72 fee-bearing form types beginning January 31, 2024. The changes to EDGAR will also allow the phase-in of the Inline XBRL filing fee requirements over a period of approximately 18 months:

○ January 31, 2024—Filers voluntarily file fee data in Inline XBRL format (approximately six months prior to July 31, 2024).

○ July 31, 2024—Large Accelerated Filers required to submit fee data in Inline XBRL format.

○ July 31, 2025—Compliance by all filers required, including certain investment companies that file registrations on Forms N–2 and N–14.

[6] Use of Derivatives by Registered Investment Companies and Business Development Companies, Release No. IC–34084 (Nov. 2, 2020) [86 FR 83162 (Dec. 21, 2020)].

[7] Securities Offering Reform for Closed-End Investment Companies, Release No. 33–10771A (Apr. 8, 2020) [86 FR 33290 (June 1, 2020)].

[8] Filing Fee Disclosure and Payment Methods Modernization, Release No. 33–10997 (Oct. 13, 2021) [86 FR 70166 (Dec. 9, 2021)].

III. Amendments to Rule 301 of Regulation S–T

Along with the adoption of the updated Filer Manual, we are amending Rule 301 of Regulation S–T to provide for the incorporation by reference into the Code of Federal Regulations of the current revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

The updated EDGAR Filer Manual is available at *https://www.sec.gov/edgar/filerinformation/current-edgar-filer-manual.*

IV. Administrative Law Matters

Because the Filer Manual and rule amendments relate solely to agency procedures or practice and do not substantially alter the rights and obligations of non-agency parties, publication for notice and comment is not required under the Administrative Procedure Act (''APA'').[9] It follows that the amendments do not require analysis under requirements of the Regulatory Flexibility Act[10] or a report to Congress under the Small Business Regulatory Enforcement Fairness Act of 1996.[11]

The effective date for the updated Filer Manual and related rule amendments is January 24, 2024. In accordance with the APA,[12] we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with the related system upgrades.

V. Statutory Basis

We are adopting the amendments to Regulation S–T under the authority in Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[13] Sections 3, 12, 13, 14, 15, 15B, 23 and 35A of the Securities Exchange Act of 1934,[14] Section 319 of the Trust Indenture Act of 1939,[15] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[16]

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

[9] 5 U.S.C. 553(b)(A).

[10] 5 U.S.C. 601 through 612.

[11] 5 U.S.C. 804(3)(c).

[12] 5 U.S.C. 553(d)(3).

[13] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[14] 15 U.S.C. 78c, 78*l,* 78m, 78n, 78*o,* 78*o*–4, 78w, and 78*ll.*

[15] 15 U.S.C. 77sss.

[16] 15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37.

Text of the Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78*o*(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 80b–4, 80b–6a, 80b–10, 80b–11, 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Section 232.301 is revised to read as follows:

§ 232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets forth the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the EDGAR Filer Manual, Volume I: ''General Information,'' Version 41 (December 2022). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: ''EDGAR Filing,'' Version 68 (December 2023). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You must comply with these requirements in order for documents to be timely received and accepted. The EDGAR Filer Manual is available for inspection at the Commission and at the National Archives and Records Administration (NARA). The EDGAR Filer Manual is available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's Public Reference Room. For information on the availability of the EDGAR Filer Manual at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.* The EDGAR Filer Manual may also be obtained from *https://www.sec.gov/edgar/filerinformation/current-edgar-filer-manual.*

By the Commission.

Dated: December 18, 2023.

Vanessa A. Countryman,

Secretary.

Editorial Note: This document was received for publication by the Office of the Federal Register on January 19, 2024.

[FR Doc. 2024–01314 Filed 1–23–24; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[TD 9985]

RIN 1545–BQ94

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

RIN 1210–AC24

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 149

[CMS–9890–CN]

RIN 0938–AV39

Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges; Correction

AGENCY: Internal Revenue Service (IRS), Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services (HHS).

ACTION: Final rule; correction.

SUMMARY: This document corrects technical errors that appeared in the December 21, 2023 final rules entitled, ''Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges.''

DATES: This correcting document is effective January 22, 2024.

FOR FURTHER INFORMATION CONTACT: Shira B. McKinlay or William Fischer, Internal Revenue Service, Department of the Treasury, 202–317–5500; Shannon Hysjulien or Rebecca Miller, Employee Benefits Security Administration, Department of Labor, 202–693–8335; and Jacquelyn Rudich or Nora Simmons, Centers for Medicare & Medicaid Services, Department of Health and Human Services, 301–492–5211.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

On December 21, 2023, the Departments of Health and Human Services (HHS), Labor, and the Treasury (collectively, the Departments) published FR Doc. 2023–27931 (88 FR 88494), entitled ''Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges'' (final rules) related to the fees established by the No Surprises Act for the Federal IDR process, as established by the Consolidated Appropriations Act, 2021. The final rules (88 FR 88524 and 88525) contained non-substantive technical errors in the amendatory instructions for the regulation text and the HHS title that are identified in section II. of this document and corrected in section IV. of this document. The provisions in this correction document are effective as of the effective date of the final rules, because the Departments determined there is good cause to waive any delay in effective date for the reasons set forth in section III. of this document. Accordingly, the corrections are effective January 22, 2024.

B. Regulations Overview

The final rules amended existing regulations to provide that the administrative fee amount charged by the Departments to participate in the Federal IDR process and the ranges for certified IDR entity fees for single and batched determinations will be set by the Departments through notice and comment rulemaking. The preamble to the final rules also set forth the methodology used to calculate the administrative fee and the considerations used to develop the certified IDR entity fee ranges. The final rules also finalized the amount of the administrative fee and the certified IDR entity fee ranges for disputes initiated on or after the effective date of the final rules. Below, the Departments summarize the errors in the final rules and describe the corrections that the Departments are making in this document.

II. Summary of Errors

In the final rules the Departments inadvertently made technical errors in the amendatory instructions for the regulation text for all three Departments. Amendatory instruction 3.h. incorrectly stated that the Department of the Treasury was removing ''; and'' at the end of newly redesignated 26 CFR 54.9816–8T(e)(2)(xii) and adding a period in its place. Similarly, amendatory instruction 5.h. incorrectly stated that the Department of Labor was removing ''; and'' at the end of newly redesignated 29 CFR 2590.716–8(e)(2)(xii) and adding a period in its place, and amendatory instruction 7.h. incorrectly stated that the Department of Health and Human Services was removing ''; and'' at the end of newly redesignated 45 CFR 149.510(e)(2)(xii) and adding a period in its place. Instead, the Departments intended for these amendments to apply to newly redesignated 26 CFR 54.9816–8T(e)(2)(xi), 29 CFR 2590.716–8(e)(2)(xi), and 45 CFR 149.510(e)(2)(xi), respectively, rather than newly redesignated 26 CFR 54.9816–8T(e)(2)(xii), 29 CFR 2590.716–8(e)(2)(xii), and 45 CFR 149.510(e)(2)(xii), which do not include ''; and'' at the end of each paragraph and already end with periods. Finally, the Departments made a typographical error in the title line for HHS and incorrectly referenced 49 CFR subtitle A rather than 45 CFR subtitle A. Accordingly, the Departments are revising the title line for HHS to accurately reflect the correct title.

III. Waiver of Proposed Rulemaking and Waiver of the Delay in Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 551, *et seq.*), while a general notice of proposed rulemaking and an opportunity for public comment is generally required before the promulgation of regulations, this is not required when an agency, for good cause, finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the reasons for that finding in the document.

The APA also generally requires that a final rule be effective no sooner than 30 days after the date of publication in the **Federal Register**. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the APA notice and comment and delay in effective date requirements. Section 553(b)(B) of the APA authorizes an agency to dispense with normal notice and comment rulemaking procedures for good cause if the agency makes a finding that the notice and comment process is impracticable, unnecessary, or contrary to the public interest and includes a statement of the finding and the reasons for it in the rule. Similarly, section 553(d)(3) of the APA allows the agency

to avoid the 30-day delay in effective date where good cause is found and the agency includes in the rule a statement of the finding and the reasons for it.

The Departments are publishing this technical correction without advance notice or an opportunity for comment because it falls under the ''good cause'' exception of the APA, 5 U.S.C. 553(b)(B).

This document corrects technical and typographical errors made in the final rules, which were published in accordance with the APA after the Departments proposed the rules and provided the public with an opportunity to comment on the proposals, and will be effective on January 22, 2024. The corrections contained in this document do not make any substantive changes to the policies adopted in the final rules and merely make typographical corrections to the amendatory instructions of the regulation text and the HHS title line. Therefore, the Departments find for good cause that it is impracticable, unnecessary, and contrary to the public interest to undertake further notice and comment procedures to incorporate these corrections.

The Departments are also waiving the 30-day delay in effective date for these corrections. It is in the public interest to ensure that the final rules setting forth requirements for group health plans, health insurance issuers offering group or individual health insurance coverage, providers, facilities, and providers of air ambulance services relating to the administrative fee amount and certified IDR entity fee ranges for participation in the Federal IDR process accurately state the Departments' policies as of the date they take effect. Therefore, the Departments find that delaying the effective date of these corrections beyond the January 22, 2024 effective date of the final rules would be contrary to the public interest. In doing so, the Departments find good cause to waive the 30-day delay in the effective date.

IV. Correction of Errors in the Regulation Text

In FR Doc. 2023–27931 of December 21, 2023 (88 FR 88494), the following corrections are made:

26 CFR 54.9816–8T [Corrected]

■ 1. On page 88524, in the first column, in amendment 3.h. for 26 CFR 54.9816–8T, the instruction ''Removing ''; and'' at the end of newly redesignated paragraph (e)(2)(xii) and adding a period in its place.'' is corrected to read ''Removing ''; and'' at the end of newly redesignated paragraph (e)(2)(xi) and adding a period in its place.''

29 CFR 2590.716–8 [Corrected]

■ 2. On page 88524, in the second column, in amendatory instruction 5.h. for 29 CFR 2590.716–8, the amendatory instruction ''Removing ''; and'' at the end of newly redesignated paragraph (e)(2)(xii) and adding a period in its place.'' is corrected to read ''Removing ''; and'' at the end of newly redesignated paragraph (e)(2)(xi) and adding a period in its place.''

45 CFR Subtitle A

■ 3. On page 88525, in the first column, the title line for the Department of Health and Human Services ''49 CFR Subtitle A'' is corrected to read ''45 CFR Subtitle A''.

45 CFR 149.510 [Corrected]

■ 4. On page 88525, in the first column, in amendatory instruction 7.h. for 45 CFR 149.510, the amendatory instruction ''Removing ''; and'' at the end of newly redesignated paragraph (e)(2)(xii) and adding a period in its place.'' is corrected to read ''Removing ''; and'' at the end of newly redesignated paragraph (e)(2)(xi) and adding a period in its place.''

Oluwafunmilayo A. Taylor,

Section Chief, Publications and Regulations Section, Associate Chief Counsel, Procedure and Administration, Internal Revenue Service.

Amber M. Rivers,

Director, Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Department of Labor.

Elizabeth J. Gramling,

Executive Secretary to the Department, Department of Health and Human Services.

[FR Doc. 2024–01378 Filed 1–22–24; 11:15 am]

BILLING CODE 4150–29–P; 4830–01–P; 4120–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2022–0519]

RIN 1625–AA09

Drawbridge Operation Regulation; Housatonic River, Stratford, CT

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

ACTION: Final rule.

SUMMARY: The Coast Guard is altering the operating schedule that governs the Metro-North (Devon) Bridge, across the Housatonic River, mile 3.9, at Stratford, CT. The bridge owner, Metro-North (MNR), submitted a request on May 5, 2022 to modify the regulation by aligning with the Metro-North ''WALK'' Bridge train schedule and avoid bridge openings during peak transit hours. It is expected that this change to the regulations will better serve the needs of the community while continuing to meet the reasonable needs of navigation.

DATES: This rule is effective February 23, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov.* Type the docket number (USCG–2022–0519) in the ''SEARCH'' box and click ''SEARCH''. In the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Ms. Stephanie E. Lopez, First Coast Guard District, Project Officer, telephone 212–514–4335, email *Stephanie.E.Lopez@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking (Advance, Supplemental)
§ Section
U.S.C. United States Code
MNR Metro North Railroad

II. Background Information and Regulatory History

On January 27, 2023, the Coast Guard published an NPRM, with a request for comments, entitled ''Drawbridge Operation Regulation; Housatonic River, Stratford, CT'' in the **Federal Register** (88 FR 5293). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this regulatory change. During the comment period that ended February 27, 2023, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under 33 U.S.C. 499. The Metro-North (Devon) Bridge at mile 3.9, across the Housatonic River, Stratford, CT, has a vertical clearance of 19 feet at mean high water and a horizontal clearance of approximately 83 feet. Waterway users include recreational and commercial vessels, including fishing vessels.

The existing drawbridge operating regulations are listed at 33 CFR 117.207(b). MNR is requesting the modification of the requirements in 33 CFR part 117.207 to align with the

existing requirements for the Metro-North ''WALK'' Bridge, across the Norwalk River, at mile 0.1.

The Devon Bridge is located at one of the busiest rail segments in the United States and the Northeast Corridor. Openings at Devon Bridge, between the calendar years of 2019 and 2021, resulted in twenty-one (21) delays to MNR train service. A delay due to a bridge opening has cascading affects, resulting in multiple delayed and late trains. Delays due to the openings of Devon Bridge were notably high among the drawbridges on MNR service territory. Aligning the Devon Bridge regulation with the WALK Bridge regulation 33 CFR 117.217(b), provides a balance between railroad operations and the interest of waterway users.

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

The Coast Guard provided a comment period of 30 days and no comments were received.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the ability of vessels to still transit the bridge given advanced notice.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. 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 bridge 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 contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Government

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 Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series) which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f). The Coast Guard has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule promulgates the operating regulations or procedures for drawbridges and is categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and DHS Delegation No. 00170.1, Revision No. 01.3.

■ 2. Revise § 117.207 paragraph (b) to read as follows:

§ 117.207 Housatonic River.

* * * * *

(b) The draw of the Metro-North (Devon) bridge, mile 3.9 at Stratford, shall operate as follows:

(1) The draw shall open on signal between 4:30 a.m. and 9 p.m. after at least a two-hour advance notice is given; except that, from 5:45 a.m. through 9:45 a.m. and from 4 p.m. through 8 p.m., Monday through Friday excluding holidays, the draw need not open for the passage of vessel traffic unless an emergency exists.

(2) From 9 p.m. through 4:30 a.m. the draw shall open on signal after at least a four-hour advance notice is given.

(3) A delay in opening the draw not to exceed 10 minutes may occur when a train scheduled to cross the bridge without stopping has entered the drawbridge lock.

(4) Requests for bridge openings may be made by calling the bridge via marine radio VHF FM Channel 13 or the telephone number posted at the bridge.

Dated: December 13, 2023.

J.W. Mauger,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2024–01359 Filed 1–23–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2022–0520]

RIN 1625–AA09

Drawbridge Operation Regulation; Mianus River, Greenwich, CT

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

ACTION: Final rule.

SUMMARY: The Coast Guard is altering the operating schedule that governs the Metro-North (Cos Cob) Bridge, across Mianus River, mile 1.0, at Greenwich, CT. The bridge owner, Metro-North Railroad (MNR), submitted a request on May 5, 2022, to modify the regulation to align with the Metro-North ''WALK'' Bridge train schedule and avoid bridge openings during peak transit hours. It is expected that this change to the regulations will better serve the needs of the community while continuing to meet the reasonable needs of navigation.

DATES: This rule is effective February 23, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov.* Type the docket number (USCG–2022–0520) in the ''SEARCH'' box and click ''SEARCH''. In the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Ms. Stephanie E. Lopez, First Coast Guard District, Project Officer, telephone 212–514–4335, email *Stephanie.E.Lopez@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking (Advance, Supplemental)
§ Section
U.S.C. United States Code
MNR Metro-North Railroad

II. Background Information and Regulatory History

On August 25, 2023, the Coast Guard published a supplemental notice of proposed rulemaking (SNPRM), with a request for comments, entitled ''Drawbridge Operation Regulation; Housatonic River, Stratford, CT'' in the **Federal Register** (88 FR 58174). There we stated why we issued the SNPRM and invited comments on our proposed regulatory action related to this regulatory change. During the comment period that ended September 25, 2023, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under 33 U.S.C. 499. The Metro-North (Cos Cob) Bridge at mile 1.0, across Mianus River, Greenwich, CT, has a vertical clearance of 20 feet at mean high water and a horizontal clearance of approximately 67 feet. Waterway users include recreational and commercial vessels, including fishing vessels.

The existing drawbridge operating regulations are listed at 33 CFR 117.209. Under the current regulation, the draw shall open on signal from 5 a.m. to 9 p.m. but no later than 20 minutes after the signal to open unless a train is scheduled to cross. Once the train scheduled to cross has passed the Greenwich or Riverside stations, the bridge will open once the train has made passage. From April 1 through October 31, from 9 p.m. to 5 a.m., the bridge will open after at least a four-hour advance notice is given. From November 1 through March 30, from 9 p.m. to 5 a.m., the bridge will open after at least a twenty-four-hour advance notice is given.

MNR requested the modification to the requirements in 33 CFR part 117.209 to align with the existing requirements for the Metro-North ''WALK'' Bridge, across the Norwalk River, at mile 0.1.

The Cos Cob Bridge is located at one of the busiest rail segments in the United States and the Northeast Corridor. Openings at Cos Cob Bridge, between the calendar years of 2019 and 2021, resulted in seventy-one (71) delays to MNR train service. A delay due to a bridge opening has cascading affects, resulting in multiple delayed and late trains. Delays due to the openings of Cos Cob Bridge were notably high among the drawbridges on MNR service territory. Aligning the Cos Cob Bridge regulation with the WALK Bridge regulation 33 CFR 117.217(b) provides a balance between railroad operations and the interest of waterway users.

IV. Discussion of Comments, Changes and the Final Rule

During the comment period that ended on September 23, 2023, no comments were received. Accordingly, no changes were made to the regulatory text.

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.

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, it has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability of vessels to still transit the bridge given advanced notice.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. 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 bridge 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 contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Government

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 Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series) which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f). The Coast Guard has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule promulgates the operating regulations or procedures for drawbridges and is categorically excluded from further review, under paragraph L49, of Chapter 3, Table3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and DHS Delegation No. 00170.1, Revision No. 01.3.

■ 2. Revise § 117.209 to read as follows:

§ 117.209 Mianus River.

The draw of the Metro-North (Cos Cob) bridge, mile 1.0 at Greenwich, will operate as follows:

(a) The draw will open on signal between 4:30 a.m. and 9 p.m. after at least a two-hour advance notice is given; except that, from 5:45 a.m. through 9:45 a.m. and from 4 p.m. through 8 p.m., Monday through Friday excluding holidays, the draw need not open for the passage of vessel traffic unless an emergency exists.

(b) From 9 p.m. through 4:30 a.m. the draw will open on signal after at least a four-hour advance notice is given.

(c) A delay in opening the draw not to exceed 10 minutes may occur when a train scheduled to cross the bridge without stopping has entered the drawbridge lock.

(d) Requests for bridge openings may be made by calling the bridge via marine radio VHF FM Channel 13 or the telephone number posted at the bridge.

Dated: December 13, 2023.

J.W. Mauger,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2024–01360 Filed 1–23–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2022–0518]

RIN 1625–AA09

Drawbridge Operation Regulation; Saugatuck River, Westport, CT

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

ACTION: Final rule.

SUMMARY: The Coast Guard is altering the operating schedule that governs the Metro-North (SAGA) Bridge, across the Saugatuck River, mile 1.1, at Westport, CT.

The bridge owner, Metro-North (MNR), submitted a request on May 5, 2022, to modify the regulation to align with the Metro-North ''WALK'' Bridge train schedule and avoid bridge openings during peak transit hours. It is expected that this change to the regulations will better serve the needs of the community while continuing to meet the reasonable needs of navigation.

DATES: This rule is effective February 23, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov.* Type the docket number (USCG–2022–0518) in the ''SEARCH'' box and click ''SEARCH''. In the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Ms. Stephanie E. Lopez, First Coast Guard District, Project Officer, telephone 212–514–4335, email *Stephanie.E.Lopez@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking (Advance, Supplemental)
§ Section
U.S.C. United States Code
MNR Metro North Railroad

II. Background Information and Regulatory History

On January 27, 2023, the Coast Guard published an NPRM, with a request for comments, entitled ''Drawbridge Operation Regulation; Saugatuck River, Westport, CT'' in the **Federal Register** (88 FR 5291). There we stated why we issued the NPRM and invited comments on our proposed regulatory action related to this regulatory change. During the comment period that ended February 27, 2023, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under 33 U.S.C. 499. The Metro-North (SAGA) Bridge at mile 1.1, across the Saugatuck River, Westport, CT, has a vertical clearance of 13 feet at mean high water and a horizontal clearance of 57 feet. Waterway users include recreational and commercial vessels, including fishing vessels.

The existing drawbridge operating regulations are listed at 33 CFR 117.221(b). MNR is requesting the modification of the requirements in 33 CFR part 117.221(b) to align with the existing requirements for the Metro-North ''WALK'' Bridge, across the Norwalk River, at mile 0.1.

The SAGA Bridge is located at one of the busiest rail segments in the United States and the Northeast Corridor. Openings at the SAGA Bridge, between the calendar years of 2019 and 2021, resulted in five (5) delays to MNR train service. A delay due to a bridge opening has cascading affects, resulting in multiple delayed and late trains. Delays due to the openings of SAGA Bridge were notably high among the drawbridges on MNR service territory. Aligning the SAGA Bridge regulation with the WALK Bridge regulation 33 CFR 117.217(b), provides a balance between railroad operations and the interest of waterway users.

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

The Coast Guard provided a comment period of 30 days and no comments were received.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. 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 bridge 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 contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Government

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 Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series) which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f). The Coast Guard has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule promulgates the operating regulations or procedures for drawbridges and is categorically excluded from further review, under paragraph L49, of Chapter 3, Table3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures. Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and DHS Delegation No. 00170.1, Revision No. 01.3.

■ 2. Revise § 117.221 (b) to read as follows:

§ 117.221 Saugatuck River.

* * * * *

(b) The draw of the Metro-North ''SAGA'' bridge, mile 1.1 at Saugatuck, shall operate as follows:

(1) The draw shall open on signal between 4:30 a.m. and 9 p.m. after at least a two-hour advance notice is given; except that, from 5:45 a.m. through 9:45 a.m. and from 4 p.m. through 8 p.m., Monday through Friday excluding holidays, the draw need not open for the passage of vessel traffic unless an emergency exists.

(2) From 9 p.m. through 4:30 a.m. the draw shall open on signal after at least a four-hour advance notice is given.

(3) A delay in opening the draw not to exceed 10 minutes may occur when a train scheduled to cross the bridge without stopping has entered the drawbridge lock.

(4) Requests for bridge openings may be made by calling the bridge via marine radio VHF FM Channel 13 or the telephone number posted at the bridge.

* * * * *

Dated: December 13, 2023.

J.W. Mauger,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2024–01358 Filed 1–23–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Parts 668, 674, 682, and 685

Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and the Federal Direct Loan Program)

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Updated waivers and modifications of statutory and regulatory requirements.

SUMMARY: The Secretary is issuing updates of longstanding waivers and modifications of statutory and regulatory requirements governing the Federal student financial aid programs under the authority of the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). The HEROES Act requires the Secretary to publish a document in the **Federal Register** providing notice of the waivers or modifications of statutory or regulatory requirements applicable to the student financial assistance programs under title IV of the Higher Education Act of 1965, as amended (HEA), to assist individuals who are performing qualifying military service, and individuals who are affected by a disaster, war or other military operation, or national emergency, as described in the **SUPPLEMENTARY INFORMATION** section of this document.

DATES: Effective January 24, 2024. The waivers and modifications in this document expire on January 24, 2029.

FOR FURTHER INFORMATION CONTACT: For provisions related to the Federal Perkins Loan Program, Federal Family Education Loan (FFEL) Program, and Federal Direct Loan (Direct Loan) Program: Brian Smith, Telephone: (202) 987–1327. Email: *Brian.Smith@ed.gov.* For other provisions: Aaron Washington, Telephone: (202) 453–7241. Email: *Aaron.Washington@ed.gov.* The mailing address for both individuals is U.S. Department of Education, Office of Postsecondary Education, 400 Maryland Ave. SW, 2nd Floor, Washington, DC 20202.

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: The Secretary is issuing updated waivers and modifications of statutory and regulatory requirements governing the Federal student financial aid programs under the authority of the HEROES Act. As described below, these waivers and modifications primarily focus on servicemembers who are called for active duty. We note below where there is overlap between the waivers and modifications issued in this document and the waivers and modifications related to the Fresh Start Initiative, which is described below.

In a document published in the **Federal Register** on December 12, 2003 (68 FR 69312), the Secretary first exercised the authority under the HEROES Act (Pub. L. 108–76, 20 U.S.C. 1098bb(b)) and announced waivers and modifications of statutory and regulatory provisions designed to assist ''affected individuals.'' Under 20 U.S.C. 1098ee(2), the term ''affected individual'' means an individual who—

- Is serving on active duty during a war or other military operation or national emergency;
- Is performing qualifying National Guard duty during a war or other military operation or national emergency;
- Resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency; or
- Suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary.

Please note that these waivers and modifications do not apply to an individual who resides or is employed in an area declared a disaster area by any Federal, State, or local official unless that declaration has been made in connection with a national emergency.

In a document published in the **Federal Register** on September 29, 2017 (82 FR 45465), the Secretary updated the waivers and modifications to reflect statutory and regulatory changes that had occurred since the most recent prior waiver and modification document was published. The 2017 waivers and modifications expired on September 30, 2022.

The Secretary is updating the waivers and modifications to reflect statutory

and regulatory changes that have occurred since publication of the 2017 waivers and modifications. The waivers and modifications in this document will expire on January 24, 2029. With a few exceptions, the waivers and modifications in this document are the same as the 2017 waivers and modifications. However, the 2017 waivers and modifications have been updated as follows:

(1) The Secretary is not including in this document the 2017 waiver that allowed institutions to use the applicant's original Expected Family Contribution (EFC) (the EFC based on the income and tax information reported on the Free Application for Federal Student Aid (FAFSA®)), the EFC based on the data from the first calendar year of the award year, or the EFC based on another annual income that more accurately reflects the family's current financial circumstances.

A financial aid administrator has the authority to use professional judgment on a case-by-case basis for affected individuals. The Department believes that the authority provided through the 2017 waiver is already within the authority of the financial aid administrator. The Department has also issued Dear Colleague Letters GEN–21–02 and GEN–22–15 further explaining the authority and responsibilities of the financial aid administrator in regard to professional judgment.

(2) The Secretary is not including the 2017 waiver and modification that allowed institutions to exercise professional judgment to make adjustments to the cost of attendance or the items used in calculating the EFC on a broader basis than the case-by-case basis reflected in the HEA. Accordingly, an institution that exercises professional judgment must make those determinations on a case-by-case basis for affected individuals.

(3) The Secretary is not including the 2017 waivers and modifications related to verification. The Secretary will announce any changes related to verification in a separate **Federal Register** notice, Dear Colleague letter, or electronic announcement.

The Secretary is issuing these waivers and modifications under the authority of the HEROES Act, 20 U.S.C. 1098bb(a). In accordance with the HEROES Act, the Secretary is providing the waivers and modifications of statutory and regulatory requirements applicable to the student financial assistance programs under title IV of the HEA that the Secretary believes are appropriate to ensure that—

- Affected individuals who are recipients of student financial assistance under title IV are not placed in a worse position financially in relation to that financial assistance because they are affected individuals;
- Affected individuals who are recipients of student financial assistance are not unduly subject to administrative burden or inadvertent technical violations or defaults;
- Affected individuals are not penalized when a determination of need for student financial assistance is calculated;
- Affected individuals are not required to return or repay an overpayment of grant funds based on the HEA's Return of Title IV Funds provision; and
- Entities that participate in the student financial assistance programs under title IV of the HEA and that are located in areas that are declared disaster areas by any Federal, State, or local official in connection with a national emergency, or whose operations are significantly affected by such a disaster, receive temporary relief from administrative requirements.

In 20 U.S.C. 1098bb(b)(1), the HEROES Act further provides that section 437 of the General Education Provisions Act (20 U.S.C. 1232) and section 553 of the Administrative Procedure Act (5 U.S.C. 553) do not apply to the contents of this document.

The following terms used in this document are defined in 20 U.S.C. 1098ee: ''active duty,'' ''military operation,'' ''national emergency,'' ''qualifying National Guard duty during a war or other military operation or national emergency,'' and ''serving on active duty during a war or other military operation or national emergency.''

The Department intends for each of the waivers and modifications described in this document to be severable. If any waiver or modification in this document or its application to any person, act, or practice is held invalid, the remainder of the waivers and modifications or the application of such waiver or modification to any person, act, or practice will not be affected thereby.

The following waivers and modifications are grouped into three categories, according to the affected individuals to whom they apply.

Category 1: The Secretary is waiving or modifying the following requirements of title IV of the HEA and the Department's regulations for ALL affected individuals.

Return of Title IV Funds—Grant Overpayments Owed by the Student

Section 484B(b)(2) of the HEA and 34 CFR 668.22(h)(3)(ii) require a student to return or repay, as appropriate, unearned grant funds for which the student is responsible under the Return of Title IV Funds calculation. For a student who withdraws from an institution because of the student's status as an affected individual, the Secretary is waiving these statutory and regulatory requirements so that a student is not required to return or repay any overpayment of grant funds based on the Return of Title IV Funds provisions.

For these students, the Secretary also waives 34 CFR 668.22(h)(4), which—

- Requires an institution to notify a student of a grant overpayment and the actions the student must take to resolve the overpayment;
- Denies eligibility to a student who owes a grant overpayment and does not take an action to resolve the overpayment; and
- Requires an institution to refer a grant overpayment to the Secretary under certain conditions.

Therefore, an institution is not required to contact the student, notify the National Student Loan Data System, or refer the overpayment to the Secretary. However, the institution must document in the student's file the amount of any overpayment as part of the documentation of the application of this waiver.

The student is not required to return or repay an overpayment of grant funds based on the Return of Title IV Funds provision. Therefore, an institution must not apply any title IV credit balance to the grant overpayment prior to: using a credit balance to pay authorized charges; paying any amount of the title IV credit balance to the student or parent, in the case of a parent PLUS loan; or using the credit balance to reduce the student's title IV loan debt (with the student's authorization) as provided in Dear Colleague Letter GEN–04–03 (February 2004; revised November 2004).

Category 2: The Secretary is waiving or modifying requirements in the following provisions of title IV of the HEA and the Department's regulations for affected individuals who are serving on active duty or performing qualifying National Guard duty during a war or other military operation or national emergency, or who reside or are employed in a disaster area.

Return of Title IV Funds—Post-Withdrawal Disbursements of Loan Funds

Under 34 CFR 668.22(a)(6)(iii)(A)(*5*) and (D), a student (or parent for a parent PLUS loan) must be provided a post-withdrawal disbursement of a title IV

loan if the student (or parent) responds to an institution's notification of the post-withdrawal disbursement within 14 days of the date that the institution sent the notice, or a later deadline set by the institution. If a student or parent submits a late response, an institution may, but is not required to, make the post-withdrawal disbursement.

The Secretary is modifying this requirement so that, for a student who withdraws because of their status as an affected individual in this category and who is eligible for a post- withdrawal disbursement, the 14-day time period in which the student (or parent) must normally respond to the offer of the post-withdrawal disbursement is extended to 45 days, or to a later deadline set by the institution. If the student or parent submits a response after the designated period, the institution may, but is not required to, make the post-withdrawal disbursement. As required under the current regulations, if the student or parent submits the timely response instructing the institution to make all or a portion of the post-withdrawal disbursement, or the institution chooses to make a post-withdrawal disbursement based on receipt of a late response, the institution must disburse the funds within 180 days of the date of the institution's determination that the student withdrew.

Leaves of Absence

Under 34 CFR 668.22(d)(3)(iii)(B), a student is required to provide a written, signed, and dated request, which includes the reason for that request, for an approved leave of absence prior to the leave of absence. However, if unforeseen circumstances prevent a student from providing a prior written request, the institution may grant the student's request for a leave of absence if the institution documents its decision and collects the written request at a later date. It may be appropriate in certain limited cases for an institution to provide an approved leave of absence to a student who must interrupt his or her enrollment because he or she is an affected individual in this category. Therefore, the Secretary is waiving the requirement that the student provide a written request for affected individuals who have difficulty providing a written request as a result of being an affected individual in this category. The institution's documentation of its decision to grant the leave of absence must include, in addition to the reason for the leave of absence, the reason for waiving the requirement that the leave of absence be requested in writing.

Treatment of Title IV Credit Balances When a Student Withdraws

Under 34 CFR 668.164(h)(2), an institution must pay any title IV credit balance to the student, or parent in the case of a parent PLUS loan, as soon as possible, but no later than 14 days after the balance occurred if the balance occurred after the first day of class of a payment period, or 14 days after the first day of class of a payment period if the balance occurred on or before the first day of class of that payment period. If the student (or parent) has provided authorization, an institution may use a title IV credit balance to reduce the borrower's total title IV loan debt, not just the title IV loan debt for the period for which the Return of Title IV Funds calculation is performed.

For students who withdraw because they are affected individuals in this category, the Secretary finds that the institution has met the 14-day requirement under 34 CFR 668.164(h)(2) if, within that time frame, the institution attempts to contact the student (or parent) to suggest that the institution be authorized to return the credit balance to the loan program(s).

Based upon the instructions of the student (or parent), the institution must promptly return the funds to the title IV loan programs or pay the credit balance to the student (or parent).

In addition, if an institution chooses to attempt to contact the student (or parent) for authorization to apply the credit balance to reduce the student's title IV loan debt, it must allow the student (or parent) 45 days to respond. If there is no response within 45 days, the institution must promptly pay the credit balance to the student (or parent) or return the funds to the title IV programs if the student (or parent) cannot be located.

Consistent with the guidance provided in Dear Colleague Letter GEN–04–03 (February 2004; revised November 2004), the institution may also choose to pay the credit balance to the student (or parent) without first requesting permission to apply the credit balance to reduce the student's title IV loan debt.

Cash Management—Student or Parent Request for Loan or TEACH Grant Cancellation

Under 34 CFR 668.165(a)(4)(ii), an institution must return loan or TEACH Grant proceeds, cancel the loan or TEACH Grant, or do both, if the institution receives a loan or TEACH Grant cancellation request from a student or parent—

- By the later of the first day of a payment period or 14 days after the date the institution notifies the student or parent of his or her right to cancel all or a portion of a loan or TEACH Grant if the institution obtains affirmative confirmation from the student under 34 CFR 668.165(a)(6)(i); or
- Within 30 days of the date the institution notifies the student or parent of their right to cancel all or a portion of a loan if the institution does not obtain affirmative confirmation from the student under 34 CFR 668.165(a)(6)(i).

Under 34 CFR 668.165(a)(4)(iii), if an institution receives a loan cancellation request from a borrower after the period specified in 34 CFR 668.165(a)(4)(ii), the institution may, but is not required to, comply with the request. The Secretary is modifying this requirement so that an institution must allow at least 60 days for the student or parent to request the cancellation of all or a portion of a loan or TEACH Grant for which proceeds have been credited to the account at the institution. If an institution receives a loan or TEACH Grant cancellation request after the 60-day period, the institution may, but is not required to, comply with the request.

Cash Management—Student and Parent Authorizations

Under 34 CFR 668.165(b)(1), an institution must obtain a written authorization from a student or parent, as applicable, to—

- Use title IV funds to pay for educationally related charges incurred by the student at the institution other than charges for tuition and fees and, as applicable, room and board; and
- Hold on behalf of the student or parent any title IV funds that would otherwise be paid directly to the student or parent.

The Secretary is modifying these requirements to permit an institution to accept an authorization provided by a student (or parent for a parent PLUS loan) orally, rather than in writing, if the student or parent is prevented from providing a written authorization because of his or her status as an affected individual in this category. The institution must document the oral consent or authorization.

Satisfactory Academic Progress

In cases where a student failed to meet the institution's satisfactory academic progress standards as a direct result of being an affected individual in this category, institutions may apply the exception provision of ''other special circumstances'' in 34 CFR 668.34(a)(9)(ii).

Borrowers in a Grace Period

Sections 428(b)(7)(D) of the HEA and 34 CFR 685.207(b)(2)(ii) and (c)(2)(ii) exclude from a Direct Loan borrower's initial grace period any period during which a borrower who is a member of an Armed Forces reserve component is called or ordered to active duty for a period of more than 30 days. The statutory and regulatory provisions further require that any single excluded period may not exceed three years and must include the time necessary for the borrower to resume enrollment at the next available regular enrollment period. Lastly, any borrower who is in a grace period when called or ordered to active duty is entitled to another six or nine-month grace period, as applicable, upon completion of the excluded period of service.

The Secretary is modifying these statutory and regulatory requirements to exclude from a title IV borrower's initial grace period, any period, not to exceed three years, during which a borrower is an affected individual in this category. Any excluded period must include the time necessary for an affected individual in this category to resume enrollment at the next available enrollment period.

Borrowers in an ''In-School'' Period

A title IV borrower is considered to be in an ''in-school'' status and is not required to make payments on a title IV loan that has not entered repayment as long as the borrower is enrolled at an eligible institution on at least a half-time basis. Under sections 428(b)(7)(A) and 464(c)(1)(A) of the HEA and 34 CFR 674.31(b)(2), 682.209(a), and 685.207(b), (c), and (e)(2) and (3), when a borrower of a loan under the Federal Family Education Loan (FFEL) Program, the Direct Loan Program, or the Federal Perkins Loan Program ceases to be enrolled at an eligible institution on at least a half-time basis, the borrower is obligated to begin repayment of the loan after a six or nine-month grace period, depending on the title IV loan program under which the loan was made and the terms of the borrower's promissory note. The Secretary is modifying the statutory and regulatory requirements that obligate an ''in-school'' borrower who has dropped below half-time status to begin repayment if the borrower is an affected individual in this category, by requiring the holder of the loan to maintain the loan in an ''in-school'' status for a period not to exceed three years, including the time necessary for the borrower to resume enrollment in the next regular enrollment period, if the borrower is planning to go back to school.

Borrowers in an In-School, Graduate Fellowship, or Rehabilitation Training Program Deferment

Under HEA sections 427(a)(2)(C)(i), 428(b)(1)(M)(i), 428B(a)(2) and (d)(1), 428C(b)(4)(C), 455(f)(2)(A), and 464(c)(2)(A)(i) and 34 CFR 674.34(b)(1), 682.210(b)(1)(i), (ii), and (iii), 682.210(s)(2), (3), and (4), 685.204(b), 685.204(c)(1), 685.204(d), and 685.204(e), a title IV borrower is eligible for a deferment on a loan during periods after the commencement or resumption of the repayment period on the loan when the borrower is enrolled and in attendance as a regular student on at least a half-time basis (or full-time, if required by the terms of the borrower's promissory note) at an eligible institution; enrolled and in attendance as a regular student in a course of study that is part of a graduate fellowship program; engaged in an eligible rehabilitation training program; or, for Federal Perkins Loan borrowers, engaged in graduate or post-graduate fellowship-supported study outside the United States. The borrower's deferment period ends when the borrower no longer meets one of the above conditions. Under 34 CFR 685.204(c)(2), a Direct parent PLUS Loan borrower is eligible for a deferment during the time when the student on whose behalf the loan was obtained is enrolled on at least a half-time basis.

The Secretary is waiving the statutory and regulatory eligibility requirements for this deferment for title IV borrowers who were required to interrupt a graduate fellowship or rehabilitation training program deferment, or who were in an in-school deferment but who left school, because of their status as an affected individual in this category. The holder of the loan is required to maintain the loan in the graduate fellowship, rehabilitation training program, or in-school deferment status for a period not to exceed three years, during which the borrower (or, in the case of an in-school deferment on a parent PLUS loan, the student on whose behalf the loan was obtained) is an affected individual in this category. This period includes the time necessary for the borrower to resume the graduate fellowship program, resume a rehabilitation training program, or resume enrollment in the next regular enrollment period if the borrower (or in the case of a parent PLUS loan, the student) returns to school.

Forbearance

Under section 464(e) of the HEA and 34 CFR 674.33(d)(2), there is a three-year cumulative limit on the length of forbearances that a Federal Perkins Loan borrower can receive. To assist Federal Perkins Loan borrowers who are affected individuals in this category, the Secretary is waiving these statutory and regulatory requirements so that any forbearance based on a borrower's status as an affected individual in this category is excluded from the three-year cumulative limit.

Under section 464(e) of the HEA and 34 CFR 674.33(d)(2) and (3), a school must receive a request and supporting documentation from a Federal Perkins Loan borrower before granting the borrower a forbearance, the terms of which must be in the form of a written agreement. The Secretary is waiving these statutory and regulatory requirements to require an institution to grant forbearance based on the borrower's status as an affected individual in this category for a one-year period, including a three-month ''transition period'' immediately following, without supporting documentation or a written agreement, based on the written or oral request of the borrower, a member of the borrower's family, or another reliable source. The purpose of the three-month transition period is to assist borrowers so that they will not be required to reenter repayment immediately after they are no longer affected individuals in this category. To grant the borrower forbearance beyond the initial 12- to 15-month period, supporting documentation from the borrower, a member of the borrower's family, or another reliable source is required.

Under 34 CFR 674.33(d)(2) and 682.211(i)(1), a Perkins or FFEL borrower who requests forbearance because of a military mobilization must provide the loan holder with documentation showing that he or she is subject to a military mobilization. The Secretary is waiving this requirement to allow a borrower who is not otherwise eligible for the military service deferment under 34 CFR 682.210(t), and 674.34(h) to receive forbearance at the request of the borrower, a member of the borrower's family, or another reliable source for a one-year period, including a three-month transition period that immediately follows, without providing the loan holder with documentation. To grant the borrower forbearance beyond this period, documentation supporting the borrower's military mobilization must be submitted to the loan holder.

The Secretary will apply the forbearance waivers and modifications in this section to loans held by the Department.

Collection of Defaulted Loans

In accordance with 34 CFR part 674, subpart C—Due Diligence, and 682.410(b)(6), schools and guaranty agencies must attempt to recover amounts owed from defaulted Federal Perkins Loan and FFEL borrowers, respectively. The Secretary is waiving the regulatory provisions that require schools and guaranty agencies to attempt collection on defaulted loans for the time period during which the borrower is an affected individual in this category and for a three-month transition period. The school or guaranty agency may stop collection activities upon notification by the borrower, a member of the borrower's family, or another reliable source that the borrower is an affected individual in this category. The school or guaranty agency must resume collection activities after the borrower has notified the school or guaranty agency that the affected individual status no longer applies and that the three-month transition period has expired. Alternatively, the school or guaranty agency may rely upon evidence that the borrower is receiving Imminent Danger Pay or Hostile Fire Pay (IDP/HFP) to determine the time frame during which collection should be suspended; collection may be suspended while the borrower is receiving IDP/HFP and for three months after that special pay ends. The loan holder must document in the loan file why it has suspended collection activities on the loan, and the loan holder is not required to obtain evidence of the borrower's status while collection activities have been suspended. The Secretary will apply the waivers described in this paragraph to loans held by the Department.

Fresh Start Initiative

In March 2021, the Department directed guaranty agencies to halt collection efforts on defaulted loans to be consistent with the treatment of Direct Loans. On April 6, 2022, the Department announced that it would provide borrowers who defaulted on their Federal student loans prior to the COVID–19 pandemic with additional opportunities to get their loans out of default. This initiative, called ''Fresh Start'' is described in the Department's Notice of updated waivers and modifications of statutory and regulatory provisions published on June 16, 2023 (88 FR 39360). Borrowers who take advantage of this opportunity to get their loans out of default will, as a result, regain eligibility for title IV, HEA Federal student aid, including Federal Pell Grants and campus-based aid like Federal Work-Study. The Fresh Start opportunity will remain available to previously defaulted borrowers for one year after the end of the COVID–19 pandemic student loan payment pause. Borrowers eligible for Fresh Start will have one year to make payment arrangements before being treated as defaulting on their debt and before their loans will be subject to further collection efforts. Fresh Start applies to a broader group of individuals than outlined in this **Federal Register** notice so for additional information regarding implementation of the Fresh Start Initiative, refer to Electronic Announcement (General 22–58) Information About Restored Aid Eligibility Under Fresh Start Initiative and Dear Colleague Letter GEN–22–13 Federal Student Aid Eligibility for Borrowers with Defaulted Loans.

Service-Based Loan Cancellation

Depending on the loan program, borrowers may qualify for loan cancellation if they are employed full-time in specified occupations, such as teaching or in law enforcement, or providing eligible volunteer service pursuant to sections 428J, 460(b)(1), and 465(a)(2)(A)–(M) and (3) of the HEA, and 34 CFR 674.53, 674.55, 674.56, 674.57, 674.58, 674.60, 682.216, and 685.217. Generally, to qualify for loan cancellation, borrowers must perform uninterrupted, otherwise qualifying service for a specified length of time (for example, one year) or for consecutive periods of time, such as five consecutive years.

For borrowers who are affected individuals in this category, the Secretary is waiving the requirements that apply to the various loan cancellations that such periods of service be uninterrupted or consecutive, if the reason for the interruption is related to the borrower's status as an affected individual in this category. Therefore, the service period required for the borrower to receive or retain a loan cancellation for which he or she is otherwise eligible will not be considered interrupted by any period during which the borrower is an affected individual in this category, including the three-month transition period. The Secretary will apply the waivers described in this paragraph to loans held by the Department.

Rehabilitation of Defaulted Loans

A borrower of a Direct Loan or a FFEL Loan must make nine voluntary on-time, monthly payments over 10 consecutive months to rehabilitate a defaulted loan in accordance with section 428F(a) of the HEA and 34 CFR 682.405(a)(2)(i) and 685.211(f)(1). Federal Perkins Loan borrowers must make nine consecutive, on-time monthly payments to rehabilitate a defaulted Federal Perkins Loan in accordance with section 464(h)(1)(A) of the HEA and 34 CFR 674.39(a)(2). To assist title IV borrowers who are affected individuals in this category, the Secretary is waiving the statutory and regulatory requirements that payments made to rehabilitate a loan must be consecutive or made over no more than 10 consecutive months. Loan holders should not treat any payment missed during the time that a borrower is an affected individual in this category, or during the three-month transition period, as an interruption in the number of monthly, on-time payments required to be made consecutively, or the number of consecutive months in which payment is required to be made, for loan rehabilitation. If there is an arrangement or agreement in place between the borrower and loan holder and the borrower makes a payment during this period, the loan holder must treat the payment as an eligible payment in the required series of payments. When the borrower is no longer an affected individual in this category, and the three-month transition period has expired, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status. The Secretary will apply the waivers described in this paragraph to loans held by the Department.

Reinstatement of Title IV Eligibility

Under sections 428F(b) and 464(h)(2) of the HEA and under the definition of ''satisfactory repayment arrangement'' in 34 CFR 668.35(a)(2), 674.2(b), 682.200(b), and 685.102(b), a defaulted title IV borrower may make six consecutive, on-time, voluntary, full, monthly payments to reestablish eligibility for title IV Federal student financial assistance. To assist title IV borrowers who are affected individuals in this category, the Secretary is waiving statutory and regulatory provisions that require the borrower to make consecutive payments to reestablish eligibility for title IV Federal student financial assistance. Loan holders should not treat any payment missed during the time that a borrower is an affected individual in this category as an interruption in the six consecutive, on-time, voluntary, full, monthly payments required for reestablishing title IV

eligibility. If there is an arrangement or agreement in place between the borrower and loan holder and the borrower makes a payment during this period, the loan holder must treat the payment as an eligible payment in the required series of payments. When the borrower is no longer an affected individual or in the three-month transition period for purposes of this document, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status. The Secretary will apply the waivers described in this paragraph to loans held by the Department.

Consolidation of Defaulted Loans

Under the definition of ''satisfactory repayment arrangement'' in 34 CFR 685.102(b), a borrower with a defaulted FFEL or Direct Loan may consolidate the defaulted loan into a Direct Consolidation Loan by making three consecutive, voluntary, on-time, monthly, full payments on the loan. The Secretary is waiving the regulatory requirement that such payments be consecutive. FFEL loan holders should not treat any payment missed during the time that a borrower is an affected individual in this category as an interruption in the three consecutive, voluntary, monthly, full, on-time payments required for establishing eligibility to consolidate a defaulted loan in the Direct Consolidation Loan Program. If there is an arrangement or agreement in place between the borrower and loan holder and the borrower makes a payment during this period, the loan holder must treat the payment as an eligible payment in the required series of payments. When the borrower is no longer an affected individual in this category or in the three-month transition period, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status as an affected individual. The Secretary will apply the waivers described in this paragraph to loans held by the Department.

Annual Income Documentation Requirements for Direct Loan and FFEL Borrowers Under the Income-Based Repayment (IBR), Pay as You Earn (PAYE), Saving on a Valuable Education (SAVE), Formerly Known as Revised Pay as You Earn (REPAYE), and Income-Contingent Repayment (ICR) Plans

Section 493C(c) of the HEA requires the Secretary to establish procedures for annually determining a borrower's eligibility for the IBR plan, including verification of a borrower's annual income and the annual amount due on the total amount of the borrower's loans. Section 455(e)(1) of the HEA provides that the Secretary may obtain such information as is reasonably necessary regarding the income of a borrower for the purpose of determining the annual repayment obligation of the borrower under an ICR plan. Under current 34 CFR 682.215(e); 685.209(a)(5), (b)(3)(vi), and (c)(4); and 685.221(e), borrowers repaying under the IBR, PAYE, SAVE, formerly known as REPAYE, or ICR plans must annually provide their loan holder with documentation of their income and family size so that the loan holder may, if necessary, adjust the borrower's monthly payment amount based on changes in the borrower's income or family size. Please note that, as of July 1, 2024, the application and annual recertification procedures for the IBR, PAYE, and SAVE plans will be located in §§ 685.209(l) and 682.215(e). Borrowers are required to provide information about their annual income and family size to the loan holder each year by a deadline specified by the holder. If a borrower who is repaying his or her loans under the IBR, PAYE, SAVE (formerly known as REPAYE), or ICR plans fails to provide the required information by the specified deadline, the borrower's monthly payment amount is adjusted and is no longer based on the borrower's income. This adjusted monthly payment amount is generally higher than the payment amount that was based on the borrower's income.

The Secretary is waiving these statutory and regulatory provisions to require loan holders to maintain an affected borrower's payment at the most recently calculated IBR, PAYE, SAVE (formerly known as REPAYE), or ICR monthly payment amount for up to a three-year period, including a three-month transition period immediately following the three-year period, if the borrower's status as an affected individual in this category has prevented the borrower from providing documentation of updated income and family size by the specified deadline.

Category 3: The Secretary is waiving or modifying the following provisions of title IV of the HEA and the Department's regulations for affected individuals who are serving on active duty or performing qualifying National Guard duty during a war or other military operation or national emergency.

Institutional Charges and Refunds

The HEROES Act encourages institutions to provide a full refund of tuition, fees, and other institutional charges for the portion of a period of instruction that a student was unable to complete, or for which the student did not receive academic credit, because he or she was called up for active duty or for qualifying National Guard duty during a war or other military operation or national emergency. Alternatively, the Secretary encourages institutions to provide a credit in a comparable amount against future charges.

The HEROES Act also recommends that institutions consider providing easy and flexible reenrollment options to students who are affected individuals in this category. At a minimum, an institution must comply with the requirements of 34 CFR 668.18, which addresses the readmission requirements for service members serving for a period of more than 30 consecutive days under certain conditions. Some institutions must also provide protections to service members who are absent for shorter periods of service, under the Principles of Excellence (Executive Order 13607, issued April 27, 2012). More information is available at: *https://www.va.gov/education/choosing-a-school/principles-of-excellence/.*

Of course, an institution may provide such treatment to affected individuals other than those who are called up to active duty or for qualifying National Guard duty during a war or other military operation or national emergency. Before an institution makes a refund of institutional charges, it must perform the required Return of Title IV Funds calculations based upon the originally assessed institutional charges. After determining the amount that the institution must return to the title IV Federal student aid programs, any reduction of institutional charges may consider the funds that the institution is required to return. In other words, we do not expect that an institution would both return funds to the Federal programs and also provide a refund of those same funds to the student.

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

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at

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

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Family Education Loan Program; 84.032 Federal PLUS Program; 84.033 Federal Work Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; and 84.268 William D. Ford Federal Direct Loan Program.)

Program Authority: 20 U.S.C. 1071, 1082, 1087a, 1087aa, Part F–1, 1098aa.

Miguel A. Cardona,

Secretary of Education.

[FR Doc. 2024–01227 Filed 1–23–24; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2023–0065; FRL–11656–01–OCSPP]

Baicalin in Pesticide Formulations; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of Baicalin anhydrous and Baicalin hydrate when used as inert ingredients (stabilizer) on growing crops pre-harvest, limited to a maximum concentration of 10% of the end-use formulation. Exponent, Inc. on behalf of UPL NA Inc. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting establishment of an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of baicalin anhydrous and baicalin hydrate, when used in accordance with the terms of those exemptions.

DATES: This regulation is effective January 24, 2024. Objections and requests for hearings must be received on or before March 25, 2024 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2023–0065, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and the OPP docket is (202) 566–1744. Please review the visitor instructions and additional information about the docket available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1030; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title-40.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2023–0065 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before March 25, 2024. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2023–0065, by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/.*

II. Petition for Exemption

In the **Federal Register** of March 24, 2023 (88 FR 17778) (FRL–10579–02), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP IN–11658) by Exponent, Inc., 1150 Connecticut Ave., Suite 1100, Washington, DC 20036, on behalf of UPL NA Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406. The petition requested that 40 CFR 180.920 be amended by establishing an exemption from the requirement of a tolerance for residues of baicalin anhydrous (CAS Reg. No.

21967–41–9) and baicalin hydrate (CAS Reg. No. 206752–33–2) when used as inert ingredients (stabilizer) in pesticide formulations applied to growing crops pre-harvest limited to a maximum concentration of 10% of the end-use formulation. That document referenced a summary of the petition prepared by Exponent, Inc. on behalf of UPL NA Inc., the petitioner, which is available in the docket, *https://www.regulations.gov.* There were no comments received in response to the notice of filing. For ease of reading, baicalin is used throughout this document and refers to both baicalin anhydrous and hydrate forms.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. When making a safety determination for an exemption for the requirement of a tolerance FFDCA section 408(c)(2)(B) directs EPA to consider the considerations in section 408(b)(2)(C) and (D). Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .'' Section 408(b)(2)(D) lists other factors for EPA consideration making safety determinations, *e.g.,* the validity, completeness, and reliability of available data, nature of toxic effects, available information concerning the cumulative effects of the pesticide chemical and other substances with a common mechanism of toxicity, and available information concerning aggregate exposure levels to the pesticide chemical and other related substances, among others.

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no harm to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for baicalin including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with baicalin follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by baicalin as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in this unit.

Baicalin exhibits low levels of acute toxicity via the oral route of exposure. Acute dermal toxicity is expected to be low based on low oral acute toxicity and the absence of clinical signs in a skin irritation study in rabbits. Acute inhalation toxicity is expected to be low based on its low vapor pressure. Baicalin is not a skin sensitizer. Special studies reported no acute adverse effects on respiratory function and the central nervous system (CNS) in rats up to 5,000 mg/kg (equivalent to 3,000 mg/kg baicalin) or on cardiovascular function in dogs up to 1,000 mg/kg (equivalent to 600 mg/kg baicalin).

No effects were seen in subchronic oral toxicity studies in rats up to 2,000 mg/kg/day (~1,200 mg/kg/day baicalin), in mice up to 500 mg/kg/day (~300 mg/kg/day baicalin) and in dogs up to 1,000 mg/kg/day (~630 mg/kg/day baicalin). No increased offspring susceptibility was observed in the available studies as no offspring or maternal effects were observed. Concern for carcinogenicity is low based on a negative result in a mutagenicity study, lack of effects in subchronic studies, and the lack of relevant structural alerts for carcinogenicity.

No evidence of neurotoxicity or immunotoxicity was observed in the available studies. Also, no neurotoxicity was observed in an acute toxicity study evaluating central nervous system effects in rats.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold

risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/overview-risk-assessment-pesticide-program.*

The hazard profile of baicalin is adequately defined. Overall, baicalin is of low acute, subchronic, and developmental toxicity. No systemic toxicity is observed up to 2,000 mg/kg/day (~1,200 mg/kg/day baicalin), in mice up to 500 mg/kg/day (~300 mg/kg/day baicalin) and in dogs up to 1,000 mg/kg/day (~630 mg/kg/day baicalin). Since signs of toxicity were not observed, no toxicological endpoints of concern or PODs were identified. Therefore, a qualitative risk assessment for baicalin can be performed.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to baicalin, EPA considered exposure under the proposed exemption from the requirement of a tolerance. EPA assessed dietary exposures from baicalin in food as follows:

Dietary exposure (food and drinking water) to baicalin may occur following ingestion of foods with residues from their use in accordance with this exemption and use as an herbal supplement. However, a quantitative dietary exposure assessment was not conducted since a toxicological endpoint for risk assessment was not identified.

2. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables).

Baicalin may be present in pesticide and non-pesticide products that may be used in and around the home and in cosmetic products. However, a quantitative residential exposure assessment was not conducted since a toxicological endpoint for risk assessment was not identified.

3. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Based on the lack of toxicity in the available database, EPA has not found baicalin to share a common mechanism of toxicity with any other substances, and baicalin does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance exemption, therefore, EPA has assumed that baicalin does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides.*

D. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act (FQPA) Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

Based on an assessment of baicalin, EPA has concluded that there are no toxicological endpoints of concern for the U.S. population, including infants and children. Because there are no threshold effects associated with baicalin, EPA conducted a qualitative assessment. As part of that assessment, the Agency did not use safety factors for assessing risk, and no additional safety factor is needed for assessing risk to infants and children.

E. Aggregate Risks and Determination of Safety

Because no toxicological endpoints of concern were identified, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to baicalin residues.

V. Other Considerations

Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is not establishing a numerical tolerance for residues of baicalin in or on any food commodities. EPA is establishing a limitation on the amount of baicalin that may be used in pesticide formulations applied pre-harvest. This limitation will be enforced through the pesticide registration process under the Federal Insecticide, Fungicide, and Rodenticide Act (''FIFRA''), 7 U.S.C. 136 *et seq.* EPA will not register any pesticide formulation for food use that exceeds 10% by weight of baicalin in the final pesticide formulation.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established for residues of baicalin anhydrous (CAS Reg. No. 21967–41–9) and baicalin hydrate (CAS Reg. No. 206752–33–2) when used as inert ingredients (stabilizer) in pesticide formulations on growing crops pre-harvest under 40 CFR 180.920 limited to a maximum concentration of 10% of the end-use formulation.

VII. Statutory and Executive Order Reviews

This action establishes exemptions from the requirement of a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition

under FFDCA section 408(d), such as the exemptions in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

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

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: January 18, 2024.

Charles Smith,

Director, Registration Division, Office of Pesticide Programs.

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

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

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

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

■ 2. In § 180.920, amend table 1 to 180.920 by revising its heading and adding in alphabetical order entries for ''Baicalin anhydrous'' and ''Baicalin hydrate'' to read as follows:

§ 180.920 Inert ingredients used pre-harvest; exemptions from the requirement of a tolerance.

* * * * *

TABLE 1 TO § 180.920

Inert ingredients	Limits	Uses
* * * *	* *	*
Baicalin anhydrous (CAS Reg. No. 21967–41–9)	10% by weight	Stabilizer.
Baicalin hydrate (CAS Reg. No. 206752–33–2)	10% by weight	Stabilizer.
* * * *	* *	*

[FR Doc. 2024–01321 Filed 1–23–24; 8:45 am]

BILLING CODE 6560–50–P

LEGAL SERVICES CORPORATION

45 CFR Part 1611

Income Level for Individuals Eligible for Assistance

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: The Legal Services Corporation (LSC) is required by law to establish maximum income levels for individuals eligible for legal assistance. This document updates the specified income levels to reflect the annual amendments to the Federal Poverty Guidelines issued by the U. S. Department of Health and Human Services (HHS).

DATES: Effective January 24, 2024.

FOR FURTHER INFORMATION CONTACT: Stefanie Davis, Deputy General Counsel and Ethics Officer, Legal Services Corporation, 3333 K St. NW, Washington, DC 20007; (202) 295–1563; *sdavis@lsc.gov.*

SUPPLEMENTARY INFORMATION: Section 1007(a)(2) of the Legal Services Corporation Act (Act), 42 U.S.C. 2996f(a)(2), requires LSC to establish maximum income levels for individuals eligible for legal assistance. Section 1611.3(c) of LSC's regulations establishes a maximum income level equivalent to 125% of the Federal Poverty Guidelines (Guidelines), which HHS is responsible for updating and issuing. 45 CFR 1611.3(c).

Each year, LSC updates appendix A to 45 CFR part 1611 to provide client income eligibility standards based on the most recent Guidelines. The figures for 2024, set out below, are equivalent to 125% of the Guidelines published by HHS on January 12, 2024.

In addition, LSC is publishing a chart listing income levels that are 200% of the Guidelines. This chart is for reference purposes only as an aid to recipients in assessing the financial eligibility of an applicant whose income is greater than 125% of the applicable Guidelines amount, but less than 200% of the applicable Guidelines amount (and who may be found to be financially eligible under duly adopted exceptions to the annual income ceiling in accordance with 45 CFR 1611.3, 1611.4, and 1611.5).

Except where there are minor variances due to rounding, the amount by which the guideline increases for each additional member of the household is a consistent amount.

List of Subjects in 45 CFR Part 1611

Grant programs—law, Legal services.

For reasons set forth in the preamble, the Legal Services Corporation amends 45 CFR part 1611 as follows:

PART 1611—ELIGIBILITY

■ 1. The authority citation for part 1611 continues to read as follows:

Authority: 42 U.S.C. 2996g(e).

■ 2. Revise appendix A to part 1611 to read as follows:

Appendix A to Part 1611—Income Level for Individuals Eligible for Assistance

LEGAL SERVICES CORPORATION 2024 INCOME GUIDELINES *

Size of household	48 Contiguous states and the District of Columbia	Alaska	Hawaii
1	$18,825	$23,513	$21,638
2	20,550	31,925	29,375
3	32,275	40,338	37,113
4	39,000	48,750	44,850
5	45,725	57,163	52,588
6	52,450	65,575	60,325
7	59,175	73,988	68,063
8	65,900	82,400	75,800
For each additional member of the household in excess of 8, add:	6,725	8,413	7,738

* The figures in this table represent 125% of the Federal Poverty Guidelines by household size as determined by HHS.

REFERENCE CHART—200% OF FEDERAL POVERTY GUIDELINES *

Size of household	48 Contiguous states and the District of Columbia	Alaska	Hawaii
1	$30,120	$37,620	$ 34,620
2	40,880	51,080	47,000
3	51,640	64,540	59,380
4	62,400	78,000	71,760
5	73,160	91,460	84,140
6	83,920	104,920	96,520
7	94,680	118,380	108,900
8	105,440	131,840	121,280
For each additional member of the household in excess of 8, add:	10,760	13,460	12,380

* The figures in this table represent 200% of the Federal Poverty Guidelines by household size as determined by HHS.

(Authority: 42 U.S.C. 2996g(e).)

Dated: January 18, 2024.

Stefanie Davis,

Deputy General Counsel and Ethics Officer, Legal Services Corporation.

[FR Doc. 2024–01311 Filed 1–23–24; 8:45 am]

BILLING CODE 7050–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1831 and 1852

[Notice: 23–099]

RIN 2700–AE72

NASA Federal Acquisition Regulation Supplement (NFS): Removal of Total Compensation Plan Language (NFS Case 2023–N002)

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: NASA is finalizing amendments to the NASA Federal Acquisition Regulation Supplement (NFS) as well as corresponding sections of the CFR to a solicitation provision and clause.

DATES: Effective February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Edgar Lee, NASA HQ, Office of Procurement Grants and Policy Division, LP–011, 300 E Street SW, Washington, DC 20456–001. Telephone 202–420–1384; facsimile 202–358–3082.

SUPPLEMENTARY INFORMATION:

I. Background

NASA proposed a rule in the **Federal Register** at 88 FR 67720 on October 2, 2023, to amend the NFS by removing NFS 1831.205–671, Solicitation provision, and NFS 1852.231–71, Determination of Compensation Reasonableness, from the NFS. NASA has determined these provisions are unnecessary as they exceed the scope requirements adequately covered in Federal Acquisition Regulation (FAR) provision 52.222–46, Evaluation of Compensation for Professional Employees (48 CFR 52.222–46). Currently, NFS requires an evaluation for all labor categories and periodic review of total compensation plans after contract award for cost reimbursement contracts (at least every 3 years) to evaluate the reasonableness of compensation for all proposed labor categories in service contracts.

NASA has made a determination to rely on FAR provision 52.222–46, agencywide templates, and instructions, to ensure consistency in the data provided to NASA and subsequent evaluations to ensure NASA continues to pay fair and reasonable wages.

II. Discussion

As no public comments were submitted on the proposed rule, NASA is finalizing this rule with no changes.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of

harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review by OMB under E.O. 12866, Regulatory Planning and Review. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

NASA does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule is removing the NFS unique requirements for submission of total compensation plan. Therefore, an Initial Regulatory Flexibility Analysis was not performed.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply. With the publication of this final rule, an existing information collection currently approved under Office of Management and Budget (OMB) control number 2700–0077, *Contractor and Subcontractor Compensation Plans,* is no longer needed. Once the final rule is effective, NASA will discontinue this collection and rely on OMB control number *9000–0066, Certain Federal Acquisition Regulation Part 22 Labor Requirements—FAR Sections Affected: 52.222–2, 52.222–6, 52.222–11, 52.222–18, 52.222–33, 52.222–34, 52.222–46, and SF 1413 and 1444.*

List of Subjects

48 CFR Part 1831

Accounting, Government procurement.

48 CFR Part 1852

Accounting, Government procurement, Reporting and recordkeeping requirements.

Erica Jones,

NASA FAR Supplement Manager.

For the reasons stated in the preamble, NASA amends 48 CFR parts 1831 and 1852 as follows:

PART 1831—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 1. The authority citation for part 1831 continues to read as follows:

Authority: 51 U.S.C. 20113(a) and 48 CFR chapter 1.

1831.205–671 [Removed and Reserved]

■ 2. Remove and reserve section 1831.205–671.

PART 1852—SOLICITATION PROCEDURES AND CONTRACT CLAUSES

■ 3. The authority citation for part 1852 continues to read as follows:

Authority: 51 U.S.C. 20113(a) and 48 CFR chapter 1.

1852.231–71 [Removed and Reserved]

■ 4. Remove and reserve section 1852.231–71.

[FR Doc. 2024–01124 Filed 1–23–24; 8:45 am]

BILLING CODE 7510–13–P

SURFACE TRANSPORTATION BOARD

49 CFR Parts 1011, 1104, 1115, and 1146

[Docket No. EP 762]

Revisions to Regulations for Expedited Relief for Service Emergencies

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (STB or Board) adopts a final rule amending its emergency service regulations.

DATES: The rule is effective February 23, 2024.

FOR FURTHER INFORMATION CONTACT: Jonathon Binet at (202) 245–0368. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: Pursuant to its broad statutory mandate, the Surface Transportation Board closely monitors the rail industry's service performance. *See* 49 U.S.C. 1321, 11145; *see also* 49 U.S.C. 10101, 11323, 10907. Over the last decade, railroad service challenges impacting a wide range of geographic regions and commodities have occurred with some frequency. *See, e.g., U.S. Rail Serv. Issues—Performance Data Reporting,* EP 724 (Sub-No. 4) (STB served Dec. 30, 2014); *STB Letter to CSX Transp., Inc. Requesting Serv. Reporting* (July 27, 2017); *Chairman Oberman Letter to Norfolk S. Regarding Serv. Issues* (Nov. 23, 2021);[1] *Urgent Issues in Freight Rail Serv.,* EP 770 (STB served Apr. 7, 2022); *Oversight Hearing Pertaining to Union Pac. R.R.'s Embargoes,* EP 772 (STB served Nov. 22, 2022).

In response to service challenges in recent years, the Board has held a series of public hearings to permit interested persons to report on specific service problems, to hear from rail industry executives on plans to address rail service problems generally, and to explore additional options to improve service. At one such hearing in October 2017, several shippers observed that the Board's regulations at 49 CFR part 1146, which implement 49 U.S.C. 11123 and govern expedited relief for service emergencies, are rarely invoked, even in times of serious rail service challenges. *See Pub. Listening Session Regarding CSX Transp., Inc.'s Rail Serv. Issues,* EP 742, Hr'g Tr. 89:13–22; 90:1; 150:3–14; 196:11–22; 197:1–16; 199:1–9 (Oct. 17, 2017).

Based on these concerns, and to better understand the reasons for the lack of use of the Board's directed service regulations, the Board announced on March 15, 2018, that Board staff would hold informal meetings with interested persons to discuss and gather feedback on the adequacy of the Board's current regulations regarding emergency service and service inadequacies, and whether and how the current regulations should be modified to offer a more meaningful path to relief. *See* Press Release, STB, Board to Hold Informal Meetings on Directed Serv. Reguls. Beginning in Apr. (Mar. 15, 2018), *www.stb.gov/news-communications/latest-news/archived-press-releases/.*[2] As a result, in the second quarter of 2018 Board staff met with representatives of a variety of entities representing carrier and shipper interests. A recurring concern expressed by shipper interests was the amount of time required under the existing procedures to obtain relief for service failures and the difficulty of satisfying certain informational burdens. Although carrier interests acknowledged that very few emergency service petitions had been filed in recent years, they nevertheless generally asserted that the existing procedures were sufficient, and noted that the Board's Rail Customer and Public Assistance program (RCPA) had been helpful in resolving acute service issues informally.

By decision served April 7, 2022, the Board announced that it would hold a hearing on April 26 and 27, 2022, on rail service problems impacting the network and the recovery efforts involving several Class I carriers.[3] As

[1] Letters available at *www.stb.gov* (open tab ''News & Communications'' and select ''Non-Docketed Public Correspondence'').

[2] While these meetings also included discussion of 49 CFR part 1147 (Temporary Relief Under 49 U.S.C. 10705 and 11102 for Service Inadequacies), this proceeding concerns only 49 CFR part 1146 (Expedited Relief for Service Emergencies) pursuant to 49 U.S.C. 11123.

[3] Press Release, STB, STB Issues Hearing Notice for Urgent Issues in Freight Rail Serv. (Apr. 7, 2022), *www.stb.gov/news-communications/latest-news/pr-22–21/.*

the hearing notice explained, the Board had informally heard from a broad range of stakeholders about inconsistent and unreliable rail service throughout the network and across commodity groups. *Urgent Issues in Freight Rail Serv.,* EP 770, slip op. at 2. These challenges included tight car supply and unfilled car orders, delays in transportation for carload and bulk traffic, increased origin dwell time for released unit trains, missed switches, and ineffective customer assistance. *Id.*

On April 22, 2022, the Board issued a notice of proposed rulemaking in this docket, proposing to amend its emergency service regulations. *Revisions to Reguls. for Expedited Relief for Serv. Emergencies* (*NPRM*), EP 762 (STB served Apr. 22, 2022).[4] The Board explained in the *NPRM* that if the service issues continue, they could result in an increased need for emergency Board action to meet the needs of the public. *NPRM,* EP 762, slip op. at 2. Indeed, since the issuance of the NPRM, the Board has issued orders to address service emergencies. *See, e.g., Foster Poultry Farms—Ex Parte Pet. for Emergency Serv. Ord.,* FD 36609 (STB served June 17, 2022) (issuing, just two days after the filing of the petition seeking emergency service relief, an order under 49 U.S.C. 11123 directing Union Pacific to adhere, to the greatest extent possible, to a schedule that Union Pacific itself put forward). In addition, the Board has proposed new regulations that would, if adopted, establish additional procedures to govern reciprocal switching determinations related to service inadequacy. *See* Notice of Proposed Rulemaking, *Reciprocal Switching for Inadequate Serv.,* EP 711 (Sub-No. 2) (STB served Sept. 7, 2023).

Background

Emergency service orders are designed to preserve rail service where there has been a substantial rail service issue or failure that requires immediate relief. Under 49 U.S.C. 11123(a), the Board may issue an emergency service order when it determines that there exists ''an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier . . . cannot transport the traffic offered to it in a manner that properly serves the public.'' [5] When the Board determines that such a situation exists, it may: ''(1) direct the handling, routing, and movement of the traffic of a rail carrier and its distribution over its own or other railroad lines; (2) require joint or common use of railroad facilities; (3) prescribe temporary through routes; [and] (4) give directions for—(A) preference or priority in transportation; (B) embargoes; or (C) movement of traffic under permits;'' or, when the service failure is caused by a cessation of service by Amtrak, direct the continuation of operations and related functions. 49 U.S.C. 11123(a). The Board may act on its own initiative or pursuant to a petition, and emergency service may be ordered summarily (*i.e.,* without regard to the Administrative Procedure Act, 5 U.S.C. 551–559). 49 U.S.C. 11123(b)(1). Board orders under 49 U.S.C. 11123 are subject to an initial time limit of 30 days, but they may be extended up to an additional 240 days if the Board finds that emergency conditions continue to exist. 49 U.S.C. 11123(a), (c).[6]

The current regulations at 49 CFR 1146.1(a) require that a petitioner seeking relief show a substantial, measurable deterioration or other demonstrated inadequacy in rail service by the incumbent carrier over an identified period of time. Any petition for relief must demonstrate that the standard in 49 CFR 1146.1(a) is met, provide a summary of discussions the petitioner has had with the incumbent carrier regarding the service problems and the reasons why the incumbent is unlikely to restore adequate rail service within a reasonable period of time, and include a commitment from an alternative carrier to provide service that can be performed safely without degrading service to existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service. 49 CFR 1146.1(b). A reply to the petition must be filed by the incumbent carrier within five business days, and a rebuttal by the party requesting relief may be filed within three business days following submission of the reply. 49 CFR 1146.1(b)(2) and (3).

In the *NPRM,* the Board proposed to amend part 1146 by (1) modifying the procedures for parties seeking a Board order directing an incumbent carrier to take action to remedy a service emergency, (2) indicating that the Board may act on its own initiative to direct emergency service, (3) modifying the informational requirements for parties in emergency service proceedings, (4) shortening the filing deadlines in emergency service proceedings and establishing a timeframe for Board decisions, and (5) establishing an accelerated process for certain acute service emergencies. In response to the *NPRM,* the Board received 18 opening comments and five reply comments.[7] Below, the Board addresses the comments submitted and discusses the clarifications and modifications being adopted in this final rule. The text of the final rule is appended to this decision.

Final Rule

Several commenters express support for the Board's proposal.[8] For example, ARA comments that the proposal would reduce barriers and provide more certainty for both shippers and railroads, as well as enable the Board to better address emergency service situations, thus helping to prevent localized service issues from impacting the entire network. (ARA Comment 1.) NACD points to the efficiencies the proposal would bring, (NACD Comment 2), and emphasizes that such ''[a]ccessible and efficient relief mechanisms are especially needed now in this unprecedented time of supply chain problems,'' (*id.* at 4). Shipper

[4] The *NPRM* was published in the **Federal Register**, 87 FR 25609 (May 5, 2022).

[5] Under the statute, an emergency situation can be created by ''shortage of equipment, congestion of traffic, unauthorized cessation of operations, failure of existing commuter rail passenger transportation operations caused by a cessation of service by the National Railroad Passenger Corporation, or other failure of traffic movement.'' 49 U.S.C. 11123(a).

[6] In the case of an alternative carrier providing service over an incumbent carrier's lines, the carriers themselves may establish the terms of compensation and operations, with the Board available to resolve disputes, including disputes about compensation, if any arise. 49 U.S.C. 11123(b)(2).

[7] Opening comments were filed by the Association of American Railroads (AAR); the American Chemistry Council, the Corn Refiners Association, and The Fertilizer Institute (collectively, the Coalition Associations); American Fuel & Petrochemical Manufacturers (AFPM); Agricultural Retailers Association (ARA); the Brotherhood of Locomotive Engineers and Trainmen (BLET); CSX Transportation, Inc. (CSXT); Industrial Minerals Association—North America (IMA); the Military Surface Deployment and Distribution Command (SDDC); the National Association of Chemical Distributors (NACD); the National Mining Association (NMA); the National Grain and Feed Association (NGFA); Norfolk Southern Railway Company (NS); Private Railcar Food and Beverage Association (PRFBA); the Renewable Fuels Association (RFA); the Transportation Trades Department, AFL–CIO (TTD); the U.S. Department of Agriculture (USDA); the West Virginia Coal Association (WVCA); and the Western Coal Traffic League, Freight Rail Customer Alliance, National Coal Transportation Association, and Portland Cement Association (collectively, Shipper Groups).

Reply comments were filed by AAR, the Coalition Associations, NGFA, the National Industrial Transportation League (NITL) and the Institute of Scrap Recycling Industries (ISRI), and the Shipper Groups.

[8] (*See, e.g.,* AFPM Comment 2; ARA Comment 1; IMA Comment 2; NACD Comment 2; NGFA Comment 1–2; PRFBA Comment 2; RFA Comment 2; Shipper Grps. Comment 1–2; SDDC Comment 1; USDA Comment 1.)

Groups argue that the proposed changes would clarify substantive standards and improve the emergency service relief procedures, (Shipper Grps. Comment 1–2), as well as encourage carriers to act more responsibly to avoid emergency service issues in the first place, (*id.* at 8). USDA agrees that the proposal would ''improve rail service in times of disruption and incentivize railroads to maintain better service overall.'' (USDA Comment 1.)

AFPM, IMA, NACD, and PRFBA each note how infrequently the Board's emergency service regulations have been utilized and argue that this lack of use justifies review of the provisions. (AFPM Comment 6; IMA Comment 7; NACD Comment 2–3; PRFBA Comment 7.) According to AFPM, rather than pursuing emergency relief from the Board, refiners simply accept the temporary disruptions, often adjusting production, storage, or fleet size. (AFPM Comment 6–7; *see also* NACD Comment 2–3.) IMA similarly states that its member companies have not petitioned the Board for emergency service because the existing process requires information unavailable to them and does not provide a timely result. (IMA Comment 3.) Several commenters note that shippers choose not to petition the Board for emergency relief because they fear retribution from railroads. (AFPM Comment 6–7; PRFBA Comment 8 n.6; IMA Comment 8 n.6.) [9]

Other commenters support the proposal but assert that the Board should take further action. The Coalition Associations, for example, express strong support for the proposal, stating that it provides ''critical improvements that will enhance the utility of emergency service orders for some circumstances,'' but caution that the rulemaking will not solve all, or even most, service problems. (Coalition Ass'ns Comment 1–2; *see also* NMA Comment 2–3; NITL & ISRI Reply 1.) TTD likewise supports the proposal but also argues that the provisions in this rulemaking will not fully address the current rail service problems, which it claims stem primarily from the railroads' staffing, equipment, and scheduling decisions. (TTD Comment 1.) WVCA states it supports the NPRM and encourages the Board to continue its rail service oversight efforts. (WVCA Comment 2, 12.)

AAR, CSXT, and NS each express their support of the Board's efforts to ensure the accessibility of service relief when necessary in times of emergency. (AAR Comment 1; CSXT Comment 2; NS Comment 2.) AAR supports ''the Board's effort to properly structure expedited relief where appropriate and necessary to resolve emergency situations,'' and proposes several modifications and additional clarifications. (AAR Comment 1–2.) CSXT expressly supports certain aspects of the proposed rule and expresses ''serious concerns'' about others. (CSXT Comment 2–3.) NS ''supports review and appropriate updates based on sound policy and evidence,'' but it notes that the Board has ''existing tools at its disposal . . . that remain useful and effective to address service issues in an expedited manner,'' and it offers ''three suggestions and minor modifications'' to the proposed rule. (NS Comment 2.)

Clarifying Remedial Pathways. In the *NPRM,* the Board proposed adding language to 49 CFR 1146.1(a) to clarify that it may direct an incumbent carrier or alternative carrier to provide service and that it can act on its own initiative as well as pursuant to a petition. *NPRM,* EP 762, slip op. at 5. The Board noted these changes would better align the Board's regulations with its statutory authority and provide clarity to stakeholders. *Id.* Several commenters express support for one or both of these clarifications, which merely codify the Board's existing statutory authority.[10]

Other commenters request additional modifications and clarifications to other aspects of part 1146.1(a). Specifically, the Coalition Associations request that the Board remove the phrase ''over an identified period of time,'' arguing that service emergencies can arise in short order and that this language suggests a shipper must wait for some time to pass before petitioning the Board for emergency service relief. (Coalition Ass'ns Comment 2.) NGFA and Shipper Groups ask the Board to address the Board's authority to issue emergency service orders on an ex parte basis. (NGFA Comment 3; Shipper Grps. Comment 9 (citing *Hasa, Inc.* v. *Union Pac. R.R.,* NOR 42165 (STB served Aug. 21, 2019)).) According to Shipper Groups, the reply and rebuttal filings permitted in 49 CFR 1146.1(b) are unnecessary when a second carrier is not involved. (Shipper Grps. Comment 9.)

The Board finds it unnecessary to remove the phrase ''over an identified period of time'' from 49 CFR 1146.1(a). This language does not restrict petitioners from seeking emergency service orders in quickly emerging situations because the section prescribes no minimum period that must pass prior to filing. *See Expedited Relief,* EP 628, slip op. at 8 n.14. In addition, as the Board has previously noted, the language of 49 CFR 1146.1(a) in its current format affords the Board the needed flexibility to address varying circumstances on a case-by-case basis. *See Expedited Relief,* EP 628, slip op. at 8–9.

Regarding the request from NGFA and Shipper Groups that the Board address its authority to issue emergency service orders on an ex parte basis, the Board agrees that 49 U.S.C. 11123 permits the Board to order emergency service without regard to Administrative Procedure Act requirements. *See* 49 U.S.C. 11123(b)(1).[11] Even though the Board is modifying its regulations to improve the processing time when emergencies occur, there may still be circumstances when the Board needs to act on an ex parte basis. Under the current proposal, the Board retains the statutory authority to order emergency service on an ex parte basis in appropriate circumstances and may waive its regulations when appropriate.[12]

AAR and NS ask the Board to articulate a standard for the types of emergency situations that would be eligible for relief under 49 CFR part 1146. (AAR Comment 3; NS Comment 3.) They argue that emergency service relief should be available only in ''real'' or ''true'' emergencies. (AAR Comment 2; NS Comment 2.) According to AAR,

[9] AFPM requests that the Board investigate retribution by railroads toward shippers through rate increases, reduction in service days, and more. (AFPM Comment 6.) Similarly, WVCA asks the Board to ''convene a specific examination and proceeding regarding rail service and the movement of coal.'' (WVCA Comment 12.) While these requests are outside the scope of this proceeding, stakeholders may share information about these concerns through the Board's RCPA program or request informal meetings with the Board, as appropriate.

[10] NACD, NMA, and Shipper Groups express support for both clarifications. (*See* NACD Comment 3; NMA Comment 2; Shipper Grps. Comment 4.) CSXT,NITL, and ISRI state that they support clarifying that the Board may direct an emergency service order at the incumbent as well as the alternative carrier, (*see* CSXT Comment 2; NITL & ISRI Reply 1), while AFPM, IMA, and PRFBA state they support clarifying that the Board can act on its own initiative as well as on petition, (*see* AFPM Comment 6; IMA Comment 7; PRFBA Comment 7; NS Comment 2 (acknowledging that the statute provides the Board authority to act on its own initiative)).

[11] The Board is subject to the Administrative Procedure Act when it establishes the terms of compensation if the railroads do not agree. 49 U.S.C. 11123(b)(1) and (2).

[12] The procedures in the proposed regulations do not address situations when the Board is acting on its own initiative. NS argues that the Board should ensure impacted rail carriers have an opportunity to comment—either in writing or by telephonic conference—before the Board orders emergency service in these situations. (NS Comment 4.) Absent extraordinary circumstances, the Board intends to afford carriers an opportunity to be heard even when the Board acts on its own initiative.

without further guidance, the regulations could be used to ''secure leverage and immediate attention to their particular service complaints.'' (AAR Comment 5.) On reply, various commenters argue AAR's request is unnecessary and overly restrictive. (*See* Coalition Ass'ns Reply 9; NITL & ISRI Reply 3.) The Coalition Associations note that the existing process has been in place for ''nearly 25 years without the objective standards AAR deems 'essential' '' and that the Board has denied emergency relief when a petitioner has improperly invoked 49 CFR 1146.1. (Coalition Ass'ns Reply 9.) [13] They argue that a case-by-case approach is superior because the Board cannot anticipate every scenario that may arise. (Coalition Ass'ns Reply 9–10; *see also* NITL & ISRI Reply 3; Shipper Grps. Reply 2 (''[w]hether relief is appropriate should be determined based on a full set of facts'').)

AAR also asks that the Board require petitioners seeking relief under 49 CFR part 1146 to ''affirm that there are no alternative modes available or feasible.'' (AAR Comment 17.) According to AAR, the Board could not find there was a ''real'' emergency if the petitioner could shift its traffic to truck, barge, or another mode. (*Id.*) In response, the Coalition Associations note that it is unclear whether AAR is asking the Board to require the petitioner to include a sworn statement or market dominance analysis and that the latter would be impractical in an emergency. (Coalition Ass'ns Reply 14.) The Coalition Associations also assert that the ''time, cost, and uncertainty of pursuing emergency service relief will always outweigh the additional cost of a non-rail transportation alternative to avoid the emergency,'' so AAR's inference that shippers would petition for an emergency service order when they have alternatives available is ''unrealistic and cynical.'' (Coalition Ass'ns Reply 14; *see also* Shipper Grps. Reply 8 (''[O]ne would expect that a shipper that had a viable, economic option to pursue would choose that option before seeking emergency relief.'').) Shipper Groups claim that carriers are attempting to increase the burden on petitioners by inserting a ''mini-market dominance case'' into emergency service proceedings. (*Id.*)

AAR's and NS's proposal to limit the type of situations eligible for emergency relief under 49 CFR part 1146 is not necessary and would complicate the process, increase the burden on shippers, and undermine the flexibility provided by the current regulations.[14] In addition, as various commenters have observed, the substantive standard in the part 1146 regulations has been in place for nearly 25 years without this limitation, during which time the Board has denied petitions where it found the situation did not constitute an emergency. *See, e.g., S.F. Bay R.R.—Mare Island Pet. for Emergency Serv. Ord. & Pet. for Declaratory Ord.—Lennar Mare Island, LLC,* FD 35360, slip op. at 3 (STB served Dec. 6, 2010) (denying an emergency service petition ''because the record does not show that an emergency exists''). The Board has previously emphasized that the emergency service procedures are ''not meant to redress minor service disruptions,'' *Expedited Relief,* EP 628, slip op. at 2, but rather provide temporary relief for serious ones, *id.* at 8.

The Board also declines to adopt AAR's suggestion to require petitioners to affirm that no alternative modes of transportation are feasible or available. Generally, it seems unlikely that a shipper would seek emergency service relief from the Board if it has easy access to other transportation options, as the Coalition Associations have observed. However, in evaluating emergency service petitions, the Board has considered and will continue to consider the transportation environment in which the emergency occurs and the impact of the inadequate rail service on the affected shippers. *Roseburg Forest Prod. Co.—Alt. Rail Serv.—Cent. Or. & Pac. R.R.,* FD 35175, slip op. at 7–8 (STB served Mar. 4, 2009); *Pioneer Indus. Ry.—Alt. Rail Serv.—Cent. Ill. R.R.,* FD 34917, slip op. at 9–11 (STB served Jan. 12, 2007).

NS expresses its concern that the Board might base an emergency service order on the railroad performance data collected under 49 CFR part 1250 without obtaining additional information from all parties involved. (NS Comment 3.) NS argues that, although railroad performance data might identify service trends, those trends do not necessarily amount to service emergencies under 49 U.S.C. 11123. (*Id.*) The Board appreciates the significance of ordering emergency service and the operational, safety, and financial implications it may have on carriers, and it anticipates getting more information beyond service trends in individual emergency service cases to aid the Board in appropriately resolving these matters. The procedures in the proposed regulations thus allow an opportunity for carriers to provide specific information to the Board about the situation at hand.

Lastly, AAR requests the Board either ''clarify that it will not invoke [49 CFR] 1146.1 authority on its own motion if the issue has been the subject of [an] RCPA informal dispute resolution process about which the Board was aware,'' or add a requirement that the Board ''certify when it invokes its [49 CFR] 1146.1 authority on its own motion, that none of the information leading to such invocation came from an RCPA informal dispute resolution process.'' (AAR Comment 15.) As the Board explained in the *NPRM,* RCPA serves as a resource for the Board's stakeholders, and a key part of RCPA's mission involves providing informal facilitation services to shippers and other parties without charge to resolve disputes with railroads. Requests for RCPA assistance, including informal facilitation services, are kept confidential and not shared with other STB offices. Accordingly, the Board does not find it necessary to add the language requested by AAR.

Modifying Petition Requirements. Currently, under 49 CFR 1146.1(b)(1)(iii), a petitioner must have a commitment from another available railroad to provide alternative service and explain how the alternative service would be provided safely without degrading service to the alternative carrier's existing customers and without unreasonably interfering with the incumbent's overall ability to provide service. As the Board discussed in the

[13] In support of its argument, Coalition Association cite to *Granite State Concrete Company* v. *B&M Corporation,* NOR 42083 (STB served Sept. 15, 2003) (denying an emergency service order but commencing a proceeding); *Keokuk Junction Railway—Alternative Rail Service—Line of Toledo, Peoria & Western Railway,* FD 34397 (STB served Oct. 31, 2003) (denying an emergency service order because alleged service inadequacy was based primarily upon rate levels); and *Ohio Valley Railroad—Petition to Restore Switch Connection & Other Relief,* FD 34608 (STB served Feb. 23, 2005) (denying an emergency service order but granting relief under 49 U.S.C. 10742).

[14] In contrast, the Board has proposed using objective standards, rather than a flexible case-by-case approach, to determine when a reciprocal switching arrangement should be prescribed, since objective standards in that context ''would create an incentive for rail carriers to provide adequate service in the first instance and because, if a rail carrier did not do so, the affected shippers and receivers would then have more certainty in their opportunities to obtain line-haul service from an alternate carrier.'' *See* Notice of Proposed Rulemaking, *Reciprocal Switching for Inadequate Serv.,* EP 711 (Sub-No. 2), slip op. at 9–10 (STB served Sept. 7, 2023). Those proposed objective standards seek to ''provide the certainty that is needed to protect the public interest, as well as the interests of rail customers, in adequate service on a general and sustained basis.'' *Id.* at 5. The Board made clear, however, that these standards should not be used ''for the prescription of emergency service under part 1146.'' *Id.* at 10–11. The Board finds that a more flexible approach is appropriate here, given the nature of an emergency finding, its related effects, and generally shorter remedy period.

NPRM, many proponents of a rule modification have expressed frustration with the requirement to secure an alternative carrier in advance (*i.e.,* a commitment to be included in a petition) during a service emergency because potential alternative carriers may be reluctant to participate in emergency alternative service. *NPRM,* EP 762, slip op. at 5. The Board stated in the *NPRM* that requiring an advance commitment from an alternative carrier as a condition to filing an emergency service petition is an unnecessary burden on petitioners experiencing a service crisis that undermines the usefulness of this important statutory remedy. *Id.* at 5–6. Accordingly, the Board proposed removing that requirement and instead requiring petitioners to submit only a list of possible alternative carriers, based on the petitioner's understanding of other rail carriers' nearby operations. *Id.* at 6.

The Board also proposed requiring the incumbent carrier and alternative carriers, if any, to address in the first instance whether the specific remedy proposed by the petitioner would be unsafe or infeasible, or whether it would substantially impair the replying carrier's ability to serve its other customers adequately or fulfill its common carrier obligations. *Id.* Regarding the requirement that petitions include an explanation of reasons why the incumbent carrier is unlikely to restore rail service, the Board proposed to clarify that the explanation need only take the form of a ''summary'' to the extent that such information is available to the petitioner. *Id.* The Board reasoned that these changes would place the informational requirements on the parties most likely to have the information. *Id.*

According to NGFA, these changes are ''an extremely equitable and more efficient way to ensure the Board is presented with the evidence it needs to make a decision in an efficient manner.'' (NGFA Comment 4–5.) Shipper Groups, AFPM, IMA, and PRFBA each express support for how these changes place the burden to provide certain relevant information on the entity likely to have direct knowledge of it. (AFPM Comment 8; IMA Comment 10; PRFBA Comment 10; Shipper Grps. Comment 5–6.) Shipper Groups argue that the changes would ''lead to the development of a better evidentiary record and more efficient and expeditious decision-making,'' further the rail transportation policy goals of requiring fair and expeditious regulatory decisions when regulation is required, and provide for the expeditious handling and resolution of proceedings. (Shipper Grps. Comment 5–6 (citing 49 U.S.C. 10101(2), (15)).) AFPM, IMA, and PRFBA note that these changes would incentivize rail shippers to bring cases that may have gone unfiled in the past for lack of evidence not within the petitioner's control. (AFPM Comment 8; IMA Comment 10; PRFBA Comment 10.)

RFA projects that the Board's proposal to eliminate the requirement for an advance commitment from an alternative carrier and instead require only a list of potential alternative carriers would ease the burden on petitioners, streamline the petition process, and minimize disruptions in important customer service dynamics with carriers. (RFA Comment 1.) According to NACD, NGFA, and Shipper Groups, the advance commitment requirement has made it excessively difficult for shippers seeking relief as the regulations intended. (NACD Comment 3; NGFA Comment 4; Shipper Grps. Reply 6; *see also* Shipper Grps. Comment 6.) According to Shipper Groups, an alternative carrier ''may be reluctant to commit publicly in advance to providing alternative service, especially if it is otherwise dependent on the incumbent carrier in some way, such as a short line that is beholden to the affected carrier for all or much of its business or otherwise subject to 'paper barriers' established by the incumbent.'' (Shipper Grps. Reply 6.) NITL and ISRI contend that this change will enhance the utility of the emergency service remedy. (NITL & ISRI Reply 2.)

On the other hand, AAR and CSXT oppose this change. AAR argues that deferring the question of whether an alternative carrier is available and able to provide emergency service would be impractical given the short time frames, ''unfairly penalize the alternative carrier by suddenly dragging them into an emergency proceeding as to which they had no prior knowledge,'' and hinder the Board's ability to ''act quickly and decisively, with knowledge of all relevant facts.'' (AAR Comment 7.) According to AAR, for the Board to be aware of factors affecting an alternative carrier's ability to provide service, such as restrictions on service in labor contracts or operational difficulties being experienced by the alternative carrier, the alternative carrier must be ''involved on the frontend.'' (*Id.* at 9.) AAR claims its concerns are exacerbated by the tight timelines proposed. (*Id.*)

CSXT argues that retaining the requirement for an advance commitment would promote the speed and success of the emergency service process and would ensure that any Board action is consistent with the prohibition in 49 U.S.C. 11123 of any Board action that would ''cause a rail carrier to operate in violation of this part'' or ''impair substantially the ability of a rail carrier to serve its own customers adequately, or to fulfill its common carrier obligations.'' (CSXT Comment 6 (quoting 49 U.S.C. 11123(c)(2)(A)–(B)).) CSXT further argues that requiring petitioners to obtain advance commitment from an alternative carrier is not ''an obstruction'' to their ability to obtain relief but rather ''essential'' because it ''can only expedite the process by ensuring the [alternative] carrier is ready, willing, and able to act at the earliest possible point in the remedial process.'' (*Id.* at 7.)

AAR and CSXT both note that the Board—when it adopted 49 CFR 1146.1—considered and rejected the position the Board took in the *NPRM.* (AAR Comment 8 (quoting *Expedited Relief,* EP 628, slip op. at 11); CSXT Comment 7.) AAR argues that nothing has changed since then that would make an alternative carrier's advance commitment less essential, (AAR Comment 8), and CSXT asserts that ''the Board must offer a reasoned decision supported by substantial evidence for making any change to [its] conclusion.'' (CSXT Comment 7–8 (citing *Jicarilla Apache Nation* v. *Dep't of Interior,* 613 F.3d 1112, 1120 (D.C. Cir. 2010)).)

In response to these concerns, the Coalition Associations suggest the Board require petitioners to serve their petitions on the identified alternative carriers and to mandate that those carriers participate in the process. (Coalition Ass'ns Reply 6, *see also* NGFA Comment 5–6 (suggesting the Board mandate that identified alternative carriers reply to a petition).) NGFA urges the Board to ''err on the side [of] collecting as much relevant information as possible, as quickly as possible, from the incumbent and an identified alternative carrier.'' (NGFA Comment 6.) NITL and ISRI also oppose the carriers' proposal to retain the advance commitment requirement, arguing that elimination of this requirement would increase the usefulness of the emergency service regulations. (NITL & ISRI Reply 3.)

The Board does not find AAR's and CSXT's concerns persuasive and finds it in the public interest to eliminate the advance commitment requirement, as was proposed in the *NPRM.* Requiring shippers to obtain an advance commitment from an alternative carrier has unduly hindered the objectives of the emergency service process for the reasons stated in the *NPRM,* slip op. at

5–6, and by various commenters, *see supra* at 9–10, and removing this obstacle will help the process work more effectively. As the Board acknowledged in the *NPRM,* and as AAR and CSXT point out, the Board took a different position in the 1998 decision, stating that the absence of an advance commitment could create safety concerns, impair service to the alternative carrier's customers, or hurt the alternative carrier's finances. *NPRM,* slip op. at 5 (citing *Expedited Relief for Serv. Inadequacies,* EP 628, slip op. at 11). However, as the Board explained in the *NPRM,* feedback from rail users and the agency's own observations have led the Board to conclude that the disadvantages of the advance commitment requirement outweigh any potential advantages, and that the concerns expressed in the 1998 decision can be adequately addressed when considering individual requests. *See id.* Moreover, the inability of shippers to obtain such advance commitments from alternative carriers appears to have been a key driver in shippers' failure to use the regulatory process at all. *Id.* In promulgating the original regulations in 1998, the Board did not anticipate that the alternative carrier commitment requirement would lead to that result, and AAR and CSXT cite no precedent requiring the Board to ignore its experience under the regulations. With regard to the NGFA's suggestion, the Board will require an identified alternative carrier to reply to a petition. Though the Board noted in the *NPRM* that it could take appropriate action to request more information from an alternative carrier, it has determined that—for the Board to best meet its information needs and carry out its statutory obligations in a more efficient manner—the Board will require that an alternative carrier address whether the specific remedy would be unsafe or infeasible, or would substantially impair the carrier's ability to serve its other customers adequately or fulfill its common carrier obligations.

Numerous commenters support the Board's proposal to require incumbent carriers to first address whether the proposed remedy would be unsafe or infeasible or whether it would substantially impair the replying carrier's ability to adequately serve its other customers or fulfill its common carrier obligations.[15] AFPM, IMA, and PRFBA assert that such a procedural shift makes sense in proceedings where the ''use of the discovery process [would be] too slow to allow the Board to act expediently.'' (AFPM Comment 9; IMA Comment 10; PRFBA Comment 10.) NACD also supports this proposed change, calling it a ''common sense reform,'' (NACD Comment 3), and CSXT agrees that it is appropriate to ask the rail carrier rather than the shipper to address the safety and feasibility of the requested service, (CSXT Comment 3). BLET supports the Board's proposal to allow an alternative carrier to reply to the petition, arguing that its employees and members could provide valuable insight into how operations are happening in the field. (BLET Comment 4.)

The Coalition Associations suggest the Board consider requiring railroads to provide certain minimum information to validate their claims that a remedy is unsafe or infeasible, or that it will interfere with their ability to serve their other customers. (Coalition Ass'ns Comment 7.) Similarly, Shipper Groups ask the Board to require carriers to make a ''specific and documented showing,'' rather than ''conclusory assertions,'' of substantial impairment in order to defeat a request for emergency service relief. (Shipper Grps. Comment 7.) According to Shipper Groups, carriers will seek to preserve service that is more profitable or that limits liquidated damages or other contractual exposure. (*Id.*) The Coalition Associations also ask the Board to clarify that a petition would not be defeated automatically if the proposed emergency service would affect another shipper. (Coalition Ass'ns Comment 8.)

AFPM, IMA, and PRFBA argue the Board should shift the burden of proof to the railroads if a petitioner can demonstrate a prima facie case of ''a substantial, measurable service deterioration or other demonstrated inadequacy over an identified period of time by the incumbent carrier.'' (AFPM Comment 9; IMA Comment 10; PRFBA Comment 10.) They further ask the Board to establish a defined standard for that prima facie showing of service deterioration, which could be based on, for example, the percentage of missed switches for first mile/last mile, trip plan compliance data, or plant/facility shutdown/slowdown in the past, present, or future. (AFPM Comment 9–10; IMA Comment 10–11; PRFBA Comment 11.) AFPM, IMA, and PRFBA also suggest that in cases where the incumbent railroad's reply fails to adequately rebut the petitioner's prima facie case, the Board should issue its order five days after the reply, effectively eliminating the rebuttal period and expediting the case by two days. (AFPM Comment 11; IMA Comment 13; PRFBA Comment 13.) AAR opposes this request, arguing that the Board's authority under 49 U.S.C. 11123 is ''limited to emergency situations, not generalized service complaints,'' and that service metrics, ''whether based on first-mile/last-mile data or trip plan compliance, are ill-suited to the identification of emergencies.'' (AAR Reply 4–5.) AAR further argues that proponents of a Board order are required to make their case in support of the order, and that it would be unfair to further shorten a carrier's response time while also shifting the burden to the carrier. (*Id.* at 5.)

Since emergencies can take various forms, flexibility is critical in determining whether a particular situation constitutes an emergency requiring expeditious Board action. The Board will not attempt to define the required minimum information appropriate for every case, nor will it establish a requirement for a carrier to make ''a specific and documented showing'' of substantial impairment in its ability to serve its other customers to defeat a request for an emergency service order. The Board seeks to gain a quick and accurate understanding of the circumstances underlying requests for relief so it can act to serve the public when necessary, not bog proceedings down with technical requirements that might undermine the purpose of these emergency proceedings. To be sure, especially given the expedited timelines, the Board expects that parties will support their claims with available evidence. The Board will not accept bald assertions regarding feasibility or safety as evidence of such, but circumstances will unfold differently from case to case, and the Board must maintain flexibility so it can evaluate all aspects of a case and act appropriately.[16] Additionally, emergencies often arise from unexpected or unanticipated circumstances, and the Board must have the flexibility to respond to those circumstances promptly.

The Board also clarifies that petitions, regardless of whether they seek emergency service from incumbent carrier or an alternative, will not automatically be defeated simply

[15] (*See, e.g.,* AFPM Comment 8; BLET Comment 4; IMA Comment 10; NACD Comment 3; PRFBA Comment 10; USDA Comment 1.)

[16] The Board is mindful that whether railroad operations are safe is generally within the purview of the Federal Railroad Administration (FRA). The Board's regulations accordingly require that petitions for emergency service relief under part 1146 be served on FRA. *See* 49 CFR 1146.1(e), 1146.2(e). Carriers should demonstrate that they have undertaken the requisite advance planning necessary to assure safe operations, including consideration of FRA safety regulations. *See Expedited Relief,* EP 628, slip op. at 13 n.19.

because the proposed emergency service order would affect another party. Rather, the concern lies with whether a proposal would ''substantially impair'' a carrier's ability to serve its other customers or fulfill its common carrier obligations, which is why the Board is asking for replies from carriers to address this matter. Pursuant to 49 U.S.C. 1146.1(a), the Board will then consider this information and the effects on other shippers of ordering emergency service as part of its analysis when determining whether emergency service is suitable under the circumstances and whether to order relief.

In addition, the Board declines to shift the burden of proof onto carriers by requiring a petitioner only to make a defined prima facie showing of a substantial and measurable service deterioration or another demonstrated service inadequacy, as requested by certain shipper interests. As AAR notes, this would shift the burden from petitioners to carriers while also giving carriers less time to respond. While the regulations adopted here seek to remove unnecessary burdens on petitioners, such as obtaining the advance commitment from alternative carriers, petitioners must still bear the burden of establishing the need for such relief.

CSXT and NS ask the Board to require petitioners seeking relief under 49 CFR 1146.1 to describe the efforts taken to resolve the issue through other means, as the Board is proposing for the new, accelerated process under 49 CFR 1146.2. (CSXT Comment 11; NS Comment 12.) According to CSXT, ''it would be appropriate to likewise encourage good faith efforts at informal dispute resolution prior to seeking the extraordinary relief of an emergency service order.'' (CSXT Comment 11.) NS notes that the Board's reasoning for including this requirement in 49 CFR 1146.2, which it states appears related to the timeline of the accelerated process, seems to apply equally to the 49 CFR 1146.1 process, which the Board also proposes to shorten. (NS Comment 12.)

The Board agrees that it is appropriate to require petitioners seeking relief under 49 CFR 1146.1 to describe efforts taken to resolve issues prior to the filing of the petition. The Board prefers informal resolution of disputes whenever possible, and requiring petitioners to describe efforts taken to arrive at solutions prior to emergency service will encourage parties to make such efforts in good faith rather than seeking an order from the Board as a matter of first resort. Moreover, many petitions already include this information to some degree, given that the current regulations require petitions to include a ''summary of the petitioner's discussions with the incumbent carrier of the service problems,'' so mandating that petitioners describe their efforts at resolution in 49 CFR 1146.1 would not significantly increase their burden. Finally, requiring this information in 49 CFR 1146.1 petitions would better align that process with the 49 CFR 1146.2 process and help ensure that the Board receives all information necessary to understand the underlying emergency and overall circumstances. 49 CFR 1146.1(b)(ii) will be amended to adopt this requirement.

Shipper Groups argue that a carrier should face additional consequences, such as penalties or damages, when it has ''deprived itself of the ability to meet its commitments and obligations'' due to underinvestment in employees and other resources, particularly when it cannot provide emergency service due to this underinvestment. (Shipper Grps. Comment 8.) According to Shipper Groups, penalties would incentivize carriers to act more proactively to maintain their service commitments and reduce the need for emergency service orders altogether. (*Id.*) NGFA agrees, adding that the Board should more aggressively penalize carriers that do not comply with emergency service orders or are unable to provide emergency service relief due to business or operational decisions. (NFGA Reply 3–4.) NGFA further contends that the Board should interpret the phrase ''each violation'' more broadly, for example, on a per-car basis instead of a per-train basis. (*Id.* at 4.) AAR, in contrast, maintains that a punitive approach is not authorized by 49 U.S.C. 11123, which contemplates alternative carriers compensating incumbent carriers for the use of incumbents' equipment and facilities. (AAR Reply 2–3 (quoting *Pyco Indus., Inc.—Alt. Rail Serv.—S. Plains Switching, Ltd. Co.,* FD 34889 et al, slip op. at 4–5 (STB served Jan. 11, 2008)).)

The Board will not adopt these changes suggested by Shipper Groups and NGFA. Section 11123, from which the Board derives its emergency authority, contains no language or provision authorizing penalties or damages. Furthermore, the Board rejected similar arguments when adopting the existing regulations, noting that emergency service relief ''is to be used for restorative or alleviative purposes only, and not as a punitive or preventive measure.'' *Expedited Relief,* EP 628, slip op. at 7.[17]

Finally, APFM, IMA, and PRFBA want the Board to create a ''reasonable railroad standard'' requiring ''the incumbent railroad to cooperate in a reasonable manner with the petitioner and the alternative carrier, while the [emergency service] order is in effect.'' (AFPM Comment 10; IMA Comment 11–12; PRFBA Comment 11–12.) The Board finds that implementing such a ''reasonable railroad'' standard is not necessary because acting reasonably, in good faith and in compliance with Board orders, is already required. *See* 49 U.S.C. 10702. Any allegation of unreasonableness, bad faith or non-compliance can and will be dealt with on a case-by-case basis.

Modifying the Regulatory Timeframe. In response to stakeholders' previously-expressed concerns about the overall length of the current 49 CFR 1146.1 process, as well as the lack of a date certain by which a Board decision can be expected, the Board proposed in the *NPRM* to shorten the filing deadlines for replies and rebuttals set forth in 49 CFR 1146.1 and to establish a target timeframe for a Board decision. *NPRM,* EP 762, slip op. at 7. The Board explained that by shortening the timeframe and indicating when the parties can expect a decision by the Board, the proposed amendments would further streamline the process for all parties involved in an emergency service proceeding. *Id.*

Many commenters support this aspect of the Board's proposal.[18] AFPM, IMA, and PRFBA assert that shortening the procedural timeline would expedite the proceeding where time is clearly of the essence. (AFPM Comment 10–11; IMA Comment 13; PRFBA Comment 13.) NGFA asserts that a short timeline is imperative to avoid severe damage to a petitioner's business and customers since shippers will have exhausted all commercial remedies before seeking Board intervention. (NGFA Comment 5.) According to Shipper Groups, the Board's proposal to shorten the filing deadlines and establish a target timeframe for a Board decision is reasonable and appropriate. (Shipper Grps. Comment 8.)

Several commenters ask the Board to shorten the 49 CFR 1146.1 timeline further still. According to RFA, ''the modified timeline is too lengthy to

[17] *See also* Notice of Proposed Rulemaking, *Reciprocal Switching for Inadequate Serv.,* EP 711 (Sub-No. 2), slip op. at 10 (STB served Sept. 6, 2023) (distinguishing the standard for obtaining a reciprocal switching order from complaint-based common carrier obligation cases under 49 U.S.C. 11101(a)).

[18] (*See* AFPM Comment 10–11; BLET Comment 4; IMA Comment 13; NACD Comment 3; NGFA Comment 5; PRFBA Comment 13; RFA Comment 2; Shipper Grps. Comment 8; USDA Comment 1.)

efficiently address emergencies in a timely manner.'' (RFA Comment 2.) RFA explains that because ethanol facilities can typically store less than one week's production on-site, shortening the process by a few days would not fully address emergency situations at these facilities. (*Id.*) ARA presents a similar argument, noting that timely delivery of products, such as fertilizer, is critical for agricultural retailers as crop production is weather-dependent and seasonal. (ARA Comment 1.) [19]

AAR opposes shortening the timeline under 49 CFR 1146.1, arguing that ''[r]educing the time available for the parties to make an adequate record is not the solution to uncertainty over how quickly relief will be ordered,'' and suggests that modifying the proposed rule to provide firm decision deadlines may help alleviate this concern. (AAR Comment 13; *see also* CSXT Comment 12 (asking the Board to provide firm decision deadlines for 49 CFR 1146.1 and 1146.2).) AAR notes that the Board previously rejected shorter timelines and argues that the concerns expressed in that decision remain valid today. (AAR Comment 12 (quoting *Expedited Relief,* EP 628, slip op. at 16 (''[w]e do not believe that a shorter time frame is feasible, given the nature of the relief sought, the need for an adequately developed record regarding the factual predicate for such action, and the ability of the parties to implement the proposed arrangement safely and without harm to either railroad or their other shippers.'').) According to AAR, shortening the timeline is even less feasible under the current proposal because the Board is also eliminating the requirement that petitioners obtain an advance commitment from an alternative carrier. (*Id.*) AAR asserts petitioners can consider the total timeline when deciding when to file a petition. (*Id.* at 13.) In addition, AAR urges the Board to reject the requests to further shorten the proposal's timelines. (AAR Reply 6.) AAR claims the proposal's timelines are ''already so short as to strain feasibility'' and asserts shippers can time the filing of their petitions ''to ensure relief can be provided in the correct amount of time.'' (*Id.*)

On reply, Shipper Groups assert that AAR's proposals are unnecessary or at least speculative at this time, and they state that a firm decision deadline might prevent the Board from taking the time that is needed in complex situations. (Shipper Grps. Reply 7.) The Coalition Associations state they are amenable to forgoing the shortening of the timelines in 49 CFR 1146.1 since the Board has proposed an accelerated process in 49 CFR 1146.2. (Coalition Ass'ns Reply 6–7.)

The Board is not persuaded by AAR's arguments for retaining the existing timeline in 49 CFR 1146.1. As explained in the *NPRM,* the Board agrees with stakeholders that have expressed concern that the process in 1146.1 is too lengthy in the context of a service emergency. *NPRM,* EP 762, slip op. at 7. Although the Board rejected a shorter timeframe in 1998, its subsequent experience with 49 CFR 1146.1 has convinced the Board that a shorter time frame would in fact be feasible, contrary to what the Board anticipated when it adopted these regulations. *See Foster Farms—Ex Parte Pet. for Emergency Serv. Ord.,* FD 36609 (STB served June 17, 2022).

Because the final rule includes an accelerated process for acute service emergencies, the Board does not find it necessary to further shorten the timelines in 49 CFR 1146.1 beyond the periods initially proposed in the *NPRM.* The Board will also refrain from setting a firm decision deadline in the regulations. The Board intends to issue decisions within five days of the rebuttal deadline, as proposed in the *NPRM,* but setting a firm deadline for this part of the regulations would serve only to complicate the decision-making process by constraining the Board (or requiring additional procedural decisions) in situations where a specific deadline might prove to be impracticable. The Board again emphasizes that flexibility is vital in conducting these proceedings.

Establishing an Accelerated Process to Handle Acute Service Emergencies. In an effort to more efficiently address the most urgent service emergencies in a more expeditious manner, the Board proposed in the *NPRM* to establish a new, accelerated process at new 49 CFR 1146.2 for certain acute service emergencies presenting potential imminent harm and threatening potentially severe adverse consequences to the petitioner, its customers, or the public. *NPRM,* EP 762, slip op. at 7. Under the new process proposed by the Board, a petitioner seeking accelerated relief must indicate that it is seeking such relief pursuant to that process, include a description of specific and particularized actions that can be performed by the incumbent or an alternative carrier and ordered by the Board,[20] and demonstrate that the described emergency presents an imminent significant harm and threatens potentially severe adverse consequences to the petitioner, its customers, or the public. *Id.* To satisfy this standard, the Board proposed that the petitioner must demonstrate the alleged harm will occur before any relief could be ordered under 49 CFR 1146.1 and that any relief ordered by the Board pursuant to 49 CFR 1146.1 would be rendered ineffective. *NPRM,* EP 762, slip op. at 7. The Board noted that such severe adverse circumstances would exist when there is a clear and present threat to public health, safety, or food security, or a high probability of business closures or immediate and extended plant shutdowns. *Id.* Additionally, the Board proposed that the petition must include a verified description of any efforts taken to resolve the issue through other means, such as consultation with RCPA or direct discussions with the incumbent railroad. *Id.* at 8. The Board proposed to limit the length of petitions to three substantive pages (not including cover page, verifications, or certificate of service), noting that a petitioner could present further evidence in support of its petition during a telephonic or virtual hearing. *Id.*

Under the Board's proposal, a petition filed under the proposed 49 CFR 1146.2 would be assigned to a designated Board Member for initial resolution. *NPRM,* EP 762, slip op. at 8. The Board proposed that the Board Member designation would rotate on a quarterly basis, and if the designated Board Member is unavailable, the next Board Member in the rotation would be assigned to evaluate the petition. *Id.* The designated Board Member would notify the parties regarding a telephonic or virtual hearing to be held between 24 and 48 hours after receipt of the petition or as soon thereafter as logistically possible. *Id.* Given the accelerated process, the Board's proposed schedule did not include a period for written replies—oral replies to the petition would occur during the hearing—however, the designated Board Member could order

[19] BLET asks the Board to permit extension of the deadlines if all parties agree, (BLET Comment 4), and AFPM, IMA, and PRFBA urge the Board to grant extension requests in extraordinary circumstances only, (AFPM Comment 11, IMA Comment 13; PRFBA Comment 13). In most cases, extension requests agreed upon by all parties to an emergency service proceeding are likely to be appropriate. However, given the urgent nature of the situations underlying emergency service proceedings, the Board will grant unilateral extension requests only for good cause. The Board will amend 49 CFR 1104.7 to clarify that requests for an extension under 49 CFR part 1146 must be filed as early as possible under the circumstances.

[20] Because the statute limits the Board's emergency service authority to the actions enumerated in 49 U.S.C. 11123(a), the proposal limited any relief ordered pursuant to the accelerated process to the actions listed in the statute. *NPRM,* EP 762, slip op. at 7 n.9.

the carriers to submit, or the carriers could voluntarily submit, an alternative plan to address the emergency within 24 hours of the hearing. *Id.* The Board's proposal contemplated an initial decision on the merits of the petition by the designated Board Member within two business days after completion of the hearing. *Id.* That initial decision could be appealed to the entire Board pursuant to 49 CFR 1115.2. *Id.*

The Board proposed that any relief granted under 49 CFR 1146.2 clearly avoid any substantial impairment of the ability of a rail carrier to serve its own customers adequately or to fulfill its common carrier obligations. *NPRM,* EP 762, slip op. at 8–9. Given the accelerated nature of this process, the Board also proposed a 20-day limit on relief, which it stated should provide petitioners with sufficient time to pursue relief up to 240 days, if necessary, under 49 CFR 1146.1. *Id.* at 9. Under the Board's proposal, if a petition for relief under 49 CFR 1146.2 is denied for failure to satisfy the standard for relief, the petitioner may appeal that ruling to the entire Board, or the petitioner may file a new petition pursuant to 49 CFR 1146.1 regarding the same service emergency. *NPRM,* EP 762, slip op. at 8.

According to the Coalition Associations, the creation of this new accelerated process is the ''single most impactful proposal'' in the *NPRM.* (Coalition Ass'ns Comment 2.) NACD also supports the creation of this new accelerated process, noting that emergencies require immediate action and accelerating the timeliness would facilitate relief in emergency situations. (NACD Comment 3.) SDDC states that it ''sees the potential for a significant improvement from adding [49 CFR] 1146.2,'' (SDDC Comment 1), and NITL and ISRI state that the creation of this new process is a critical change that will enhance the usefulness of the Board's emergency service regulations, (NITL & ISRI Reply 1–2). AFPM, IMA, NGFA, RFA, and USDA also indicated their support of the new proposed process at 49 CFR 1146.2. (AFPM Comment 12; IMA Comment 14; NGFA Comment 6; RFA Comment 2; USDA Comment 1.)

AAR, CSXT, and NS urge the Board to discard its proposal for a new accelerated process. According to AAR, the new accelerated process is ''fundamentally unfair and impracticable,'' and the ''extreme limitations on development of a record and meaningful opportunity to be heard present substantial questions of procedural fairness and due process.'' (AAR Comment 13.) AAR notes that neither the incumbent nor any alternative carrier would have the opportunity to reply in writing to a petition and claims ''the incumbent (and any alternative carrier) will have virtually no time to investigate the few facts provided'' in the three-page petition. (*Id.*) AAR doubts the timeline would allow the Board to ''make a responsible decision'' and asserts its concerns are exacerbated by the fact that petitioners would not be required to obtain an advance commitment from an alternative carrier. (AAR Comment 13–14; *see also* CSXT Comment 10 (''The proposed acceleration to the [49 CFR] 1146.1 process is as fast as the Board could reasonably act in a manner that ensures that the parties and the Board have sufficient time to both gather and analyze the available information to make a wise decision with such an extraordinary power.'') (emphasis omitted); NS Comment 4 (''[T]he proposed accelerated process will not allow for the development of a factual record upon which the Board can act.'').)

CSXT argues it is unnecessary to create a second process when the Board is shortening the existing process. (CSXT Comment 9.) According to CSXT, because the Board's authority under 49 U.S.C. 11123 is limited to acute service emergencies, there is ''no authority for an even more extraordinary remedy for a different category of emergency—emergent is emergent.'' (CSXT Comment 9.) CSXT also asserts the Board has not explained why ''acute service emergencies'' cannot be handled under 49 CFR 1146.1 or through the Board's injunctive authority at 49 U.S.C. 1321(b)(4). (CSXT Comment 9.)

NS likewise cites to the Board's injunctive authority as a reason for discarding the proposed new process, noting that the Board has in the past granted an injunction where emergency service was sought. (NS Comment 5 n.4 (citing *Cent. Valley Ag Grinding, Inc.* v. *Modesto & Empire Traction Co.,* NOR 42159, slip op. at 7 (STB served June 12, 2018).) NS further argues that the Board previously declined to shorten the timeline of 49 CFR 1146.1 and that there is no evidence a faster process is ''needed or superior to the current expedited timeline in [49 CFR] 1146.1.'' (NS Comment 5.) NS asserts that if the Board is concerned about the timeline of the 49 CFR 1146.1 process, the Board can eliminate the rebuttal period. (NS Comment 5 n.4.)

On reply, the Coalition Associations urge the Board to reject the carriers' requests to abandon the accelerated process and suggest several modifications to address the concerns raised. (Coalition Ass'ns Reply 8.) First, the Coalition Associations suggest that rather than discarding the new accelerated process, the Board could discard its proposal to shorten the existing 49 CFR 1146.1 process. (Coalition Ass'ns Reply 8.) According to the Coalition Associations, the accelerated process would sufficiently address shippers' concerns that the 49 CFR 1146.1 process is ''too slow and cumbersome for the most time-sensitive emergencies.'' (Coalition Ass'ns Reply 8.) The Coalition Associations also state they are open to limiting the relief available under 49 CFR 1146.2 to incumbent-based relief only. (Coalition Ass'ns Reply 8–9.)

NITL and ISRI also oppose the carriers' proposal to jettison the accelerated process, noting that it offers one of the ''greatest opportunit[ies] to improve the usefulness of the [Board's regulations].'' (NITL & ISRI Reply 3.) Shipper Groups argue that ''[t]here is no basis to conclude at this stage that any railroad will be deprived of a fair hearing without the opportunity to make a written presentation.'' (Shipper Grps. Reply 8.)

The Board finds that an accelerated process is warranted to address acute service emergencies more efficiently. As noted in the *NPRM,* the most serious issue identified by stakeholders was the timeliness of regulatory action in situations involving acute service emergencies. In certain instances, the process in 49 CFR 1146.1 would simply take too long (even under the shortened 1146.1 timeline adopted in this final rule) for a shipper facing an acute emergency to utilize it effectively, even though the shipper might otherwise qualify for emergency service relief. The accelerated process addresses this timeliness issue by streamlining the petition process in certain emergency situations to allow the Board to act quickly while providing it with enough time to make a responsible decision while maintaining adequate due process for carriers.[21]

Although the process will be short, carriers will have a meaningful opportunity to reply to the petition, and the provision of an oral response at a hearing is consistent with 49 U.S.C. 11123, which intended summary procedures in these emergency

[21] The Board appreciates the Coalition Associations' suggestion that 1146.2 might make it possible to discard its proposal to shorten the deadlines for 1146.1, but concludes that the best solution is to adopt 1146.2 *and* to shorten the deadlines under 1146.1. The situations that justify the use of 1146.1 are emergencies, even if they are not ''acute'' emergencies, so a faster timeline will be beneficial.

situations.[22] Additionally, the regulations do not preclude the provision of written comments by the rail carriers; it simply does not provide specific extra time for them in the necessarily short schedule. Nor will the filing of a petition be the first opportunity for carriers to investigate the circumstances surrounding the particular service issue. Prior to filing at the Board, a petitioner would have to engage in the process mandated by 49 CFR 1146.2(a), which requires that parties seek, in good faith, to resolve any service issues through an informal dispute resolution process first. Finally, the accelerated process limits relief to no more than 20 days, and parties may petition the Board to reconsider its decision.[23] The Board understands the gravity of issuing emergency service orders and finds that this new process will accommodate the procedural rights of all parties while affording the Board the ability to swiftly act on behalf of the public interest in necessary situations, as Congress intended.[24]

Concerning the standard for relief proposed by the Board, the Coalition Associations state that the proposal ''reasonably restricts this process to circumstances that threaten severe consequences to the shipper, its customers, or the public that cannot be avoided using the [49 CFR] 1146.1 procedures.'' (Coalition Ass'ns Comment 3.) However, several commenters ask the Board to define ''acute service emergency'' more clearly. AFPM, IMA, and PRFBA urge that the Board permit any plant shutdown to qualify for relief under this new process, arguing that any shutdown is acute. (AFPM Comment 12; IMA Comment 14; PRFBA Comment 14.) AFPM suggests removing the requirement that plant shutdowns be ''extended,'' (AFPM Comment 12), and IMA and PRFBA suggest removing the requirement that plant shutdowns be ''immediate and extended,'' (IMA Comment 14; PRFBA Comment 14). NMA expresses concern that entities may interpret ''acute service emergency'' differently and notes that if there are multiple emergencies at the same time, the Board may need to weigh one emergency over the other. (NMA Comment 3.)

AAR opposes allowing any plant slowdown or shutdown to qualify under 49 CFR 1146.2, arguing that not all plant slowdowns, shutdowns, or even closures are genuine emergencies that would qualify for emergency service relief.[25] (AAR Reply 5–6.) According to AAR, ''shutdowns and closures can often be remedied with monetary damages.'' (AAR Comment 6.) AAR and NS both argue the accelerated process, if adopted, should be more narrowly tailored, available only if the petitioner will experience immediate and irreparable harm, as is required for a preliminary injunction or temporary restraining order. (AAR Comment 6; NS Comment 6–7.) NS notes emergency service orders are similar to preliminary injunctions in that both are extraordinary remedies, (NS Comment 7), and AAR argues that much like temporary restraining orders, petitions brought under 49 CFR 1146.2 would be decided pursuant to a short procedural schedule with ''minimal opportunity for response from the involved railroad[s],'' (AAR Comment 6 (brackets in original)).

Shipper Groups and the Coalition Associations both take issue with AAR's suggestion that not all plant shutdowns meet the statutory requirements for an emergency under 49 U.S.C. 11123. (Shipper Grps. Reply 2; Coalition Ass'ns Reply 10.) According to Shipper Groups, the basis for relief should be decided in individual adjudications, not based on hypothetical facts at the rulemaking stage. (Shipper Grps. Reply 2.)

Shipper Groups and the Coalition Associations also both oppose applying the standard for injunctions at 49 U.S.C. 1321(b)(4) to emergency service petitions. (Shipper Grps. Reply 4; Coalition Ass'ns Reply 12.) The Coalition Associations argue that the irreparable harm standard considers whether the petitioner could be made whole, whereas the Board's emergency service authority is also exercised for the public interest. (Coalition Ass'ns Reply 12–13). According to Coalition Associations, ''[i]t is entirely conceivable that the petitioner could be made whole with monetary damages, but the broader public interest could not.'' (*Id.* at 13.) The Coalition Associations further argue that monetary damages are not a realistic remedy for plant shutdowns as most contracts and tariffs allow only for direct damages (*i.e.,* primarily the additional cost of alternative transportation) but not consequential damages.[26] (*Id.* at 10.) According to Shipper Groups, the fact that shippers need to seek emergency relief in the first place is evidence that the ''other types of proceedings'' AAR references are insufficient and fail to deter carriers from curtailing service. (Shipper Grps. Reply 2 (quoting AAR Comment 5).) According to Shipper Groups, the economic losses shippers face from rail service failures can be massive, and the carriers' proposal would ''categorically preclude[]'' shippers and their customers from receiving emergency service. (Shipper Grps. Reply 3–4.)

The Board will revise the portion of 49 CFR 1146.2(a) that states ''immediate and extended plant shutdowns'' to simply state ''immediate plant shutdowns.'' Striking ''extended'' as a qualifier allows the Board to consider how the impact of a shutdown will vary by industry. In some industries, for example, imminent significant harm and severe adverse consequences could occur immediately upon plant shutdown. This change will allow the Board to better assess petitions for emergency relief based on the circumstances of the underlying emergency.[27]

The irreparable harm standard applicable to injunctions under section 49 U.S.C. 1321(b)(4) will not be imported by the Board to its consideration of emergency petitions under 49 U.S.C. 11123. Congress has kept separate the emergency service and preliminary injunction powers of the Board. The Board sees no reason to conflate the general preliminary injunction standard in 49 U.S.C. 1321(b)(4) with the more specific emergency issues arising under 49 U.S.C. 11123, which provides an independent standard for when it applies, *see* 49 U.S.C. 11123(a).

[22] As noted above, the Board's decision would not be subject to the APA. *See* 49 U.S.C. 11123(b)(1).

[23] NS contends that the Board should not adopt a shorter 1146.2 process because it rejected a shorter 1146.1 process when it adopted the rule in 1998. (NS Comment 5.) But the fact that relief under 1146.2 is significantly more limited than relief under 1146.1 (a distinction that did not exist in 1998) weighs in favor of a shorter time frame. *See Expedited Relief,* EP 628, slip op. at 16. Also, the absence of rebuttal and reply periods in 1146.2 will facilitate a faster process. Moreover, as explained above in connection with 1146.1, the Board has reevaluated its views of the feasibility of faster timelines than the one established in 1998.

[24] NS argues that the 1146.2 process is unnecessary because the Board could issue preliminary injunctions instead, but the emergency service standard is different from the preliminary injunction standard, as discussed in more detail below. The fact that the Board has found it appropriate under certain circumstances to issue preliminary injunctions in lieu of emergency service orders does not mean that preliminary injunctions are an adequate substitute for 1146.2.

[25] The Board agrees that not all ''immediate plant shutdowns'' are genuine emergencies that would qualify for relief under 1146.2 and, as reflected in the language of 1146.2, that it is highly unlikely that a plant ''slowdown'' would ever constitute a genuine emergency under 1146.2.

[26] The Coalition Associations further note that captive shippers, which they claim have the greatest need for emergency service, have the least ability to use alternative transportation. (Coalition Ass'ns Reply 10–11.)

[27] 49 CFR 1146.2 will also be revised to include reference to 49 U.S.C. 11123 in a manner similar to 49 CFR 1146.1.

NGFA and AAR ask the Board to clarify the phrase ''food security.'' More specifically, NGFA asks the Board to clarify that the new accelerated process could be used in situations presenting a ''clear and present threat to the health of livestock.'' (NGFA Comment 6.) NGFA states that railroads' failures to deliver corn, which its members process into feed for livestock, can be damaging and potentially catastrophic to the health of livestock populations. (*Id.*) AAR questions what the phrase would include (*e.g.,* does it cover a shortage of pet food, livestock feed, potato chips, or soda) and asserts it is not clear ''what a threat to 'food security' would entail in the railroad context.'' (AAR Comment 7.) The Coalition Associations argue that ''food security'' need not be defined more clearly as it is ''common sense'' and note that food security is ''traced back to the ultimate food sources, not the manufactured products in the AAR's hypotheticals.'' (Coalition Ass'ns Reply 11.)

Further clarification of ''food security'' is unnecessary at this time. While the Board agrees with the Coalition Associations that shortages of the ultimate food sources are more likely to constitute an emergency than shortages of manufactured products, the Board cannot anticipate all circumstances of potential food security-related emergencies. Instead, a case-by-case application that affords the Board flexibility in addressing situations based on the specific conditions of each case will best allow the Board to apply these regulations appropriately.

SDDC requests the Board add ''a threat to national defense'' to the standard for relief under 49 CFR 1146.2. (SDDC Comment 1.) SDDC states that ''national defense is one very important aspect of the public interest, and the timely deployment of military units to a port or timely movement of critical defense materiel are important to that end.'' (*Id.*) AAR states it does not object to this change if the accelerated process is adopted. (AAR Reply 7.) The Board of course agrees that national defense is critical to the public interest and will therefore include language in 49 CFR 1146.2 to reflect that the accelerated process is an appropriate mechanism for addressing threats to national defense related to rail service.

Regarding the proposed petition requirements under 49 CFR 1146.2, AAR requests that the Board require a petitioner to include in its petition that it has ''previously notified the incumbent railroad of the emergency and its intent to file.'' (AAR Comment 17.) According to AAR, while the proposal requires a good faith effort to resolve the dispute before filing, it does not require the petitioner to notify the incumbent carrier of the emergency. (*Id.*) AAR asserts that this modification would ensure the incumbent carrier has sufficient notice to prepare a response to a petition and that the Board has the most complete information. (*Id.*) Shipper Groups argue this concern is unfounded. (Shipper Grps. Reply 8.) Additionally, Shipper Groups express concern with the Board's proposal to limit petitions under 49 CFR 1146.2 to three substantive pages. According to Shipper Groups, this page limit may lead to skeletal filings that could cause uncertainty, confusion, and longer hearings. (Shipper Grps. Comment 10.) Shipper Groups suggest that a word count limitation would be less subject to manipulation. (*Id.*)

The Board agrees with Shipper Groups regarding AAR's concerns here. It is redundant to require petitions to state that petitioners have notified incumbent carriers of emergencies and their intent to file for emergency service given that shippers are required in good faith to seek informal resolution of the matter before filing under 49 CFR 1146.2 and to describe those efforts in their petitions. The Board expects that shippers facing such an emergency would make the impact of the service issue on their business clear to the railroad during informal discussions.

The Board declines to adopt Shipper Groups' suggestion that it address concerns about the page limitation by using a word limit instead. It is not clear from Shipper Groups' argument why such a change would be meaningful, and doing so would depart from standard Board practice. *See, e.g.,* 49 CFR 1115.2(d), 1115.3(d), 1115.5(c). Moreover, 49 CFR 1104.2 sets forth requirements such as page size, font size, and line spacing, which will help prevent parties from manipulating the limitations. The Board will, however, expand the petition page limit from three substantive pages to five substantive pages to accommodate the requirements that petitions include a particularized description of the commodities and volumes subject to the requested relief and the timing necessary for such relief, including why relief under 1146.1 would be ineffective; as well as a particularized description of how the measurable deterioration or other demonstrated inadequacy, absent the requested relief, presents imminent significant harm and threatens potentially severe consequences as specified in 1146.2(a).

AAR expresses concern about the Board's proposal to rotate, on a quarterly basis, the Board Member assigned to evaluate petitions for emergency relief and issue the initial decision. AAR projects that a single quarter may see a large number of complaints, which could tax a single Board Member; AAR goes so far as to speculate that single-Member decision making could even lead to ''judge shopping'' by shippers. (AAR Comment 15–16.) AAR suggests that the Board ''shorten the rotation, not make it public, and allow for at least two Members'' to resolve cases or allow Board staff to hold a conference before making a recommendation to the full Board, as is done for motions to compel. (*Id.* at 16.) The Coalition Associations do not object to AAR's proposals intended to mitigate the burdens that could fall unduly upon a single Board Member; however, they object to AAR's statement that petitioners would ''judge shop.'' (Coalition Ass'ns Reply 14.) According to the Coalition Associations, ''any circumstance in which a shipper can afford to wait until the following calendar quarter to have its petition decided by a different Board Member would not qualify for the [49 CFR] 1146.2 process.'' (Coalition Ass'ns Reply 14–15.) Shipper Groups argue that AAR's concerns may never materialize, and if they do, the Board can address them at that time. (Shipper Grps. Reply 7.) [28]

After considering the concerns raised in the comments, the Board finds that the objectives of the new 49 CFR 1146.2 process would be best achieved through a full Board decision rather than through delegation to a single Board Member. The Board's emergency service powers, when exercised, undoubtedly have a significant impact on various parties and the interstate rail network as a whole. Consideration by the full Board better lends itself to the exercise of that power, even in the accelerated process. Moreover, consideration by the full Board in the first instance (rather than upon appeal of a single-Member decision) will allow the process to be more efficient while still protecting the right to appeal by petitioning the Board for reconsideration. Accordingly, the regulations adopted in this final rule provide for a full Board decision on the merits of petitions seeking relief under 49 CFR 1146.2. To accommodate this procedural change but still allow proceedings to move quickly, instead of a hearing before the designated single

[28] NS notes the *NPRM* did not propose to amend the Board regulations at 49 CFR 1011.4 to delegate this authority to an individual Board Member. (NS Comment 11 n.10.) Because the regulations adopted in this final rule provide for a full Board decision, this modification is unnecessary.

Board Member as was proposed in the *NPRM,* Board staff will hold a staff-led conference with parties, as suggested by AAR.[29] (AAR Comment 16.) Board Members may attend the staff-led conference.[30] A transcript or recording of the staff-led conference will be made available to all Board Members before they make their decision and will be posted in the docket following any necessary redactions for confidentiality. In addition, given the change from a single Member to full Board decision, the Board will endeavor to issue a decision on the merits within three business days, rather than two as was proposed in the *NPRM.* This process is intended to be quick and flexible while also respecting the regulatory powers involved in the emergency service process.[31] Moreover, including a staff-led conference might encourage discussion and resolution among parties to a proceeding.

NGFA asks the Board to require potential alternative carriers to address at the hearing proposed by the Board in the *NPRM* ''whether the remedy proposed by the petitioner is unsafe, infeasible, or will substantially impair the replying carrier's ability to serve its other customers adequately or fulfill its common carrier obligations,'' as the proposed regulations required of incumbent carriers. (NGFA Comment 6–7.) Additionally, CSXT and NS argue that if the Board adopts the accelerated process, it should modify the proposed treatment of confidential information because closing portions of the proposed hearing to certain parties is unnecessary and would be unfair, prejudicial, and inconsistent with how the Board treats confidential information in other proceedings (accessible subject to a protective order). (CSXT Comment 13; NS Comment 11.)

Potential alternative carriers will be required to attend the staff conference where that information can be discussed and will be required to identify, at the conference, facts showing whether the proposed alternative service would be infeasible, or substantially impair the replying carrier's service to other customers. As for CSXT's and NS's positions on modifying the treatment of confidential information, the Board finds it is best to adopt this aspect of the regulation as proposed in order to maintain flexibility. This flexibility is imperative, for example, if a case involves multiple carriers and requires discussion of highly confidential information. While the Board will leave this aspect of the proposal unchanged, the Board emphasizes that transparency will be pursued to the greatest extent possible.

Regarding the proposed limitations on relief available under the new process, BLET argues the 20-day relief limit would provide a ''back-stop to causing most major harms.'' (BLET Comment 4–5.) CSXT asks the Board to clarify in the regulations that orders under 49 CFR 1146.2 may not be extended beyond the 20-day period and that additional relief would require a petition under 49 CFR 1146.1. (CSXT Comment 12.) AAR and NS argue that relief under the proposed new accelerated process should be limited to incumbent-based relief. (AAR Comment 10–11; *see also* NS Comment 5.) Both carrier interests argue it would be impractical for an alternative carrier to provide service for 20 days and that, for safety reasons, crews from the alternative carrier must be qualified to operate on the incumbent's tracks. (AAR Comment 10–11; NS Comment 5–6.) AAR adds that if an incumbent crew is available to train the crew of the alternative carrier, the incumbent crew could simply be directed to provide the service itself. (AAR Comment 10–11.) AAR asserts that limiting 49 CFR 1146.2 to incumbent-based relief would provide more time to identify an alternative carrier for continued relief under 49 CFR 1146.1. (AAR Comment 11.)[32] The Coalition Associations state they are amenable to limiting the relief under 49 CFR 1146.2 to ''incumbent-based relief'' only, which they understand to include relief that does not involve the grant of trackage rights to an alternative carrier but could include granting an alternative through route using an alternative carrier. (Coalition Ass'ns Reply 7.)

The Board will adopt language clarifying that relief under 49 CFR 1146.2 may not be extended beyond the 20-day period and any additional relief will require a separate petition under 49 CFR 1146.1. This will provide a clearer pathway for any party wishing to seek additional emergency relief. However, the Board will not limit 49 CFR 1146.2 to provide for incumbent-based relief only. Section 1146.1 allows the Board to provide for trackage rights to an alternative carrier with the same safety and feasibility concerns present as those raised regarding 49 CFR 1146.2. Additionally, while the Board expects incumbent-based relief to be utilized in the vast majority of instances, the Board finds it important to maintain flexibility in its process since, for example, there may be situations where arrangements between parties could make trackage-rights relief more feasible. Nevertheless, the Board emphasizes that feasibility will be considered in determining what relief is appropriate in a given case and that it will not order a remedy that it deems infeasible.

Several commenters asked the Board to clarify the proposed service requirements. CSXT questions whether the Board is suggesting that all pleadings must be e-filed with the Board, or whether it is proposing to introduce electronic service of pleadings, which cannot be accomplished through e-filing. (CSXT Comment 12.) AAR and NS each ask the Board to clarify that e-filing alone is not considered sufficient service since e-filing on the Board's website does not effectuate service on other parties or the FRA. (AAR Comment 16; NS Comment 10.) NS states it ''supports the Board adding a method of electronic service and suggests that the Board consider using language similar to that contained in 49 CFR 1104.12, which governs service of documents.'' (NS Comment 11.) The Coalition Associations agree that the requested clarifications are needed. (Coalition Ass'ns Reply 15.) They also ask the Board to consider requiring all Class I carriers to file with the Board the name and electronic address for service of petitions, which it states would ensure faster delivery to those carriers and maximize their response time. (*Id.*)

The Board agrees that the proposed service provisions were unclear and will clarify them by revising the text to read

[29] Designated Board staff will not be recused from handling substantive elements of the case.

[30] The Board Members may do so ''without regard to subchapter II of chapter 5 of title 5.'' 49 U.S.C. 11123(b)(1).

[31] Shipper Groups assert that the possibility for consecutive appeals—first, to the entire Board, followed by a petition for reconsideration of the full Board decision—could dissuade petitioners from utilizing the accelerated process because the 49 CFR 1146.1 process, which takes 10 business days, would appear to be less burdensome. (Shipper Grps. Comment 10–11.) On reply, AAR argues that the right to appeal is ''fundamental and already required by the Board's own regulations'' and that ''prohibiting appeal from the decision of a single Board [M]ember would be patently unfair and a denial of due process.'' (AAR Reply 4.) Now that the entire Board will decide on petitions under 49 CFR 1146.2, parties will no longer need to appeal these decisions to the full Board before then petitioning for reconsideration. However, petitions for reconsideration will be permitted under a shortened timeline, similar to the timeline provided for appeals in the NPRM, given the nature of proceedings under the accelerated process. The Board will amend 49 CFR 1115.3 accordingly.

[32] AAR notes the proposed language for 49 CFR 1146.2 in the *NPRM* did not include a requirement to provide even an identification of an alternative carrier, although potential alternative carriers would be required to attend the hearing. (AAR Comment 11 n.16.) However, 49 CFR 1146.2(e) requires service on other parties, which, as discussed below, includes any proposed alternative carriers. Accordingly, the contact information for any potential alternative carriers should be provided on the certificate of service.

more like that in 49 CFR 1104.12. The Board should be served by e-filing on the Board's website, given the short timeline of these proceedings. Service on other parties, including any proposed alternative carriers, and the FRA may be done by email, hand, or overnight delivery. In addition, all pleadings should also be emailed to *ServiceEmergency@stb.gov.* However, the Board will not at this time require the Class I carriers to file the name and electronic address for service of petitions. The contact information for the serving carrier is the type of information that should already be in the possession of the petitioner. Moreover, parties are required to make a good faith effort to resolve any service issues through an informal dispute resolution process, during which time they can obtain this information from the carrier, if needed.

BLET expresses concern that emergency service for acute service emergencies might undermine collective bargaining agreements (CBAs). (BLET Comment 5.) The Board does not anticipate that CBAs will be an issue in most emergency service proceedings, but notes that any such issues are best resolved on a case-by-case basis in any event.

Lastly, NMA cautions that the new process, if codified, should be used sparingly because, although ''it is not the intent of the [Board] to create a new program to regulate rail, this proposed rulemaking is a slippery slope that has the potential to be abused by bad actors.'' (NMA Comment 3; *see also* AAR Reply 8–9 (noting that it shares the concerns expressed by NMA).) While the accelerated process may impact informal dispute resolution between the parties, the Board finds no reason to assume potential abuse of the accelerated process itself. By its own definition, 49 CFR 1146.2 will be used only sparingly because it is much narrower than 49 CFR 1146.1, and the circumstances under which it can be used are limited. Moreover, it is in the interest of all parties to act in good faith, and the Board will deny petitions filed in bad faith or that otherwise abuse the Board's processes.

Contract and Exempt Traffic. Various carrier interests also ask the Board to clarify that traffic moving pursuant to a contract is not eligible for relief under the Board's proposal. (AAR Comment 18–19, CSXT Comment 12; NS Comment 7–10.) According to NS, the plain language of 49 U.S.C. 10709(c)(1) makes clear that traffic moving pursuant to a contract is outside the Board's jurisdiction, but the Board's final rule adopting 49 CFR 1146.1 ''injected unnecessary ambiguity'' into the issue. (NS Comment 7–10 (citing *Expedited Relief,* EP 628, slip op. at 10).) NS argues that even if a railroad stops service, if that service is governed by a contract, ''any relief . . . is wholly outside the Board's jurisdiction,'' and any remedies ''must be provided for in the contract itself (*e.g.,* a force majeure provision) and are enforceable only in the courts and subject to applicable state law.'' (*Id.* at 9 (citing 49 U.S.C. 10709(c)(2)).) CSXT asks that the Board require all petitions filed under part 1146 to include a verification that the transportation for which relief is sought is not governed by a contract. (CSXT Comment 12.) AAR also argues exempt traffic should be ineligible for relief under part 1146 because the expedited timelines would not provide sufficient time for the Board to complete the analysis required by statute to revoke an exemption. (AAR Comment 19.) AAR further argues that revocation of an exemption requires a decision of the full Board, not an individual Board Member as contemplated by 49 CFR 1146.2. (AAR Comment 20.)

The Coalition Associations disagree, arguing the Board may exercise its authority to order emergency service over traffic covered by a contract. (Coalition Ass'ns Reply 3.) According to the Coalition Associations, Congress would not have granted the Board the broad emergency authority it did in 49 U.S.C. 11123 only to carve out in 49 U.S.C. 10709 the substantial volume of traffic covered by a contract, nor would Congress have subordinated the public interest to a private contract. (Coalition Ass'ns Reply 4.) The Coalition Associations contend that ''[t]he transportation that occurs pursuant to an emergency service order is not occurring under a contract,'' but rather is ''alternate service pursuant to [49 U.S.C.] 11123,'' (Coalition Ass'ns Reply 5), and they identify a prior instance where the Board exercised its 49 U.S.C. 11123 authority over contract traffic, (Coalition Ass'ns Reply 4 (citing *Joint Pet. for Serv. Ord.,* SO 1518 (STB served Oct. 31, 1997), *modified and extended* (STB served Dec. 4, 1997), *further modified and extended* (STB served Feb. 17 and 25, 1998), *terminated with wind-down period* (STB served July 31, 1998).)

NGFA also disagrees with the proposition that contract traffic is not eligible for emergency service relief, pointing to the Board's rejection of this very argument made by AAR in the 1998 final rule in Docket No. EP 628, and asserting that the Board ''clearly established that it has jurisdiction to issue an order under [49 U.S.C.] 11123 for movements subject to a transportation contract if the facts and circumstances require it.'' (NGFA Reply 1–2 (citing *Expedited Relief,* EP 628, slip op. at 10.)) NGFA likewise urges the Board to decline NS's request for the Board to clarify that its emergency service authority does not apply to contract traffic, observing that the adoption of such a ''blanket, overreaching prohibition'' would be bad public policy because it would render the Board powerless to act when rail service failures significantly harm businesses and the public merely because the service is governed by a contract. (*Id.* at 3.) Rather, NGFA asks the Board to reaffirm its decision that 49 U.S.C. 11123 grants the Board authority ''to act in the public interest to avert rail service emergencies, regardless of whether the service the railroad has failed to provide is governed by a tariff or a contract, subject to the restrictions set forth in [*Expedited Relief,* EP 628].'' (NGFA Reply 3.) In a similar vein, NGFA disputes the claim that exempt traffic is ineligible for emergency service, citing *Expedited Relief,* EP 628, where the Board noted that this argument ''is clearly wrong'' because the Board ''retain[s] full jurisdiction to deal with exempted transportation, as [the Board] can revoke the exemption at any time, in whole or in part, under [49 U.S.C.] 10502(d).'' (NGFA Reply 2 (quoting *Expedited Relief,* EP 628, slip op. at 10).)

NITL and ISRI similarly dispute carrier arguments that the Board lacks the power to exercise its emergency service authority over contract and exempt traffic. With respect to contract traffic, NITL and ISRI assert the carriers' arguments ''are factually and legally incorrect and contrary to the intent of Congress.'' (NITL & ISRI Reply 3.) As for exempt traffic, NITL and ISRI request that the Board partially revoke existing class exemptions so they will not apply to requests for emergency service. (*Id.* at 8.) NITL and ISRI argue there are ''substantial similarities'' between the Board's ''partial revocation of the exemption for agricultural commodities and the circumstances involving exempt traffic and emergency service orders,'' which would justify the Board partially revoking existing exemptions to permit shippers of exempt commodities to access the Board's emergency service regulations. (*Id.* at 3–8.)

Shipper Groups contend that the carriers have not presented any basis for the Board to depart from its decision in *Expedited Relief,* EP 628, (Shipper Grps. Reply 4), and argue that this issue is outside the scope of the proceeding

because it was not included in the *NPRM,* (*id.* at 5).

The NPRM did not make any new proposal regarding the application of section 11123 to contract traffic. In *Expedited Relief,* EP 628, the Board concluded that any advance rejection of all authority to address situations where a contract exists in an emergency would be inappropriate and declined to include any bright-line prohibition. *Expedited Relief,* EP 628, slip op. at 10. In the *NPRM,* the Board made no proposals changing the status of existing law on this issue and sees no reason to revisit that position here.

As for exempt traffic, the Board reiterates that it has the authority to revoke exemptions when appropriate. Petitioners may request partial revocations in their filings at 49 CFR 1146.1 or the new accelerated process at 49 CFR 1146.2 (which will not be decided by a single Member, as the *NPRM* originally proposed, but by the full Board). *See supra* at 23–24.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Regulatory Flexibility Act), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact of a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities, (2) analyze effective alternatives that may minimize a regulation's impact, and (3) make the analysis available for public comment. 5 U.S.C. 601–604. In its final rule, the agency must either include a final regulatory flexibility analysis, 5 U.S.C. 604(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' 5 U.S.C. 605(b).

Because the goal of the Regulatory Flexibility Act is to reduce the cost to small entities of complying with federal regulations, the Regulatory Flexibility Act requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

In the *NPRM,* the Board certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.[33] The Board explained that the proposed changes were intended to improve the Board's directed service procedures and would not mandate or circumscribe the conduct of small entities. Rather, the Board said, the changes would be largely procedural and would not have a significant economic impact on the Class III rail carriers to which the Regulatory Flexibility Act applies. Because affected shippers or railroads could seek the relief under 49 CFR part 1146 to obtain temporary relief from serious, localized service problems more quickly and effectively, the Board certified under 5 U.S.C. 605(b) that the proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of Regulatory Flexibility Act.

The final rule adopted here revises the rules proposed in the *NPRM;* however, the same basis for the Board's certification of the proposed rule applies to the final rule. Thus, the Board again certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

In the *NPRM,* the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521, Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), and Appendix B, about the impact of the collection for the Directed Service Regulations (OMB Control No. 2140–XXXX), concerning: (1) whether the collections of information, as added in the proposed rule, and further described in Appendix A, are necessary for the proper performance of the functions of the Board, including whether the collections have practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

The Board estimated in the *NPRM* that the proposed requirements will have a total hourly burden of 2,710 hours. There were no proposed non-hourly burdens associated with these collections. No comments were received pertaining to the collections of this information under the PRA. The new collections will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Congressional Review Act. Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this rule as a non-major rule, as defined by 5 U.S.C. 804(2).

List of Subjects

49 CFR Part 1011

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

49 CFR Part 1104

Administrative practice and procedure.

49 CFR Part 1115

Administrative practice and procedure.

49 CFR Part 1146

Railroads.

It is ordered:

1. The Board adopts the final rule as set forth in this decision. Notice of the adopted rule will be published in the **Federal Register**.

2. This decision is effective February 23, 2024.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

Decided: January 18, 2024.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Jeffrey Herzig,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, parts 1011, 1104, 1115, and 1146 of the Code of Federal Regulations as follows:

[33] For the purpose of Regulatory Flexibility Act analysis for rail carriers subject to Board jurisdiction, the Board defines a ''small business'' as only including those rail carriers classified as Class III rail carriers under 49 CFR part 1201, General Instructions 1–1. *See Small Entity Size Standards Under the Regul. Flexibility Act,* EP 719 (STB served June 30, 2016). Class III carriers have annual operating revenues of $40.4 million or less in 2019 dollars. Class II rail carriers have annual operating revenues of less than $900 million but more than $40.4 million in 2019 dollars. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 CFR 1201.1–1; *Indexing the Annual Operating Revenues of R.Rs.,* EP 748 (STB served June 29, 2023).

PART 1011—BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

■ 1. The authority citation for part 1011 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 1301, 1321, 11123, 11124, 11144, 14122, and 15722.

■ 2. Add § 1011.7(a)(2)(xx) to read as follows:

§ 1011.7 Delegations of authority by the Board to specific offices of the Board.

(a) * * *

(2) * * *

(xx) To delegate to Board staff any necessary parties for purposes of accelerated emergency service proceedings at § 1146.2 of this chapter.

* * * * *

PART 1104—FILING WITH THE BOARD–COPIES–VERIFICATION–SERVICE–PLEADINGS, GENERALLY

■ 1. The authority citation for part 1104 continues to read as follows:

Authority: 5.U.S.C. 553 and 559; 18 U.S.C. 1621; and 49 U.S.C. 1321.

■ 2. Revise § 1104.7(b) to read as follows:

§ 1104.7 Computation and extension of time.

* * * * *

(b) *Extensions.* Any time period, except those provided by law or specified in these rules respecting informal complaints seeking damage, may be extended by the Board in its discretion, upon request and for good cause. Requests for extensions must be served on all parties of record at the same time and by the same means as service is made on the Board. However, if service is made on the Board in person and personal service on other parties is not feasible, service on other parties should be made by first class or express mail. A request for an extension must be filed not less than 10 days before the due date, except that in cases seeking expedited relief for service emergencies under part 1146 of this chapter, a request for an extension must be made within 24 hours of service of the petition, reply, or other filing or procedural order of the Board as applicable. Only the original of the request and certificate of service need be filed with the Board. If granted, the party making the request should promptly notify all parties to the proceeding of the extension and so certify to the Board, except that this notification is not required in rulemaking proceedings.

* * * * *

PART 1115—APPELLATE PROCEDURES

■ 1. The authority citation for part 1115 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.

■ 2. Revise § 1115.3(e) to read as follows:

§ 1115.3 Board actions other than initial decisions.

* * * * *

(e) Petitions must be filed within 20 days after the service of the action or within any further period (not to exceed 20 days) as the Board may authorize. However, in cases under Final Offer Rate Review and in cases seeking expedited relief for service emergencies under the accelerated process at 49 CFR 1146.2, petitions must be filed within 5 days after the service of the action, and replies to petitions must be filed within 10 days after the service of the action.

* * * * *

PART 1146—EXPEDITED RELIEF FOR SERVICE EMERGENCIES

■ 1. The authority citation for part 1146 continues to read as follows:

Authority: 49 U.S.C. 1321, 11101, and 11123.

■ 2. Revise § 1146.1 to read as follows:

§ 1146.1 Prescription of alternative rail service or directed action by an incumbent carrier.

(a) *General.* Alternative rail service, or directed action by an incumbent carrier, will be prescribed under 49 U.S.C. 11123(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier. In prescribing the relief described herein, the Board may act on its own initiative or pursuant to a petition.

(b) *Procedure for petition for relief*—(1) *Petition for relief.* Affected shippers or railroads may seek the relief described in paragraph (a) of this section by filing an appropriate petition containing:

(i) A full explanation, together with all supporting evidence, to demonstrate that the standard for relief contained in paragraph (a) of this section is met;

(ii) A summary of both the petitioner's discussions with the incumbent carrier of the service problems (including a description of the efforts taken to resolve the matter prior to filing of the petition, verified by a person or persons with knowledge of the efforts taken to resolve the matter), and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with the petitioner's current transportation needs within a reasonable period of time;

(iii) In a petition that seeks alternative rail service, identification of at least one possible rail carrier to provide alternative service, based on the petitioner's understanding of other rail carriers' nearby operations, that would meet the current transportation needs of the petitioner; and

(iv) A detailed explanation of the specific remedy that is being sought.

(2) *Reply.* The incumbent carrier and any proposed alternative carriers must file a reply to a petition under this paragraph within three (3) business days of service of the petition. If applicable, any reply must address whether the specific remedy proposed by the petitioner would be unsafe or infeasible, or would substantially impair the carrier's ability to serve its other customers adequately or fulfill its common carrier obligations.

(3) *Rebuttal.* The party requesting relief may file rebuttal no more than two (2) business days after the reply is filed.

(4) *Board Decision.* The Board will endeavor to issue a decision five (5) business days after receiving the rebuttal or time has expired for the party requesting relief to file a rebuttal, whichever is earlier.

(c) *Presumption of continuing need.* Unless otherwise indicated in the Board's order, a Board order issued under paragraph (a) of this section shall establish a rebuttable presumption that the transportation *emergency* will continue for more than 30 days from the date of that order.

(d) *Procedure for petition to terminate relief*—(1) *Petition to terminate relief.* Should the Board prescribe alternative rail service under paragraph (a) of this section the incumbent carrier may subsequently file a petition to terminate that relief. Such a petition shall contain a full explanation, together with all supporting evidence, to demonstrate that the carrier is providing, or is prepared to provide, adequate service. Carriers are admonished not to file such a petition prematurely.

(2) *Reply.* Parties must file replies to petitions to terminate filed under this paragraph (d) within five (5) business days.

(3) *Rebuttal.* The incumbent carrier may file any rebuttal no more than three (3) business days later.

(e) *Service.* Every document filed with the Board under this section must include a certificate showing simultaneous service upon all parties to

the proceeding, including any proposed alternative carriers and the Federal Railroad Administration. Service on the parties must be by the same method and class of service used in serving the Board, with charges, if any, prepaid. One copy must be served on each party. If service is made on the Board in person, and personal service on other parties is not feasible, service must be made by overnight delivery. If a document is filed with the Board through the e-filing process, a copy of the e-filed document must be emailed to other parties if that means of service is acceptable to those other parties. If email is not acceptable to the receiving party, a paper copy of the document must be personally served on the other parties. If neither email nor personal service is feasible, service of a paper copy must be by overnight delivery. When a party is represented by a practitioner or attorney, service upon the practitioner is deemed to be service upon the party. All pleadings under this section must also be emailed to *ServiceEmergency@stb.gov.*

■ 3. Add § 1146.2 to read as follows:

§ 1146.2 Accelerated process.

(a) *Request for accelerated process.* After making a good faith effort to resolve its service issue through an informal dispute resolution process or service of the Board, affected shippers or railroads may seek accelerated temporary interim relief under 49 U.S.C. 11123(a) for substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier that presents potential imminent significant harm and threatens potentially severe adverse consequences to the petitioner, its customers, or the public. Such emergencies exist when there is a clear and present threat to public health, safety, national defense, or food security, or a high probability of business closures or immediate plant shutdowns. The timing of potential harm and consequences must render potential relief under § 1146.1 ineffective. The relief requested must be feasible and clearly avoid any substantial impairment of the ability of a rail carrier to serve its own customers adequately, or to fulfill its common carrier obligations.

(b) *Procedure for accelerated process*—(1) *Petition for relief.* A petitioner seeking accelerated relief must indicate in its petition that it is seeking such relief pursuant to paragraph (a) of this section and must demonstrate circumstances that meet the standard set forth in that paragraph. The petition must include:

(i) A particularized description of the commodities and volumes which would be subject to the requested relief and the timing necessary for such relief, including why potential relief under § 1146.1 would be ineffective;

(ii) A particularized explanation of how the measurable deterioration or other demonstrated inadequacy, absent the requested relief, presents imminent significant harm and threatens potentially severe adverse consequences as specified in paragraph (a) of this section;

(iii) A description of specific and particularized action that could be performed by the incumbent carrier or an alternative carrier and ordered by the Board to relieve the potential harm and adverse consequences;

(iv) A summary description of the efforts taken to resolve the matter prior to filing the petition, which must be verified by a person or persons with knowledge of the efforts taken to resolve the matter; and

(v) Contact information for the incumbent carrier.

(vi) The petition will be limited to five (5) substantive pages, not including the cover page, verifications, or certificate of service.

(2) *Staff conference.* When the Board receives a petition seeking accelerated relief under paragraph (a) of this section, the petition will be evaluated on its merits by the Board.

(i) After the Board receives the petition for accelerated relief, a telephonic or virtual conference, led by designated Board staff, will be held no sooner than 24 hours after receipt of the filing, but no later than 48 hours after receipt of the filing, if practicable. Designated Board staff may continue to work on the case after the conference.

(ii) Required parties for the conference include the petitioner(s), the incumbent carrier, and any proposed potential alternative carriers and other parties deemed necessary by the Board. Portions of the conference may be closed to certain parties if confidential business information needs to be discussed. The conference will be recorded and later transcribed (with redactions, if necessary), and placed in the public docket of the proceeding.

(iii) If applicable, the incumbent carrier or any alternative carrier shall address at the conference whether the remedy proposed by the petitioner is unsafe, infeasible, or will unreasonably impair the carrier's ability to serve other customers. The Board may order the incumbent carrier to submit, or if no such order is issued, the incumbent carrier may choose to submit, within 24 hours of the completion of the conference, an alternative service plan for the Board to consider. Any alternative carrier may also submit, within 24 hours of the completion of the conference, an alternative service plan for the Board to consider. The Board may choose to receive such information either via written submission or a second virtual or telephonic conference, if practicable.

(3) *Board decision.* The Board will endeavor to issue an initial decision on the merits of the petition requesting accelerated relief within three (3) business days of the completion of the conference. The Board shall not award relief under this section for more than 20 days, and any relief ordered under this section shall not be extended beyond the 20-day period. A party may petition the Board for subsequent relief under § 1146.1.

(c) *Petition for reconsideration.* After the Board issues an initial decision on the merits of the petition requesting accelerated relief, parties may petition the Board for reconsideration. The petition for reconsideration will be subject to § 1115.3 of this chapter. The record is to include any filings by the parties in the proceeding and the unredacted recording of the conference.

(d) *Stay of relief.* Notwithstanding § 1115.3 of this chapter, parties seeking a stay of the relief issued by the Board must concurrently file a petition for reconsideration of the decision and a petition to stay.

(e) *Service.* Every document filed with the Board under this section must include a certificate showing simultaneous service upon all parties to the proceeding, including any proposed alternative carriers and the Federal Railroad Administration. One copy must be served on each party. Service on the Board must be made through the e-filing process, and a copy of the e-filed document must be emailed to other parties if that means of service is acceptable to those other parties. If email is not acceptable to the receiving party, a paper copy of the document must be personally served on the other parties. If neither email nor personal service is feasible, service of a paper copy must be by overnight delivery. When a party is represented by a practitioner or attorney, service upon the practitioner is deemed to be service upon the party. All pleadings under this section must also be emailed to *ServiceEmergency@stb.gov.*

[FR Doc. 2024–01365 Filed 1–23–24; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230224–0053; RTID 0648–XD678]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for the Pacific cod sideboard limit by non-exempt American Fisheries Act (AFA) catcher vessels in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the annual 2024 Pacific cod sideboard limit established for non-exempt AFA catcher vessels in the Western Regulatory Area of the GOA.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), January 20, 2024, through 2400 hours, A.l.t., December 31, 2024.

FOR FURTHER INFORMATION CONTACT: Adam Zaleski, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679. Regulations governing sideboard protections for GOA groundfish fisheries appear at subpart B of 50 CFR part 680.

The annual 2024 Pacific cod sideboard limit established for non-exempt AFA catcher vessels in the Western Regulatory Area is 640 metric tons (mt), as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023).

In accordance with § 679.20(d)(1)(iv), the Regional Administrator has determined that the annual 2024 Pacific cod sideboard limit established for non-exempt AFA catcher vessels in the Western Regulatory Area will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 0 mt and is setting aside the remaining 640 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this sideboard directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for the annual 2024 Pacific cod sideboard limit for non-exempt AFA catcher vessels in the Western Regulatory Area of the GOA.

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

Classification

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

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the directed fishing closure of the annual 2024 Pacific cod sideboard limit for the non-exempt AFA catcher vessels in the Western Regulatory Area of the GOA. NMFS was unable to publish a notification providing time for public comment because the most recent, relevant data only became available as of January 16, 2024.

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

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

Dated: January 18, 2024.

Everett Wayne Baxter,

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

[FR Doc. 2024–01344 Filed 1–19–24; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230224–0053; RTID 0648–XD676]

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 610 of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for the A season pollock sideboard limit by non-exempt American Fisheries Act (AFA) catcher vessels in Statistical Area 610 of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2024 A season allowance of the pollock sideboard limit established for non-exempt AFA catcher vessels in Statistical Area 610 of the GOA.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), January 20, 2024, through 2400 hours, A.l.t., December 31, 2024.

FOR FURTHER INFORMATION CONTACT: Adam Zaleski, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679. Regulations governing sideboard protections for GOA groundfish fisheries appear at subpart B of 50 CFR part 680.

The 2024 A season pollock sideboard limit established for non-exempt AFA catcher vessels in Statistical Area 610 is 1,102 metric tons (mt), as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023).

In accordance with § 679.20(d)(1)(iv), the Regional Administrator has determined that the 2024 A season pollock sideboard limit established for non-exempt AFA catcher vessels in Statistical Area 610 will soon be reached. Therefore, the Regional Administrator is establishing a directed

fishing allowance of 0 mt and is setting aside the remaining 1,102 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this sideboard directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for the 2024 A season pollock sideboard limit for non-exempt AFA catcher vessels in Statistical Area 610 of the GOA.

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

Classification

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

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the directed fishing closure of the 2024 A season pollock sideboard limit for the non-exempt AFA catcher vessels in Statistical Area 610 of the GOA. NMFS was unable to publish a notification providing time for public comment because the most recent, relevant data only became available as of January 16, 2024.

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

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

Dated: January 19, 2024.

Everett Wayne Baxter,

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

[FR Doc. 2024–01338 Filed 1–19–24; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 89, No. 16
Wednesday, January 24, 2024

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0036; Project Identifier MCAI–2023–00731–E]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Rolls-Royce Deutschland Ltd & Co KG (RRD) Model Trent 1000–A, Trent 1000–A2, Trent 1000–AE, Trent 1000–AE2, Trent 1000–C, Trent 1000–C2, Trent 1000–CE, Trent 1000–CE2, Trent 1000–D, Trent 1000–D2, Trent 1000–E, Trent 1000–E2, Trent 1000–G, Trent 1000–G2, Trent 1000–H, Trent 1000–H2, Trent 1000–J2, Trent 1000–K2, and Trent 1000–L2 engines. This proposed AD was prompted by reports of wear in the combining spill valve (CSV) assembly of certain hydro-mechanical units (HMUs). This proposed AD would require removing certain HMUs from service and replacing with a serviceable part. This proposed AD would also prohibit installation of certain HMUs unless the HMU is a serviceable part or the CSV assembly has been replaced, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this NPRM by March 11, 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–2024–0036; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For EASA service information identified in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.* It is also available at *regulations.gov* under Docket No. FAA–2024–0036.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: Sungmo Cho, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7241; email: *sungmo.d.cho@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–2024–0036; Project Identifier MCAI–2023–00731–E'' 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 Sungmo Cho, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2023–0113, dated June 1, 2023 (EASA AD 2023–0113) (also referred to as the MCAI), to correct an unsafe condition for all RRD Model Trent 1000–A, Trent 1000–A2, Trent 1000–AE, Trent 1000–AE2, Trent 1000–C, Trent 1000–C2, Trent 1000–CE, Trent 1000–CE2, Trent 1000–D, Trent 1000–D2, Trent 1000–E, Trent 1000–E2, Trent 1000–G, Trent 1000–G2, Trent 1000–H, Trent 1000–H2, Trent 1000–J2, Trent 1000–K2 and Trent 1000–L2 engines. The MCAI states that occurrences have been reported of finding wear in the CSV assembly of certain HMUs. This wear can reduce the fuel flow output when the engine is operated at high power conditions and

lead to thrust reduction. To address this unsafe condition, the manufacturer published service information that specifies procedures to remove certain HMUs from service and replace with a serviceable part. The MCAI also specifies an implementation schedule, based on engine flight-hour (EFH) limits, for replacement of each affected part with a serviceable part and prohibits installation or reinstallation of affected HMUs that have exceeded the allowable EFH limit unless the HMU is a serviceable part or the CSV assembly has been replaced.

The FAA is proposing this AD to prevent thrust reduction, which if not addressed, could result in reduced control of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0036.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2023–0113, which specifies procedures for removing certain part-numbered HMUs from service and replacing with a serviceable part. The MCAI also specifies prohibiting installation or reinstallation of an affected HMU on any engine unless the HMU is a serviceable part.

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

FAA's Determination

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

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the MCAI described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and CAAs to use this process. As a result, the FAA proposes to incorporate by reference EASA AD 2023–0113 in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0113 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions within the compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0113. Service information required by the EASA AD for compliance will be available at *regulations.gov* under Docket No. FAA–2024–0036 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 28 engines installed on 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
Replace the HMU	7 work-hours × $85 per hour = $595	$552,000	$552,595	$15,472,660

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:

Rolls-Royce Deutschland Ltd & Co KG: Docket No. FAA–2024–0036; Project Identifier MCAI–2023–00731–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by March 11, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd & Co KG Model Trent 1000–A, Trent 1000–A2, Trent 1000–AE, Trent 1000–AE2, Trent 1000–C, Trent 1000–C2, Trent 1000–CE, Trent 1000–CE2, Trent 1000–D, Trent 1000–D2, Trent 1000–E, Trent 1000–E2, Trent 1000–G, Trent 1000–G2, Trent 1000–H, Trent 1000–H2, Trent 1000–J2, Trent 1000–K2, and Trent 1000–L2 engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7300, Engine Fuel and Control.

(e) Unsafe Condition

This AD was prompted by reports of wear in the combining spill valve (CSV) assembly of certain hydro-mechanical units (HMUs). The FAA is issuing this AD to prevent thrust reduction. The unsafe condition, if not addressed, could result in reduced control of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0113, dated June 1, 2023 (EASA AD 2023–0113).

(h) Exceptions to EASA AD 2023–0113

(1) Where EASA AD 2023–0113 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where Table 1 of EASA AD 2023–0113 specifies ''June 15, 2023'', replace that text with ''As of the effective date of this AD.''

(3) Where Table 1 of EASA AD 2023–0113 specifies ''01 January 2025'', replace that text with ''Within 4 months after the effective date of this AD or January 1, 2025, whichever occurs later.''

(4) Where the service information referenced in EASA AD 2023–0013 specifies to discard certain parts, this AD requires those parts to be removed from service.

(5) This AD does not adopt the Remarks paragraph of EASA AD 2023–0113.

(i) Definitions

For the purposes of this AD, the ''implementation date'' is defined as the date that the applicable engine flight hour limit takes effect.

(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 local Flight Standards District Office, as appropriate. If sending information directly to the manager of the AIR–520 Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (j) of this AD and email to: *ANE-AD-AMOC@faa.gov.*

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

(j) Additional Information

For more information about this AD, contact Sungmo Cho, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7241; email: *sungmo.d.cho@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0113, dated June 1, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0113, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

(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 17, 2024.

Victor Wicklund,

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

[FR Doc. 2024–01248 Filed 1–23–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 120

[Docket No. FAA–2012–1058; Notice No. 24–05A]

RIN 2120–AK 09

Drug and Alcohol Testing of Certificated Repair Station Employees Located Outside of the United States; Extension of Comment Period

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM); extension of comment period.

SUMMARY: This action extends the comment period for the notice of proposed rulemaking (NPRM), Drug and Alcohol Testing of Certificated Repair Station Employees Located Outside of the United States. On December 7, 2023, the Federal Aviation Administration (FAA) published this proposed rule. The NPRM would require certificated repair stations located outside the territory of the United States whose employees perform safety-sensitive maintenance functions on certain air carrier aircraft to obtain and implement a drug and alcohol testing program in accordance with the requirements of the Drug and Alcohol Testing Program published by the FAA and the Procedures for Transportation Workplace Drug Testing Programs published by the Department of Transportation. The FAA is extending the comment period for this NPRM to allow commenters additional time to analyze the proposed rule and prepare a response.

DATES: The comment period for the NPRM published December 7, 2023, at 88 FR 85137 and scheduled to close on February 5, 2024, is extended until April 5, 2024.

ADDRESSES: Send comments identified by docket number FAA–2012–1058 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey

Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

Docket: Background documents or comments received may be read at https://www.regulations.gov at any time. Follow the online instructions for accessing the docket or go to 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.

FOR FURTHER INFORMATION CONTACT: Nancy Rodriguez-Brown, Office of Aerospace Medicine, Drug Abatement Division, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–8442; email: *drugabatement@faa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

On December 7, 2023, the FAA published the NPRM, Drug and Alcohol Testing of Certificated Repair Station Employees Located Outside of the United States.[1] This proposed rule, which the FAA is required by statute to promulgate, would implement a statutory mandate to require certificated part 145 repair stations located outside the territory of the United States (U.S.) to ensure that employees who perform safety-sensitive maintenance functions on part 121 air carrier aircraft are subject to a drug and alcohol testing program, consistent with the applicable laws of the country in which the repair station is located. This proposed rule would require a part 145 repair station located outside the territory of the U.S. to implement a drug and alcohol testing program meeting the requirements of 49 CFR part 40 and 14 CFR part 120, which must cover its employees who perform maintenance functions on part 121 air carrier aircraft. If a part 145 repair station cannot meet one or all requirements in 49 CFR part 40 (*e.g.,* the laws of the country where the repair station is located are inconsistent with the regulations), the part 145 repair station may apply for an exemption using the process described in 49 CFR 40.7. Similarly, if a part 145 repair station cannot meet one or all requirements in 14 CFR part 120, it may apply for a waiver in accordance with proposed waiver authority. This rule would affect approximately 977 part 145 repair stations in about 65 foreign countries.[2]

It is the responsibility of the employer (*e.g.,* the part 121 operator) to ensure that any person who performs safety-sensitive functions (*e.g.,* maintenance or preventive maintenance), directly or by contract (including by subcontract at any tier), is subject to drug and alcohol testing. The FAA notes that part 145 repair stations located within the territory of the U.S. may elect to, but are not required to, implement a drug and alcohol testing program under 14 CFR part 120. When hiring by contract, if a part 145 domestic repair station does not have a testing program of its own, the part 121 operator must cover the repair station's safety-sensitive employees under its FAA drug and alcohol testing program.[3] In this scenario, for purposes of drug and alcohol testing, the part 121 operator hires the repair station employees as covered employees[4] and must apply all the regulatory requirements of the program to these employees (*e.g.,* conduct a pre-employment drug test, the records check, the training and educational information distribution requirements, and include the individuals in the random testing pool). Therefore, all employees performing a safety-sensitive function within the U.S. are part of a drug and alcohol testing program, whether it is the part 121 operator's program or the repair station's program. As further discussed in this preamble, the FAA does not propose any changes to its current drug and alcohol testing requirements applicable to employees performing a safety-sensitive function within the U.S. as part of this rulemaking. In addition, the FAA invites comments, with supporting data, on whether the drug and alcohol testing requirements in this proposed rule should be extended to safety sensitive maintenance employees of part 121 certificate holders located outside the United States.

II. Extension of Comment Period

Commenters were instructed to provide comments to the NPRM on or before February 5, 2024, (*i.e.,* sixty (60) days after publication of the NPRM). Subsequently, on January 16, 2024, the FAA received a request from 15 organizations to extend the comment period an additional ninety (90) days.[5] Commenters cited the holiday season and the complexity, including international ramifications, as reasons for requesting the extension.

The FAA grants the petitioners' request for an extension of the comment period. The FAA recognizes the importance of the proposed rule and that an extension would help commenters craft complete and thoughtful responses. However, the FAA believes that an additional sixty (60) days provides sufficient opportunity to review the NPRM and provide comments. With this extension, the comment period will now close on April 5, 2024. This will provide the public with a total of one hundred twenty (120) days to conduct its review and submit comments to the docket. The FAA will not grant any additional requests to further extend the comment period for this rulemaking.

III. Additional Information

A. Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The Agency also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. 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

[1] 88 FR 85137.

[2] These estimates are current as of April 2021 and sourced from the National Vital Information Subsystem (NVIS). NVIS is a subsystem of the Flight Standards Automation System, a comprehensive information system used primarily by inspectors to record and disseminate data associated with inspector activity and aviation environment. While there are more current estimates (as of March 2023, the rule would affect approximately 962 part 145 repair stations in about 66 foreign countries), the 2021 numbers are used in the regulatory evaluation and Regulatory Impact Assessment to estimate cost.

[3] 14 CFR 120.1(b), 120.105(e), 120.215(a)(5).

[4] A covered employee is defined in § 120.7(e) as an individual who performs, either directly or by contract, a safety-sensitive function listed in §§ 120.105 and 120.215 for an employer (as defined in § 120.7(g)).

[5] FAA–2012–1058–0099. Organizations included:
Aeronautical Repair Station Association
Civil Aviation Aerospace Industries Association
Air Transport Association of Canada
Aircraft Electronics Association
Airlines for America
Aviation Suppliers Association
Aviation Technician Education Council
Cargo Airline Association
Helicopter Association International
International Air Transport Association
Modification and Replacement Parts Association
National Air Carrier Association
National Air Transportation Association
National Business Aviation Association
Regional Airline Association

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.*

B. Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA), 5 U.S.C. 552, CBI is exempt from public disclosure. If your comments responsive to 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 the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document. Any commentary the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

C. Electronic Access and Filing

A copy of this notice of proposed rulemaking, all comments received, any final rule, and all background material may be viewed online at *www.regulations.gov* using the docket number listed above. A copy of this rulemaking will be placed in the docket. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *www.federalregister.gov* and the Government Publishing Office's website at *www.govinfo.gov.* A copy may also be found at the FAA's Regulations and Policies website at *www.faa.gov/regulations_policies.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, may be accessed in the electronic docket for this rulemaking.

IV. Extension of Comment Period

In accordance with § 11.47(c) of title 14, Code of Federal Regulations, the FAA has reviewed the petitions for extension of the comment period for this notice. The petitioners have shown a substantive interest in the proposed policy and good cause for the extension of the comment period. The FAA has determined that an extension of the comment period for an additional sixty (60) days to April 5, 2024 is consistent with the public interest, and that good cause exists for taking this action.

Accordingly, the comment period for Notice No. 24–05 is extended until April 5, 2024.

Issued under authority provided by 49 U.S.C. 106(f), 45102, and 44733 in Washington, DC.

Yvette A. Rose,

Deputy Executive Director, Office of Rulemaking.

[FR Doc. 2024–01272 Filed 1–23–24; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2022–0090; FRL–9528–01–R9]

Air Plan Approval; California; Feather River Air Quality Management District; Nonattainment New Source Review; 2015 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a state implementation plan (SIP) revision submitted by the State of California addressing the nonattainment new source review (NNSR) requirements for the 2015 ozone National Ambient Air Quality Standards (NAAQS). This SIP revision addresses the Feather River Air Quality Management District (''District'') portion of the California SIP. This action is being taken pursuant to the Clean Air Act (CAA or ''Act'') and its implementing regulations.

DATES: Comments must be received on or before February 23, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2022–0090, at *https://www.regulations.gov*. For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Amita Muralidharan, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947–4140 or by email at *muralidharan.amita@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to the EPA.

Table of Contents

I. Background and Purpose

On October 26, 2015, the EPA promulgated a revised ozone NAAQS of 0.070 parts per million (ppm).[1] Upon promulgation of a new or revised NAAQS, the CAA requires the EPA to designate as nonattainment any area that is violating the NAAQS based on the three most recent years of ambient air quality data. This action relates to the two portions of the District that were designated nonattainment for the 2015 ozone NAAQS on June 4, 2018.[2] The southern portion of Sutter County, which is part of the Sacramento Metro nonattainment area (also referred to as Sacramento Federal Nonattainment Area or SFNA), was designated as ''Moderate'' nonattainment. The Sutter Buttes portion of Sutter County was designated as ''Marginal'' nonattainment. On October 28, 2021, the EPA issued a final rule reclassifying the Sacramento Metro nonattainment area as ''Serious'' for the 2015 ozone NAAQS.[3] However, because the District only certified their NNSR program satisfies the requirements for a Moderate area, this action is only proposing to approve the District's certification as it pertains to a Moderate ozone nonattainment area.

On December 6, 2018, the EPA issued a final rule entitled, ''Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements,'' (''2015 SIP Requirements Rule'') which establishes the requirements and deadlines that state, tribal, and local air quality management agencies must meet as they develop implementation plans for areas where ozone concentrations exceed the 2015 ozone NAAQS.[4] Based on the initial nonattainment designations for the 2015 ozone standards, the District was required to make a SIP revision addressing NNSR program requirements no later than August 3, 2021.[5] This requirement may be met by submitting a SIP revision consisting of a new or revised NNSR permit program, or an analysis demonstrating that the existing SIP-approved NNSR permit program meets the applicable 2015 ozone requirements and a letter certifying the analysis.

II. The State's Submittal

A. What did the State submit?

The submitted 2015 Ozone Certification letter addressed by this proposal was adopted by the District on June 7, 2021. It was submitted by the California Air Resources Board (CARB), the agency that serves as the governor's designee for California SIP submittals, on August 3, 2021.

CARB's August 3, 2021 submittal of the District's 2015 Ozone Certification letter was deemed by operation of law to meet the completeness criteria in 40 CFR part 51, Appendix V on February 3, 2021, which must be met before formal EPA review.

B. What is the purpose of the submitted certification letter?

The District's submittal is intended to satisfy the 2015 SIP Requirements Rule that requires States to make a SIP revision addressing NNSR. The District's portion of the California SIP contains its approved NNSR permit program as applicable to the southern portion of Sutter County, as well as the Sutter Buttes portion of Sutter County's Marginal nonattainment classification for the 2015 ozone NAAQS. The submitted certification letter provides a mechanism for the District to satisfy the 40 CFR 51.1314 submittal requirements based on its 2015 Moderate and Marginal ozone nonattainment designations. The EPA's analysis of how this SIP revision addresses the NNSR requirements for the 2015 ozone NAAQS is provided below.

III. Analysis of Nonattainment New Source Review Requirements

NNSR is a preconstruction review permit program that applies to new major stationary sources or major modifications at existing sources within a nonattainment area and is required under CAA sections 172(c)(5) and 173.

As mentioned in Section I of this notice, NNSR permit program requirements were adopted for the 2015 ozone NAAQS at 40 CFR 51.1314 as part of the 2015 SIP Requirements Rule.[6] The minimum SIP requirements for NNSR permitting programs for the 2015 ozone NAAQS are contained in 40 CFR 51.165. These NNSR program requirements include those promulgated in the 2015 SIP Requirements Rule implementing the 2015 ozone NAAQS. The SIP for each ozone nonattainment area must contain NNSR provisions that: (1) set major source thresholds for nitrogen oxides (NO_X) and volatile organic compounds (VOC) pursuant to 40 CFR 51.165(a)(1)(iv)(A)(*1*)(*i*)–(*iv*) and (*2*); (2) classify physical changes as a major source if the change would constitute a major source by itself pursuant to 40 CFR 51.165(a)(1)(iv)(A)(*3*); (3) consider any significant net emissions increase of NO_X as a significant net emissions increase for ozone pursuant to 40 CFR 51.165(a)(1)(v)(E); (4) consider any increase of VOC emissions in Extreme ozone nonattainment areas as a significant net emissions increase and a major modification for ozone pursuant to 40 CFR 51.165(a)(1)(v)(F); (5) set significant emissions rates for VOC and NO_X as ozone precursors pursuant to 40 CFR 51.165(a)(1)(x)(A)–(C) and (E); (6) contain provisions for emissions reductions credits pursuant to 40 CFR 51.165(a)(3)(ii)(C)(*1*)–(*2*); (7) provide that the requirements applicable to VOC also apply to NO_X pursuant to 40 CFR 51.165(a)(8); (8) set offset ratios for VOC and NO_X pursuant to 40 CFR 51.165(a)(9)(ii)–(iv); and (9) require public participation procedures compliant with 40 CFR 51.165(i).

The District's SIP-approved NNSR program,[7] established in Rule 10.1, ''New Source Review,'' of the District's Rules and Regulations, applies to the construction and modification of stationary sources, including major stationary sources in nonattainment areas under its jurisdiction. The District's submitted SIP revision includes a compliance demonstration consisting of a table listing each of the 2015 ozone NAAQS NNSR SIP requirements from 40 CFR 51.165 and a citation to the specific provision of the rule satisfying the requirement. The submittal also includes a certification by the District that the cited rule meets the federal NNSR requirements for the respective Marginal and Moderate ozone nonattainment designations. These documents, including our Summary of Evaluation [8] of the District's submittal, are available in the docket for this action.

The EPA has reviewed the demonstration and cited program

[1] 80 FR 65292 (October 26, 2015).

[2] 83 FR 25776 (June 4, 2018).

[3] 86 FR 59648, 59651 (October 28, 2021).

[4] 83 FR 62998 (December 6, 2018). The SIP Requirements Rule addresses a range of nonattainment area SIP requirements for the 2015 ozone NAAQS, including requirements pertaining to attainment demonstrations, reasonable further progress (RFP), reasonably available control technology, reasonably available control measures, major new source review, emission inventories, and the timing of SIP submissions and of compliance with emission control measures in the SIP.

[5] 40 CFR 51.1314.

[6] 83 FR 62998 (December 6, 2018).

[7] 76 FR 44809 (July 27, 2011); 78 FR 58460 (September 24, 2013); 80 FR 60047 (October 5, 2015).

[8] Our review of the District's submittal is included in a Memorandum to Docket EPA–R09–OAR–2022–0090, titled ''Feather River Air Quality Management District 2021 Ozone Certification Summary of Evaluation,'' dated November 17, 2023.

elements intended to meet the federal NNSR requirements for the 2015 ozone NAAQS and is proposing to approve the District's submittal because the current SIP-approved NSR program satisfies all the 2015 SIP Requirements Rule NNSR program requirements applicable to the southern portion of Sutter County as a Moderate ozone nonattainment area and the Sutter Buttes portion of Sutter County as a Marginal ozone nonattainment area.

IV. Proposed Action and Public Comment

The EPA is proposing to approve the SIP revision addressing the NNSR requirements for the 2015 ozone NAAQS for the District. In support of this proposed action, we have concluded that our approval of the submitted 2015 ozone certification for the District would comply with section 110(l) of the Act because the submittal will not interfere with continued attainment or maintenance of the NAAQS in the District. Similarly, we find that the submitted revision is approvable under section 193 of the Act because it does not modify any control requirement in effect before November 15, 1990, without ensuring equivalent or greater emission reductions. The EPA has concluded that the State's submission fulfills the 40 CFR 51.1314 revision requirement and meets the requirements of CAA sections 110, 172(c)(5), 173, 182(a)(2)(C), and 193, and the minimum SIP requirements of 40 CFR 51.165. If we finalize this action as proposed, our action will incorporate this certification into the federally enforceable SIP and be codified through revisions to 40 CFR 52.220 (Identification of plan—in part).

The EPA has made, and will continue to make, the State's submission and all other materials available electronically through *https://www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). We will accept comments from the public on this proposal until February 23, 2024.

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely proposes to approve state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

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

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' The EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The State did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

List of Subjects in 40 CFR Part 52

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

Dated: January 16, 2024.

Martha Guzman Aceves,

Regional Administrator, Region IX.

[FR Doc. 2024–01300 Filed 1–23–24; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 89, No. 16
Wednesday, January 24, 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.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–SC–24–0002]

Virtual Meeting of the Fruit and Vegetable Industry Advisory Committee

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the Agricultural Marketing Service (AMS), U.S. Department of Agriculture (USDA), is announcing a two-day virtual meeting of the Fruit and Vegetable Industry Advisory Committee (FVIAC). This meeting is being convened to examine the full spectrum of fruit and vegetable industry issues and provide recommendations and ideas on how the USDA can tailor programs and services to better meet the needs of the U.S. produce industry. Agenda items may include, but are not limited to, administrative matters and consideration of recommendations pertaining to labor and production, food safety, infrastructure and sustainability, consumption and nutrition, and data reporting and analysis.

DATES: A virtual two-day meeting will be held March 04–05, 2024, from 11:00 a.m. to approximately 4:00 p.m. Eastern Time (ET) each day.

Written Comments: Written public comments will be accepted until 11:59 p.m. ET on February 21, 2024, via *https://www.regulations.gov.:Document#AMS–SC–24–0002.* Comments submitted after this date will be provided to AMS, but the Committee may not have adequate time to consider those comments prior to the meeting. AMS, Specialty Crops Program, strongly prefers that written comments be submitted electronically. However, written comments may also be submitted (*i.e.,* postmarked) via mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section by or before the deadline.

Oral Comments: The Committee will hear oral public comments via the webinar on March 04, 2024. Persons or organizations wishing to make oral comments must pre-register by 11:59 p.m. ET, February 21, 2024, and can register for only one speaking slot. Instructions for registering and participating in the webinars can be found at *https://www.ams.usda.gov/event/virtual-meeting-fruit-and-vegetable-industry-advisory-committee-0.*

ADDRESSES: The webinar for the virtual meeting and public comment period can be accessed via the internet and/or phone. Members of the public must register in advance for this webinar. Instructions for registering and participating in the webinar can be found at *https://www.ams.usda.gov/event/virtual-meeting-fruit-and-vegetable-industry-advisory-committee-0.*

FOR FURTHER INFORMATION CONTACT: Darrell Hughes, Designated Federal Officer, Fruit and Vegetable Industry Advisory Committee, USDA–AMS-Specialty Crops Program, 1400 Independence Avenue SW, Suite 1575, STOP 0235, Washington, DC 20250–0235; Telephone: (202) 378–2576; Email: *SCPFVIAC@usda.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2), the Secretary of Agriculture (Secretary) established FVIAC in 2001 to examine the full spectrum of issues faced by the fruit and vegetable industry and to provide suggestions and ideas to the Secretary on how USDA can tailor its programs to meet the fruit and vegetable industry's needs.

The AMS Chief of Staff for the Specialty Crops Program serves as the Committee's Designated Federal Officer, leading the effort to administer the Committee's activities. Representatives from USDA mission areas and other government agencies affecting the fruit and vegetable industry are periodically called upon to participate in the Committee's meetings as determined by the Committee. AMS is giving notice of the virtual Committee meeting to the public so that they may participate and present their views via written comments. The meeting is open to the public.

Public Comments: Comments should address specific topics noted on the meeting agenda.

Written Comments: Written public comments will be accepted until 11:59 p.m. ET on February 21, 2024, via *http://www.regulations.gov:Document#AMS–SC–24–0002.* Comments submitted after this date will be provided to AMS, but the Committee may not have adequate time to consider those comments prior to the meeting. AMS, Specialty Crops Program strongly prefers that written comments be submitted electronically. However, written comments may also be submitted (*i.e.,* postmarked) via mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section by or before the deadline.

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Meeting Accommodations: The USDA provides reasonable accommodation to individuals with disabilities. The FVIAC virtual meeting will have sign language interpretation. If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to the person listed under the **FOR FURTHER INFORMATION CONTACT** section. Determinations for reasonable accommodation will be made on a case-by-case basis.

Dated: January 18, 2024.

Cikena Reid,

Committee Management Officer.

[FR Doc. 2024–01312 Filed 1–23–24; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by February 23, 2024 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Small and Very Small Establishment Outreach Survey.

OMB Control Number: 0583–NEW.

Summary of Collection: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18 and 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat, poultry, and egg products are safe, wholesome, and properly labeled.

Need and Use of the Information: FSIS plans to use a multi-language survey to solicit feedback from small and very small establishment owners to ascertain how FSIS can better service the needs of small and very small establishments and improve outreach to them. This survey is one of many ways FSIS is working to bring equity—that is, consistent and systematic treatment of all individuals in a fair, just, and impartial manner, including individuals who belong to communities that often have been denied such treatment—to small and very small establishments. Results will inform the Agency on ways to improve engagement with, and outreach to, small and very small establishments, particularly those in underrepresented communities. Without this study, FSIS could lack useful information that would help the Agency better service the needs of small and very small establishments.

Description of Respondents: Business or other for-profit.

Number of Respondents: 5,000.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 168.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2024–01297 Filed 1–23–24; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of National Advisory Council on Innovation and Entrepreneurship Meeting

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The National Advisory Council on Innovation and Entrepreneurship (NACIE) will hold a virtual public meeting on Thursday, February 8, 2024. This will be the current NACIE members' fifth meeting since their appointments in 2022. During this meeting, NACIE expects to vote on its slate of policy recommendations comprising a national strategy to strengthen technology- and innovation-centric entrepreneurship, and then discuss next steps and implementation strategies.

DATES: Thursday, February 8, 2024, 9:00 a.m.–4:00 p.m. Eastern Time (ET).

ADDRESSES: The meeting will be held at the Eisenhower Executive Office Building, Room 350, 1650 Pennsylvania Avenue NW, Washington, DC 20504. The public will be able to participate via teleconference or web conference. Please note that pre-clearance is required to make a statement during the public comment portion of the meeting. Please limit comments to five minutes or less and submit a brief statement summarizing your comments to Eric Smith (see contact information below) no later than 11:59 p.m. ET on Thursday, February 1, 2024. Teleconference and web conference connection information will be published prior to the meeting along with the agenda on the NACIE website at *https://www.eda.gov/strategic-initiatives/national-advisory-council-on-innovation-and-entrepreneurship.*

FOR FURTHER INFORMATION CONTACT: Eric Smith, Office of the Assistant Secretary, 1401 Constitution Avenue NW, Room 78018, Washington, DC 20230; email: *nacie@doc.gov;* telephone: +1 202 482 8001. Please reference ''NACIE February 2024 Meeting'' in the subject line of your correspondence.

SUPPLEMENTARY INFORMATION: NACIE, established pursuant to section 25(c) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3720(c)), is a Federal Advisory Committee Act committee that provides advice directly to the Secretary of Commerce.

NACIE has been charged with developing a national entrepreneurship strategy that strengthens America's ability to compete and win as the world's leading startup nation and as the world's leading innovator in critical emerging technologies. NACIE also has been charged with identifying and recommending solutions to drive the innovation economy, including growing a skilled STEM workforce and removing barriers for entrepreneurs ushering innovative technologies into the market. The Council facilitates federal dialogue with innovation, entrepreneurship, and workforce development communities. Throughout its history, NACIE has presented recommendations to the Secretary of Commerce along the research-to-jobs continuum, such as increasing access to capital, growing and connecting entrepreneurial communities, fostering small business-driven research and development, supporting the commercialization of key technologies, and developing the workforce of the future.

The final agenda for the meeting will be posted on the NACIE website at *https://www.eda.gov/strategic-*

initiatives/national-advisory-council-on-innovation-and-entrepreneurship/meetings prior to the meeting. Any member of the public may submit pertinent questions and comments concerning NACIE's affairs at any time before or after the meeting. Comments may be submitted to Eric Smith (see contact information above). Those wishing to listen to the proceedings can do so via teleconference or web conference (see above). Copies of the meeting minutes will be available by request within 90 days of the meeting date.

Dated: January 18, 2024.

Eric Smith,

Tech Hubs Program Director.

[FR Doc. 2024–01302 Filed 1–23–24; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–51–2023]

Foreign-Trade Zone (FTZ) 29; Authorization of Production Activity; Toyota Motor Manufacturing Kentucky, Inc.; (Dual Fuel Cell Modules); Georgetown, Kentucky

On September 21, 2023, the Louisville & Jefferson County Riverport Authority, grantee of FTZ 29, submitted a notification of proposed production activity to the FTZ Board on behalf of Toyota Motor Manufacturing Kentucky, Inc., within Subzone 29E, in Georgetown, Kentucky.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (88 FR 67231, September 29, 2023). On January 19, 2024, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: January 19, 2024.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2024–01345 Filed 1–23–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–846]

Boltless Steel Shelving Units Prepackaged for Sale From Thailand: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Amended Preliminary Determination of Sales at Less Than Fair Value; Correction

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

ACTION: Notice; correction.

SUMMARY: The U.S. Department of Commerce (Commerce) published notice in the **Federal Register** of November 29, 2023, in which Commerce made a preliminary affirmative determination of sales at less than fair value (LTFV) concerning boltless steel shelving units prepackaged for sale (boltless steel shelving) from Thailand. This notice included an incorrect table in the ''Preliminary Determination of the Investigation'' section. Commerce also published notice in the **Federal Register** of January 2, 2024, in which Commerce amended its preliminary determination of sales at LTFV concerning boltless steel shelving from Thailand. This notice included an incorrect table in the ''Amended Preliminary Determination'' section and contained incorrect language regarding the suspension of liquidation for Siam Metal Tech Co., Ltd. (Siam Metal).

FOR FURTHER INFORMATION CONTACT: Fred Baker, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6274.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of November 29, 2023, in FR Doc 2023–26230, on page 83390, in the third column, correct the cash deposit rates tables. The cash deposit rate application is on a ''produced and/or exported by'' basis and not on a chain rate basis. In addition, this correction applies to the **Federal Register** of January 2, 2024, in FR Doc 2023–28824, on page 62, in the third column. The cash deposit rate application to Bangkok Sheet Metal Public Co. is on a ''produced and/or exported by'' basis and not on a chain rate basis.

In the **Federal Register** of January 2, 2024, in FR Doc 2023–28824, on page 63, in the first column, correct the language to state:

''Because we are now making a negative determination of sales at LTFV for Siam Metal, we will instruct U.S. Customs and Border Protection (CBP) to discontinue the suspension of liquidation of entries of subject merchandise produced and exported by Siam Metal and to liquidate all suspended entries without regard to antidumping duties. However, entries of shipments of subject merchandise from this company in any other producer/exporter combination, or by third parties that sourced subject merchandise from the excluded producer/exporter combination, will be subject to suspension of liquidation at the all-others rate.''

Background

On November 29, 2023, Commerce published in the **Federal Register** the preliminary affirmative determination of sales at LTFV of boltless steel shelving from Thailand.[1] In this notice, we inadvertently included an incorrect cash deposit rate table. On January 2, 2024, Commerce published in the **Federal Register** the amended preliminary determination of sales at LTFV of boltless steel shelving from Thailand.[2] In this notice, we inadvertently included an incorrect cash deposit rate table, and incorrect language regarding the suspension of liquidation for Siam Metal.

Notification to Interested Parties

This notice is issued and published in accordance with sections 733(f) and 777(i) of the Tariff Act of 1930, as amended, and 19 CFR 351.205(c).

Dated: January 17, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2024–01277 Filed 1–23–24; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Boltless Steel Shelving Units Prepackaged for Sale from Thailand: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 88 FR 83389 (November 29, 2023).

[2] *See Boltless Steel Shelving Units Prepackaged for Sale from Thailand: Amended Preliminary Determination of Sales at Less Than Fair Value,* 89 FR 62 (January 2, 2024).

DEPARTMENT OF COMMERCE

International Trade Administration

Amended Trade Mission Application Deadline to the U.S. Environmental Technologies Business Development Mission to IFAT

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: The U. S. Department of Commerce, International Trade Administration (ITA), is organizing a U.S. Environmental Technologies Business Development Mission to IFAT (Internationale Fachausstellung fuer Abwasser Technologie) an environmental technologies trade show in Munich, Germany, from May 13–15, 2024, with an optional program to the Czech Republic and Slovakia from May 8–10, 2024. This notice is to update the prior **Federal Register** notice to reflect that the application deadline is now extended to January 31, 2024.

FOR FURTHER INFORMATION CONTACT: Jeffrey Odum, Global Trade Programs, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington DC 20230; telephone (202) 482–6397 or email *Jeffrey.Odum@trade.gov*.

SUPPLEMENTARY INFORMATION: Amendment to Revise the Trade Mission Deadline for Submitting Applications.

Background

U.S. Environmental Technologies Business Development Mission to IFAT

The International Trade Administration has determined that to allow for optimal execution of recruitment, the application deadline has been extended from January 12, 2024, to January 31, 2024. Applications may be accepted after that date if space remains and scheduling constraints permit. Interested U.S. companies and trade associations/organizations that have not already submitted an application are encouraged to do so. The U.S. Department of Commerce will review applications and make selection decisions on a rolling basis in accordance with the 88 FR 69901 (October 10, 2023). The applicants selected will be notified as soon as possible.

Contact

Megan Hyndman, Team Lead, Climate and Environmental Technologies, Office of Energy and Environmental Industries, Phone: +1–823–1839, Email: *Megan.Hyndman@trade.gov*

Elizabeth Laxague, Global Environmental Technologies Team Leader, U.S. Commercial Service—Seattle, Phone: +1–206–406–8903, Email: *Elizabeth.Laxague@trade.gov*

Sean Timmins, Principal Commercial Officer, U.S. Consulate in Munich—Germany, Phone: +49–151–6772–6689, Email: *Sean.Timmins@trade.gov*

Richard Pales, Commercial Assistant, U.S. Embassy in Prague—Czech Republic, Phone: +420–257–022–397, Email: *Richard.Pales@trade.gov*

Marian Volent, Head of U.S. Commercial Section, U.S. Embassy in Bratislava—Slovakia, Phone: +421–2–5922–5310, Email: *Marian.Volent@trade.gov*

Donald Calvert, Desk Officer, Germany, Office of Central & Southeast Europe, Phone: (202) 482–9128, Email: *Donald.Calvert@trade.gov*

Marie Geiger, Desk Officer, Czechia/Slovakia, Office of Central & Southeast Europe, Phone: (202) 482–6418, Email: *Marie.Geiger@trade.gov*

Gemal Brangman,

Director, Global Trade Programs.

[FR Doc. 2024–01298 Filed 1–23–24; 8:45 am]

BILLING CODE 3510–DR–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; Southeast Region Dealer and Interview Family of Forms

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 25, 2024.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0013 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 Dr. David Gloeckner, Supervisory Mathematical Statistician, 75 Virginia Beach Drive, Bldg. 1, Miami, FL 33149–1003 (305) 361–4257 or *david.gloeckner@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for renewal of a current information collection. Fishery quotas are established for many species in the fishery management plans developed by the Gulf of Mexico Reef Fish Fishery Management Council, the South Atlantic Fishery Management Council, and The Caribbean Fishery Management Council. The Southeast Fisheries Science Center has been delegated the responsibility to monitor these quotas. To do so in a timely manner, seafood dealers that handle these species are required to report the purchases (landings) of these species. The frequency of these reporting requirements varies depending on the magnitude of the quota (*e.g.,* lower quota usually require more frequent reporting) and the intensity of fishing effort. The most common reporting frequency is weekly. Daily reporting is only used for one fishery.

In addition, information collection included in this family of forms includes interview with fishermen to gather information on the fishing effort, location and type of gear used on individual trips. This data collection is conducted for a subsample of the fishing trips and vessel/trips in selected commercial fisheries in the Southeast region and commercial fisheries of the US Caribbean. Fishing trips and individuals are selected at random to provide a viable statistical sample. These data are used for scientific analyses that support critical conservation and management decisions made by national and international fishery management organizations.

II. Method of Collection

Dealer reports used for quota monitoring are reported electronically for all, but one fishery (mackerel gillnet) is reported via fax or email. Bio profile

data from Trip Interview programs is obtained by face-to-face interviews with fisherman or sea food dealers.

III. Data

OMB Control Number: 0648–0013.

Form Number(s): None.

Type of Review: Regular submission (renewal of a current information collection).

Affected Public: Business and other for-profit organizations.

Estimated Number of Respondents: 4,500.

Estimated Time per Response: Dealer reporting for monitoring Federal fishery annual catch limits (ACLs): coastal fisheries dealers reporting, 10 minutes; mackerel dealer reporting (gillnet), 10 minutes. Bio profile data from Trip Interview programs (TIP): Fin Fish interviews, 10 minutes.

Estimated Total Annual Burden Hours: 5,500.

Estimated Total Annual Cost to Public: $0.

Respondent's Obligation: Mandatory.

Legal Authority: This data collection is authorized under 50 CFR part 622.5.

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. 2024–01280 Filed 1–23–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD684]

Pacific Island Fisheries; Western Pacific Stock Assessment Review; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Western Pacific Fishery Management Council (Council) and NMFS will convene a Western Pacific Stock Assessment Review (WPSAR) of a stock assessment update for the multispecies bottomfish complex in Guam. The review will be conducted virtually. A satellite location will be made available for the public to view the review process and NMFS staff will be available in-person to answer questions. See **ADDRESSES** for the web address to access the meeting and the location of the satellite viewing site.

DATES: The WPSAR meeting will be held between February 7 and February 8, 2024 (February 8 and 9, Chamorro Standard). See **SUPPLEMENTARY INFORMATION** for meeting dates and times and the daily agenda.

ADDRESSES: The meeting will be held by web conference via WebEx. Audio and visual portions for all of the web conferences can be accessed at: *https://wprfmc.webex.com/join/info.wpcouncilnoaa.gov.* Web conference access information and instructions for providing public comments will be posted on the Council website at *www.wpcouncil.org.* For assistance with the web conference connection, contact the Council office at (808) 552–8220.

The satellite viewing site for the WPSAR review is located at the Guam NOAA Field Office 770 East Sunset Blvd., STE 170, Tiyan, GU 96913.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: The NMFS Pacific Islands Fisheries Science Center (PIFSC) conducted a stock assessment update for bottomfish management unit species (BMUS) in the U.S. territory of Guam. PIFSC previously conducted a 2019 benchmark stock assessment for the Guam bottomfish stock complex using a Bayesian surplus production model based on data through 2017. The 2019 assessment incorporated improvements to data standardization and model assumptions that followed recommendations from the review panel for the 2015 assessment for the same stock. PIFSC used production models to estimate biomass and stock status through time, and to evaluate stock status against maximum sustainable yield-based reference points set in the fishery ecosystem plan (FEP) for the Mariana Archipelago, which includes Guam. Based on the results of the 2019 assessment, NMFS determined the stock to be overfished but not experiencing overfishing. In 2022 NMFS and the Council implemented a plan to rebuild biomass of the stock consistent with requirements of the Magnuson Stevens Fishery Conservation and Management Act and the FEP.

The 2024 assessment update that will be reviewed in February used the methodology of the 2019 benchmark assessment and updated it with data through 2022. The 2024 assessment update will provide new information to inform management, including updates on biomass and fishing mortality relative to status determination thresholds to evaluate rebuilding progress, and projections to inform recommendations of allowable biological catch and annual catch limits.

Meeting Agenda for WPSAR Review

The meeting schedule and agenda are as follows:

Wednesday, February 7, 2024 (12 p.m.–6 p.m., Hawaii Standard Time)/ Thursday, February 8, 2024 (8 a.m.–2 p.m., Chamorro Standard Time)

1. Introduction
2. Review objectives and terms of reference
3. Review of stock assessment updates
4. Summary of comments and analysis during desktop phase
5. Questions to presenters
6. Public comment

Thursday, February 8, 2024 (12 p.m.–6 p.m., Hawaii Standard Time)/Friday, February 9, 2024 (8 a.m.–2 p.m., Chamorro Standard Time)

7. Panel presentation on the review results and recommendations

8. Questions to reviewers
9. Public comment
10. Closing comments and adjourn

The agenda order may change. The meeting will run as late as necessary to complete scheduled business.

Special Accommodations

This meeting is physically accessible to people with disabilities. Please direct requests for sign language interpretation or other auxiliary aids to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: January 19, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024–01357 Filed 1–23–24; 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; Applications and Reports for Registration as a Tanner or Agent

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, written or on-line comments must be submitted on or before March 25, 2024.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0179 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 Requests for additional information or copies of the information collection instrument and instructions should be directed to Jerod Cook, Enforcement Officer, PO Box 1310 Petersburg, Alaska 99833 (907) 772–2285; *jerod.cook@noaa.gov* or Robert Marvelle, Supervisory Enforcement Officer, PO Box 21767 Juneau, Alaska 99802, (907) 586–9329; *robert.marvelle@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a request for extension of an approved information collection. The Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) mandates the protection and conservation of marine mammals and makes the taking, killing or serious injury of marine mammals, except under permit or exemption, a violation of the Act. An exemption is provided for Alaskan natives to take marine mammals if the taking is for subsistence or for creating and selling authentic native articles of handicraft and clothing. Possession of marine mammals and marine mammal parts by other than Alaskan natives is therefore prohibited (exception, 50 CFR 216.26: beach found non-Endangered Species Act (ESA) teeth or bones that have been registered with NOAA's National Marine Fisheries Service (NMFS)). As native handicrafts are allowed by the MMPA to enter interstate commerce, an exemption is also needed to allow non-natives to handle the skins or other marine mammal produce, whether to tan the pinniped hide or to act as an agent for the native to sell his handicraft products. The information is necessary for law enforcement purposes to ensure that only Alaska Indians, Aleuts, or Eskimos are submitting marine mammal hides or parts for tanning.

The information required by 50 CFR 216.23 is of two types. Applications: Information is required to identify the applicant as a tanner/agent in order to preclude prosecution under the MMPA and to determine that he/she has an acceptable record keeping program to accurately account for those marine mammal products received. This information serves as a deterrent for those individuals who might use this registration program for entering prohibited marine mammal products into interstate commerce. Reports: Information is also needed annually to evaluate the agent/tanner's activities during the year, and his/her procedures for bookkeeping and yearly inventory to assure NMFS, the Marine Mammal Commission, and the general public that prohibited marine mammal products were not being transshipped through registered agents.

The reporting requirements are: report in writing to the Assistant Administrator for Fisheries, NMFS, any changes in the facts stated in Registrant's applications for this Certificate of Registration within 30 days of such change; maintain current records of each transaction authorized stating the marine mammals or marine mammal parts or products involved, from whom received, any processing accomplished, to whom returned, and the date of each such transaction. These records shall be kept separate and apart from other records maintained in the ordinary course of business and shall be retrained for not less than three years; and annually, during the month of January, send certified copies of such records (annual report) to the Assistant Administrator for Fisheries.

II. Method of Collection

Paper documentation is submitted to meet the requirements found at 50 CFR 216.23(c).

III. Data

OMB Control Number: 0648–0179.

Form Number(s): None.

Type of Review: Regular submission (extension of an existing information collection).

Affected Public: Business or other for profit organizations.

Estimated Number of Respondents: 25.

Estimated Time per Response: 2 hours for an application and 2 hours for a report.

Estimated Total Annual Burden Hours: 50.

Estimated Total Annual Cost to Public: $150.00.

Respondent's Obligation: Mandatory.

Legal Authority: Paper documentation is submitted to meet the requirements found at 50 CFR 216.23(c).

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. 2024–01278 Filed 1–23–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD671]

Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act—Notification of Issuance of Comparability Findings

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

ACTION: Notice.

SUMMARY: Under the authority of the Marine Mammal Protection Act (MMPA), the NMFS Assistant Administrator for Fisheries (Assistant Administrator) has issued comparability findings for the Government of New Zealand's (GNZ) regulated fisheries: West Coast North Island multi-species set-net fishery, and West Coast North Island multi-species trawl fishery. NMFS bases the comparability findings on documentary evidence submitted by the GNZ and other relevant, readily available information.

DATES: These comparability findings are valid from February 21,2024, through December 31, 2025, unless revoked or revised by the Assistant Administrator in a subsequent action.

FOR FURTHER INFORMATION CONTACT: Kellie Foster-Taylor, NMFS Office of International Affairs, Trade, and Commerce at *mmpa.loff@noaa.gov* or by phone at 301–427–7721.

SUPPLEMENTARY INFORMATION:

The MMPA Import Provisions

The MMPA, 16 U.S.C. 1371 *et seq.,* states that the Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards. For purposes of applying this import restriction, the Secretary of Commerce shall insist on reasonable proof from the government of any nation, from which fish or fish products will be exported to the United States, of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States.

In August 2016, NMFS published a final rule (81 FR 54390; August 15, 2016) implementing the fish and fish product import provisions in section 101(a)(2) of the MMPA (MMPA Import Provisions). This rule established conditions for evaluating a harvesting nation's regulatory programs to address incidental and intentional mortality and serious injury of marine mammals in fisheries operated by nations that export fish and fish products to the United States. Under the final rule, fish or fish products may not be imported into the United States from commercial fishing operations that result in the incidental mortality or serious injury of marine mammals in excess of U.S. standards (16 U.S.C. 1371(a)(2)).

The final rule established a 5-year exemption period, through December 31, 2021, before imports would be subject to any trade restrictions (see 50 CFR 216.24(h)(2)(ii)). The Department of Commerce and NMFS have revised the regulations implementing the Fish and Fish Product Import Provisions of the MMPA Import Provisions to extend the exemption period, most recently on November 17, 2023. Following careful consideration, the Department of Commerce and NMFS concluded that additional time is required to effectively complete the comparability finding evaluation process and issued a **Federal Register** notice (88 FR 80193; November 17, 2023) extending the exemption period to end on December 31, 2025 for foreign nations to receive a comparability finding for their commercial fishing operations to export fish and fish products to the United States.

In the 2016 final rule, NMFS stated that it may consider emergency actions during the exemption period to ban imports of fish and fish products from a foreign fishery having or likely to have an immediate and significant adverse impact on a marine mammal stock. (81 FR 54390; August 15, 2016). In addition, pursuant to the MMPA Import Provisions rule, nothing prevents a nation from implementing a bycatch reduction regulatory program and seeking a comparability finding during the exemption period. The GNZ submitted its comparability finding application by the November 30, 2021 regulatory deadline, including information pertaining to the West Coast North Island multi-species set-net fishery and the West Coast North Island multi-species trawl fishery. In December 2022, after the Court of International Trade (CIT) enjoined the two fisheries, the GNZ submitted supplemental documentary evidence regarding its monitoring and reporting programs and estimates of Māui dolphin (*Cephalorhynchus hectori maui*) mortality and serious injury pertaining to the two enjoined fisheries for NMFS' consideration for comparability findings. NMFS is undertaking this action in response to the GNZ's request and prior comparability findings, its 2021 application for comparability findings and its submission of additional documentary evidence regarding its regulatory program to reduce mortality and serious injury of Māui dolphin in the West Coast North Island multi-species set-net fishery and the West Coast North Island multi-species trawl fishery.

Petition for Rulemaking and Request for a Comparability Finding

On May 21, 2020, Sea Shepherd New Zealand and Sea Shepherd Conservation Society (collectively, ''Plaintiffs'') initiated a lawsuit in the CIT challenging NMFS' denial of its petition. On June 24, 2020, the GNZ announced its final fisheries measures for reducing bycatch of Māui dolphins (effective October 1, 2020) and its final Threat Management Plan (TMP).

On July 15, 2020, the GNZ requested that NMFS perform a comparability assessment of the TMP and its regulatory program as it relates to Māui dolphins.On November 9, 2020, NMFS issued comparability findings for the West Coast North Island multi-species set-net and trawl fisheries because the GNZ had implemented a regulatory program governing the bycatch of Māui dolphin that is comparable in effectiveness to U.S. standards. Based on NMFS' decision, Plaintiffs subsequently filed a Motion for

Preliminary Injunction on December 11, 2020.

The CIT granted this preliminary injunction, requiring the imposition of import restrictions and a comparability finding determination for the export fisheries operating on the West Coast North Island within the Māui dolphin's range. The judge's order effectively removed the operative exemption period protections for these fisheries.

In November 2021, the GNZ submitted its comparability finding application to NMFS for all its fisheries on the List of Foreign Fisheries (LOFF), including the West Coast North Island multi-species set-net fishery and the West Coast North Island multi-species trawl fishery. In December 2022, after the CIT enjoined the two fisheries, the GNZ submitted supplemental documentary evidence regarding its monitoring and reporting programs and estimates of Māui dolphin mortality and serious injury, along with supplemental regulatory information, pertaining to the two enjoined fisheries for NMFS' consideration for comparability findings.

Under the MMPA Import Provisions, the Assistant Administrator is reconsidering comparability findings that were previously issued on November 9, 2020, based on supplemental information provided by the Plaintiffs and New Zealand since that time. As part of this review of comparability findings under the reconsideration provisions, NMFS has consulted with the GNZ to ascertain and discuss additional measures intended for implementation to eliminate the risk of Māui dolphin bycatch in the future. The following is a summary of NMFS' analysis and provides the evidence supporting compliance with each of the conditions needed for a comparability finding. Procedures and conditions for a comparability finding are specified in the MMPA Import Provisions at 50 CFR 216.24(h)(6).

NMFS Determination on the GNZ's Comparability Finding Request

The Government of New Zealand's Regulatory Actions and Mitigation Plan

The GNZ manages human-induced threats to Māui dolphins under a Hector's and Māui dolphin TMP. The TMP is underpinned by a spatial risk assessment informed by the best available scientific information. On October 1, 2020, the GNZ adopted regulations to manage fisheries threats effectively that include:

- A nationwide ban on recreational and commercial drift netting;
- An extension of current set-net closures and the creation of new areas closed to set-netting in the North and South Islands;
- An extension of the existing area closed to trawling off the West Coast of the North Island;
- A management trigger that becomes effective if a single fishing-related mortality of a dolphin occurs within the Māui Dolphin Habitat Zone (MDHZ) (from Cape Reinga to Wellington). This trigger allows the Minister of Fisheries to immediately impose additional fishing restrictions, including prohibiting all or any fishing or fishing methods within the West Coast of the North Island; and
- An authorization to use commercial ring nets in set-net prohibition areas within West Coast North Island harbors (ring nets are a fishing method that does not pose a risk to the dolphins).

Evidence That New Zealand Bans Intentional Mortality and Serious Injury of Māui Dolphins

Based on information provided by the GNZ, its Marine Mammal Protection Act of 1978 and the Fisheries Act of 1996 the primary legislation governing the GNZ's fisheries management system, prohibit the intentional killing of marine mammals in the course of commercial fishing operations and are comparable to U.S. standards.

Evidence of a Vessel Registration System for Export Fisheries

The GNZ's Fisheries Act of 1996 requires that vessels must be registered as a New Zealand ship (flagged to New Zealand) and be on the Fishing Vessel Register to commercially fish in New Zealand's waters. Based on NMFS Office of International Affairs, Trade, and Commerce's (IATC) analysis of the GNZs Fisheries Act of 1996, the GNZ's regulations and vessel registration system are comparable to U.S. standards.

Evidence of a Monitoring Plan

The GNZ's Marine Mammal Protection Act of 1978 and the Fisheries Act of 1996 require fishermen to report the mortality and injury of marine mammals in the course of commercial fishing. The GNZ has two types of monitoring programs: an at-sea monitoring program (observers and electronic monitoring) and vessel logbooks (self-reporting).

The MDHZ was created along the West Coast of the North Island (including harbors) from the coast out to 12 nautical miles. The MDHZ covers approximately 90–95 percent of Māui dolphin habitat. Fishing effort within the MDHZ has been declining while monitoring effort has been increasing since the MDHZ fishing prohibitions went into effect. The levels of effort reduction and monitoring have been different for the set net and trawl fleets. Since the 2020–2021 fishing year, fishing effort has been reduced by 71 percent for the trawl fleet and 97 percent for the set net fleet while 50 percent of trawl effort and 90 percent of set net effort were monitored. In 2022, the GNZ issued an amendment to its Fisheries (Electronic Monitoring) regulation that expanded the electronic monitoring program to include the entire MDHZ. This regulation states that if a vessel is qualified to carry a camera, then a vessel is unable to fish without an on-board camera. Based on IATC's analysis of GNZ's regulations and the implementation of the MDHZ and its accompanying rules, the GNZ's self-reporting and observer programs are comparable in effectiveness to U.S. standards. IATC also finds the GNZ's on-board camera monitoring program exceeds U.S. standards. New Zealand's 90 percent monitoring coverage through its monitoring program exceeds the U.S. requirements of section 118 of the MMPA for statistically reliable bycatch estimates. New Zealand's electronic monitoring and observer program allows New Zealand to act in near real-time in the unlikely event that a Māui dolphin were bycaught in a fishery allowing Minister to start an immediate review of New Zealand's program to determine additional actions to be taken to reduce Māui dolphin bycatch below the bycatch limit. Both nations also take observer health and safety along with vessel operational safety into consideration when determining deployments of observers on vessels 8 meters or less.

Evidence of a Population Abundance Estimate for Māui Dolphins

The GNZ has an abundance estimate for Māui dolphins, which follows a scientifically sound process to estimate abundance and has plans to undertake a stock assessment survey to update that abundance estimate. Based on NMFS' analysis the GNZ meets the condition to have an abundance estimate for a marine mammal stock, and their system for Māui dolphin abundance estimation is comparable in effectiveness to U.S. standards.

Evidence of a Bycatch Limit

The GNZ has established a bycatch limit of one Māui/Hector's dolphin. When a bycatch limit has been set, the GNZs Fisheries Act enables the Minister to prohibit all or any fishing or fishing

methods in an area to ensure that any limit on fishing-related mortality is not exceeded. The purpose of the Fisheries Act is to provide for the utilization of fisheries resources while ensuring sustainability. This means that the Minister does not have discretion to choose whether to act or not, but rather the Minister has authority to quickly enact additional prohibitions considered necessary to ensure the bycatch limit is not exceeded.

The GNZ created a Māui dolphin Threat Management Plan (TMP). The TMP provides clear objectives to ensure that government agencies are operating collectively. Some of the TMP objectives are: ensure that dolphin deaths arising from fisheries threats do not exceed the population sustainability threshold (PST) with 95 percent certainty, causes localized depletion, create substantial barriers to dispersal between subpopulations, and allow localized subpopulations to recover and/or remain at or above 80 percent of their unimpacted status with 95 percent certainty. The TMP is underpinned by the GNZs multi-species Spatially Explicit Fisheries Risk Assessment (SEFRA) model. The SEFRA model allows for improved statistical estimation of commercial fisheries risks to protected species. Specifically, the SEFRA model addresses the needs of fisheries managers in low information fisheries where observer coverage is low and protected species capture rates are rare to inform statistically robust capture estimates.

Evidence of a Regulatory Plan To Reduce Bycatch Below the Bycatch Limit

Based on IATC's analysis, the GNZ's regulatory program, including the fishery-specific area restrictions are comparable in effectiveness to U.S. standards. This regulatory program will result in Māui dolphin bycatch below PBR and concentrate the fisheries restrictions in the areas with the greatest risk, specifically those areas where fishing activities overlap with the Māui dolphin population. These restrictions, which are focused on the area that represents the greatest density of Māui dolphins, virtually eliminates the bycatch risk from set-nets and significantly reduces the trawl bycatch risk for Māui dolphins in this area. The additional restrictions at the northern and southern extent (tails of the population) of the Māui dolphin distribution reduces the bycatch risk for the extreme ranges (smaller proportion). This is comparable to U.S. standards, which does not require that a Take Reduction Plan or the U.S. regulatory program eliminate 100 percent of the bycatch risk to a particular marine mammal stock. The U.S. regulatory program seeks to target the greatest percentage of risk in the areas with the greatest overlap of fishing and the marine mammal distribution and mitigate that bycatch risk below the bycatch limit for that specific marine mammal.

As a result of these findings, NMFS announces the issuance of positive comparability findings that will allow the importation into the United States of fish and fish products harvested by New Zealand's set-net and trawl fisheries operating off the West Coast North Island within the Māui dolphin's range.

Authority: 16 U.S.C. 1361 *et seq.*

Dated: January 19, 2024.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2024–01368 Filed 1–22–24; 11:15 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2010–0112]

Agency Information Collection Activities; Extension of Collection; Contests, Challenges, and Awards

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of information collection; request for comment.

SUMMARY: As required by the Paperwork Reduction Act of 1995, the Consumer Product Safety Commission (CPSC or Commission) announces that the Commission has submitted to the Office of Management and Budget (OMB) a request for extension of approval of a generic collection of information for CPSC-sponsored contests, challenges, and awards. OMB previously approved the collection of information under Control Number 3041–0151. OMB's most recent extension of approval will expire on January 31, 2024. On November 15, 2023, CPSC published a notice in the **Federal Register** to announce the agency's intention to seek extension of approval of the collection of information. The Commission received no comments. Therefore, by publication of this notice, the Commission announces that CPSC has submitted to the OMB a request for extension of approval of that collection of information.

DATES: Submit comments on the collection of information by February 23, 2024.

ADDRESSES: Submit comments about this request by email: *OIRA_submission@omb.eop.gov* or fax: 202–395–6881. Comments by mail should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the CPSC, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503. In addition, written comments that are sent to OMB also should be submitted electronically at *http://www.regulations.gov,* under Docket No. CPSC–2010–0112.

FOR FURTHER INFORMATION CONTACT: Cynthia Gillham, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; (301) 504–7791, or by email to: *pra@cpsc.gov.*

SUPPLEMENTARY INFORMATION: CPSC seeks to extend the following currently approved generic collection of information:

Title: Contests, Challenges, and Awards.

OMB Number: 3041–0151.

Type of Review: Extension of generic collection.

Frequency of Response: On occasion.

Affected Public: Contestants, award nominees, award nominators.

Estimated Number of Respondents: We estimate that there will be 500 contest or award participants each year. In addition, 20 participants may be required to provide additional information upon selection.

Estimated Time per Response: The estimated time to complete a contest or award submission is five hours per participant. In addition, the 20 participants expected to provide additional information upon selection will require approximately two additional hours.

Total Estimated Annual Burden: CPSC estimates that there will be 500 participants who each require five hours to complete their submissions, and that 20 participants will be asked to provide additional information that will take two hours to complete. As a result, CPSC estimates that the total annual burden of this collection is 2,540 hours. The annualized cost to respondents for the information collection is approximately $109,880 (2,540 hours × $43.26/hour), as estimated from total compensation data available from the U.S. Bureau of Labor Statistics.[1]

[1] Total hourly compensation for all civilian workers is estimated by the U.S. Bureau of Labor Statistics to be $43.26: Employer Costs for Employee Compensation, June 2023, Table 1,

Continued

General Description of Collection: The Commission establishes contests, challenges, and awards to increase the public's knowledge and awareness of safety hazards. The Commission also recognizes through awards certain individuals, firms, and organizations that work to address issues related to consumer product safety. The information to be collected from contestants and award nominees or nominators includes contact and background information necessary to conduct a contest or award program. Limited background or biographical information similar to data found on a resume, such as a nominee's education and work experience, may be requested for some contests or awards. Additionally, substantive entries such as essays, posters, drawings, or videos may be requested for contestants and award nominees.

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2024–01370 Filed 1–23–24; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2023–OPE–0207]

Request for Information on Sexual Violence at Educational Institutions

AGENCY: Office of Postsecondary Education and Office of Elementary and Secondary Education, U.S. Department of Education.

ACTION: Request for information.

SUMMARY: This notice is a request for information in the form of written comments that include information, research, and suggestions regarding the prevention and response to sexual violence on campuses of educational institutions.

DATES: We must receive your comments by March 11, 2024.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at *regulations.gov.* However, if you require an accommodation or cannot otherwise submit your comments via *regulations.gov,* please contact the program contact person listed under **FOR FURTHER INFORMATION CONTACT**. The Department will not accept comments by email or by fax. To ensure that the Department does not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under the ''FAQ'' tab.

Privacy Note: The Department's policy for comments received from members of the public is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available. We encourage, but do not require, that each respondent include their name, title, institution or affiliation, and the name, title, mailing and email addresses, and telephone number of a contact person for the institution or affiliation, if any.

FOR FURTHER INFORMATION CONTACT: Amanda Miller. Telephone: (202) 453–6914. You may also email your questions to *Amanda.Miller@ed.gov,* but as described above, comments must be submitted via the Federal eRulemaking Portal at *regulations.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:

Background: Section 1314 of the Violence Against Women Act (VAWA) Reauthorization Act of 2022, Public Law 117–103, div. W, 136 Stat. 840, 936–38 (2022), requires the Secretary of Education, the Secretary of Health and Human Services, and the Attorney General to establish a joint interagency task force to be known as the ''Task Force on Sexual Violence in Education'' (hereinafter the Task Force) to provide information and recommendations, solicit information from relevant stakeholders, and create a plan to address sexual violence in education. The Biden-Harris Administration remains committed to preventing and responding to gender-based violence, including sexual violence in education, wherever it occurs and in all of its forms.

Specifically, the Task Force is to provide recommendations to educational institutions on: establishing prevention and response teams; providing survivor resources, including health care, sexual assault kits, sexual assault nurse examiners, culturally responsive and inclusive standards of care, trauma-informed services, and access to confidential advocacy and support services; best practices on responses to and prevention of sexual violence and dating violence; sex education, as appropriate, training for school staff and various equitable discipline models; and culturally responsive and inclusive approaches to supporting survivors. The law defines ''educational institution'' as ''an institution of higher education, an elementary school, or a secondary school.''

The VAWA Reauthorization Act also directs the Task Force to solicit periodic input from a diverse group of survivors, trauma specialists, advocates from national, State, and local anti-sexual violence advocacy organizations, institutions of higher education, and other public stakeholders. The goal of this request for information is to ensure the Task Force is receiving feedback and input from a diverse group of stakeholders.

Solicitation of Comments: When responding to this RFI, please address one or more of the following questions. Please note if your responses refer to elementary, secondary, or postsecondary educational settings, or more than one.

(1) What factors and best practices should educational institutions consider when establishing sexual assault prevention and response teams, including for online threats, harassment and intimidation, and other forms of technological abuse?

(2) How can educational institutions best provide survivor resources, including health care, sexual assault kits, sexual assault nurse examiners, culturally responsive and linguistically inclusive standards of care, trauma-informed services, academic supports, and access to confidential advocacy and support services?

(3) What best practices should educational institutions consider for responding to and preventing sexual violence and dating violence on their campuses, including the online environment, and which may take into consideration an institution's educational level, size, and resources?

(4) What factors should be considered as educational institutions develop or implement sex education programs, as appropriate, for students, training initiatives for school staff in sexual violence prevention, and equitably designed and applied discipline models?

(5) What are culturally responsive and linguistically inclusive approaches to supporting survivors, which include consideration of race; ethnicity; national origin; limited English proficiency; religion; immigration status; lesbian, gay, bisexual, transgender; queer or intersex (LGBTQI+) status; ability;

(*https://www.bls.gov/news.release/archives/ecec_09122023.pdf*).

disability; socio-economic status; exposure to trauma, and other compounding factors?

(6) What are promising practices for engaging student groups, community organizations or families of students in efforts to prevent and address sexual violence and dating violence?

(7) In what ways can the Federal Government support educational institutions in improving the prevention of, and response to, sexual violence and dating violence, including online threats, harassment and intimidation, and other forms of technological abuse?

If you are aware of any supportive research (qualitative or quantitative) or promising practices, please include citations, websites, or other information that will enable the Task Force to learn more.

This is a request for information only. This RFI is not a request for proposals (RFP) or a promise to issue an RFP or a notice inviting applications. This RFI does not commit the Department to contract for any supply or service whatsoever. Further, we are not seeking proposals and will not accept unsolicited proposals. The Department will not pay for any information or administrative costs that you may incur in responding to this RFI. The documents and information submitted in response to this RFI become the property of the U.S. Government and will not be returned.

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

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

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

Nasser Paydar,

Assistant Secretary, Office of Postsecondary Education.

Adam Schott,

Deputy Assistant Secretary for Policy and Programs, Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary, Office of Elementary and Secondary Education.

[FR Doc. 2024–01323 Filed 1–23–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an in-person/virtual hybrid meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, February 21, 2024; 4:00 p.m.–8:00 p.m. PST.

The opportunity for public comment is at 4:10 p.m. PST.

This time is subject to change; please contact the Nevada Site Specific Advisory Board (NSSAB) Administrator (below) for confirmation of time prior to the meeting.

ADDRESSES: This meeting will be open to the public in-person at the Molasky Corporate Center (address below) or virtually via Microsoft Teams. To attend virtually, please contact Barbara Ulmer, NSSAB Administrator, by email *nssab@emcbc.doe.gov* or phone (702) 523–0894, no later than 4:00 p.m. PST on Tuesday, February 20, 2024.

Molasky Corporate Center, 15th Floor Conference Room, 100 N City Parkway, Las Vegas, Nevada 89106.

FOR FURTHER INFORMATION AND/OR DIRECTIONS CONTACT: Barbara Ulmer, NSSAB Administrator, by phone: (702) 523–0894 or email: *nssab@emcbc.doe.gov* or visit the Board's internet homepage at *www.nnss.gov/NSSAB/.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda:

1. Public Comment Period
2. Update from Deputy Designated Federal Officer
3. Update from National Nuclear Security Administration/Nevada Field Office
4. Updates from NSSAB Liaisons
5. Presentations
6. Planning for Spring EM SSAB National Chairs' Meeting

Public Participation: The in-person/online virtual hybrid meeting is open to the public either in-person at the Molasky Corporate Center or via Microsoft Teams. To sign-up for public comment, please contact the NSSAB Administrator (above) no later than 4:00 p.m. PST on Tuesday, February 20, 2024. In addition to participation in the live public comment session identified above, written statements may be filed with the Board either before or within seven days after the meeting by sending them to the NSSAB Administrator at the aforementioned email address. Written public comment received prior to the meeting will be read into the record. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments can do so in 2-minute segments for the 15 minutes allotted for public comments.

Minutes: Minutes will be available by writing or calling Barbara Ulmer, NSSAB Administrator, U.S. Department of Energy, EM Nevada Program, 100 North City Parkway, Suite 1750, Las Vegas, NV 89106; Phone: (702) 523–0894. Minutes will also be available at the following website: *https://www.nnss.gov/nssab/nssab-meetings/.*

Signing Authority: This document of the Department of Energy was signed on January 12, 2024, by David Borak, Deputy Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on January 19, 2024.

Treena V. Garrett,

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

[FR Doc. 2024–01324 Filed 1–23–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an online virtual combined meeting of the Consent Order Subcommittee and Risk Evaluation and Management Subcommittee of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico.

DATES: Wednesday, February 21, 2024; 1:00 p.m. to 3:00 p.m. MST.

ADDRESSES: This meeting will be held virtually via WebEx. To attend, please contact Bridget Maestas by email, *Bridget.Maestas@em.doe.gov,* no later than 5:00 p.m. MST on Friday, February 16, 2024.

FOR FURTHER INFORMATION CONTACT: Bridget Maestas, Northern New Mexico Citizens' Advisory Board (NNMCAB), 94 Cities of Gold Road, Santa Fe, NM 87506; Phone (505) 709–7466; or Email: *Bridget.Maestas@em.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Purpose of the Consent Order Subcommittee: The subcommittee reviews the *2016 Compliance Order on Consent,* evaluate its strengths and weaknesses, and draft recommendations for the full Board's consideration as to how to improve it.

Purpose of the Risk Evaluation and Management Subcommittee: The subcommittee drafts external citizen-based recommendations for the full Board's consideration on human and ecological health risk resulting from historical, current, and future hazardous and radioactive legacy waste operations at Los Alamos National Laboratory.

Tentative Agenda:

- Presentation on Fiscal Year 2025 Budget
- Discussion on NNMCAB Recommendation on Fiscal Year 2025 Budget

Public Participation: The online virtual meeting is open to the public. To sign up for public comment, please contact Bridget Maestas at *Bridget.Maestas@em.doe.gov,* no later than 5:00 p.m. MST on Friday, February 16, 2024. Written statements may be filed with the Committees either before or within five days after the meeting by sending them to Bridget Maestas at the aforementioned email address. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Bridget Maestas at the email address or telephone number listed above. Minutes and other Board documents are on the internet at: *https://energy.gov/em/nnmcab/meeting-materials.*

Signing Authority: This document of the Department of Energy was signed on January 12, 2024, by David Borak, Deputy Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on January 19, 2024.

Treena V. Garrett,

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

[FR Doc. 2024–01325 Filed 1–23–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP24–35–000]

National Fuel Gas Supply Corporation; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on January 11, 2024, National Fuel Gas Supply Corporation (National Fuel), 6363 Main Street, Williamsville, New York 14221, 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 National Fuel's blanket certificate issued in Docket No. CP83–4–000, for authorization to abandon injection/withdrawal storage well EC–459 in its Beech Hill Storage Field (Beech Hill), and to abandon in place a portion of the associated well line, ECW 459. All of the above facilities are located in Allegany County, New York. (Well EC–459 Abandonment Project). The project will allow [National Fuel] to abandon a well that contains localized corrosion on its production string, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. 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 Meghan M. Emes, Senior Counsel, National Fuel Gas Supply Corporation, 6363 Main Street, Williamsville, New York 14221, by telephone at (716) 857–7004, or by email at *emesm@natfuel.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 p.m. eastern time on March 18, 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,[1] any person [2] or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[3] and must be submitted by the protest deadline, which is March 18, 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 [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is March 18, 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 18, 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 CP24–35–000 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 [6]

(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 CP24–35–000.

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 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: Meghan M. Emes, Senior Counsel, National Fuel Gas Supply Corporation, 6363 Main Street, Williamsville, New York 14221, or by email at *emesm@natfuel.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

[1] 18 CFR 157.205.

[2] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[3] 18 CFR 157.205(e).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

[6] Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

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 18, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–01328 Filed 1–23–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC24–5–000]

Commission Information Collection Activities (FERC–725HH); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection FERC–725HH (RF Reliability Standards) with no change to the current reporting or recordkeeping requirements.

DATES: Comments on the collection of information are due March 25, 2024.

ADDRESSES: You may submit your comments (identified by Docket No. IC24–5–000) on FERC–725HH by one of the following methods:

Electronic filing through *https://www.ferc.gov* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery:

○ *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

○ *Hand (Including Courier) Delivery:* Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *https://www.ferc.gov.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *https://www.ferc.gov.*

FOR FURTHER INFORMATION CONTACT: Jean Sonneman may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–6362.

SUPPLEMENTARY INFORMATION:

Title: FERC–725HH, RF Reliability Standards.

OMB Control No.: 1902–0256.

Type of Request: Three-year renewal of FERC–725HH without change to the reporting or recordkeeping requirements.

Abstract: This collection of information pertains to the Commission's compliance with section 215 of the Federal Power Act (FPA) (16 U.S.C. 824*o*), which enables the Commission to strengthen the reliability of the ''bulk-power system.'' [1] The Commission's implementation of FPA section 215 involves review and approval of a system of mandatory Reliability Standards that are established and enforced by an ''Electric Reliability Organization'' (ERO).[2] The Commission has certified the North American Electric Reliability Corporation (NERC) as the ERO.[3]

Reliability Standards that the ERO proposes to the Commission may include Reliability Standards that are proposed to the ERO by a Regional Entity.[4] A Regional Entity is an entity that has been approved by the Commission to enforce Reliability Standards under delegated authority from the ERO.[5] On March 17, 2011, the Commission approved a regional Reliability Standard submitted by the ERO that was developed by the Reliability First Corporation (RF).[6]

RF promotes bulk electric system reliability in the Eastern Interconnection. RF is the Regional Entity responsible for compliance monitoring and enforcement in the RF region. In addition, RF provides an environment for the development of Reliability Standards and the coordination of the operating and planning activities of its members as set forth in the RF bylaws.

There is one regional Reliability Standard in the RF region. The Commission requests renewal of OMB clearance for that regional Reliability Standard, known as BAL–502–RF–03 (Planning Resource Adequacy Analysis, Assessment and Documentation).

Type of Respondents: Planning coordinators.

Estimate of Annual Burden: [7] The estimated burden and cost [8] are as follows:

[1] FPA section 251(a)(1) defines ''bulk-power system'' as follows: ''(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (B) electric energy from generation facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.''

[2] FPA section 215(a)(2) defines ''Electric Reliability Organization'' as ''the organization certified by the Commission under subsection (c) the purpose of which is to establish and enforce reliability standards for the bulk-power system, subject to Commission review.''

[3] *North American Electric Reliability Corp.,* 116 FERC ¶ 61,062 (ERO Certification Order), *order on reh'g & compliance,* 117 FERC ¶ 61,126 (2006), *aff'd sub nom. Alcoa, Inc.* v. *FERC,* 564 F.3d 1342 (D.C. Cir. 2009).

[4] 16 U.S.C. 824*o*(e)(4).

[5] 16 U.S.C. 824*o*(a)(7) and (e)(4).

[6] *Planning Resource Adequacy Assessment Reliability Standard,* Order No. 747, 134 FERC ¶ 61,212 (2011).

[7] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 CFR 1320.3.

[8] For BAL–502–RF–03,

The estimated hourly cost (salary plus benefits) is a combination based on the Bureau of Labor Statistics (BLS), as of 2022, for 75% of the average of an Electrical Engineer (17–2071) $77.29/hr, 77.29 × .75 = 57.9675 ($57.97-rounded) ($57.97/hour) and 25% of an Information and Record Clerk (43–4199) $39.58/hr, $39.58 × .25% = 9.895 ($9.90 rounded) ($9.90/hour), for a total ($57.97 + $9.90 = $67.87/hour).

FERC–725HH, RF RELIABILITY STANDARDS

Entity	Number of respondents [9] (1)	Annual number of responses per respondent (2)	Annual number of responses (1) * (2) = (3)	Average burden hrs. & cost per response ($) (4)	Total annual burden hours & total annual cost ($) (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1) = (6)
Regional Reliability Standard BAL–502–RF–03						
Planning Coordinators	2	1	2	16 hrs.; $1,085.92	32 hrs.; $2,171.84	$1,085.92

Comments: Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: January 18, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–01327 Filed 1–23–24; 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 in Existing Proceedings

Docket Numbers: RP11–1711–000.

Applicants: Texas Gas Transmission, LLC.

Description: Refund Report: 2023 Cash Out Filing to be effective N/A.

Filed Date: 1/18/24.

Accession Number: 20240118–5015.

Comment Date: 5 p.m. ET 1/30/24.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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 18, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–01329 Filed 1–23–24; 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: EC24–43–000.

Applicants: Hunterstown Gen Holdings, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Hunterstown Gen Holdings, LLC, et. al.

Filed Date: 1/17/24.

Accession Number: 20240117–5193.

Comment Date: 5 p.m. ET 2/7/24.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24–83–000.

Applicants: Davis UP Energy Storage LLC.

Description: Davis UP Energy Storage LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 1/18/24.

Accession Number: 20240118–5065.

Comment Date: 5 p.m. ET 2/8/24.

Docket Numbers: EG24–84–000.

Applicants: Frederick Energy Storage LLC.

Description: Frederick Energy Storage LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 1/18/24.

Accession Number: 20240118–5066.

Comment Date: 5 p.m. ET 2/8/24.

Docket Numbers: EG24–85–000.

Applicants: Bromley Energy Storage LLC.

Description: Bromley Energy Storage LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 1/18/24.

Accession Number: 20240118–5068.

Comment Date: 5 p.m. ET 2/8/24.

Docket Numbers: EG24–86–000.

Applicants: Keenesburg Energy Storage LLC.

Description: Keenesburg Energy Storage LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 1/18/24.

Accession Number: 20240118–5076.

Comment Date: 5 p.m. ET 2/8/24.

Docket Numbers: EG24–87–000.

Applicants: Mead Energy Storage LLC.

Description: Mead Energy Storage LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 1/18/24.

Accession Number: 20240118–5104.

Comment Date: 5 p.m. ET 2/8/24.

Docket Numbers: EG24–88–000.

Applicants: Parkway Energy Storage LLC.

Description: Parkway Energy Storage LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 1/18/24.

Accession Number: 20240118–5106.

Comment Date: 5 p.m. ET 2/8/24.

Docket Numbers: EG24–89–000.

Applicants: Platte Valley Energy Storage LLC.

[9] The number of respondents is derived from the NERC Compliance Registry as of November 14, 2023 for the burden associated with the regional Reliability Standard BAL–502–RF–03.

Description: Platte Valley Energy Storage LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 1/18/24.
Accession Number: 20240118–5107.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: EG24–90–000.
Applicants: Rattlesnake Ridge Energy Storage LLC.
Description: Rattlesnake Ridge Energy Storage LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 1/18/24.
Accession Number: 20240118–5108.
Comment Date: 5 p.m. ET 2/8/24.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL24–54–000.
Applicants: Karen Schedler, Jeremy Helms, and Vote Solar.
Description: Petition for Enforcement Under the Public Utility Regulatory Policies Act of 1978.
Filed Date: 1/12/24.
Accession Number: 20240112–5029.
Comment Date: 5 p.m. ET 2/2/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER24–348–001.
Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.
Description: Tariff Amendment: Alabama Power Company submits tariff filing per 35.17(b): Needmore Solar LGIA Deficiency Response to be effective 10/25/2023.
Filed Date: 1/18/24.
Accession Number: 20240118–5075.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–564–000.
Applicants: VESI 12 LLC.
Description: Supplement to December 6, 2023 VESI 12 LLC tariff filing.
Filed Date: 1/17/24.
Accession Number: 20240117–5195.
Comment Date: 5 p.m. ET 1/31/24.
Docket Numbers: ER24–596–001.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Request to Defer Action on Amendment to WMPA, SA No. 5981; Queue No. AG1–386 to be effective 12/31/9998.
Filed Date: 1/17/24.
Accession Number: 20240117–5160.
Comment Date: 5 p.m. ET 2/7/24.
Docket Numbers: ER24–609–001.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Request to Defer Action on Amendment to WMPA, SA No. 5545; Queue No. AE2–125 to be effective 12/31/9998.
Filed Date: 1/18/24.
Accession Number: 20240118–5092.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–612–001.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Request to Defer Action on Amendment to WMPA, SA No. 6597; Queue No. AF2–294 to be effective 12/31/9998.
Filed Date: 1/18/24.
Accession Number: 20240118–5093.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–864–000.
Applicants: Louisville Gas and Electric Company.
Description: Notice of Cancellation of Interchange Agreement of Louisville Gas and Electric Company.
Filed Date: 1/11/24.
Accession Number: 20240111–5213.
Comment Date: 5 p.m. ET 2/1/24.
Docket Numbers: ER24–931–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amended ISA, Service Agreement No. 6740; Queue No. AC1–194 to be effective 3/18/2024.
Filed Date: 1/17/24.
Accession Number: 20240117–5167.
Comment Date: 5 p.m. ET 2/7/24.
Docket Numbers: ER24–932–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amended ISA, Service Agreement No. 3582; NQ–72 to be effective 3/18/2024.
Filed Date: 1/18/24.
Accession Number: 20240118–5061.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–933–000.
Applicants: Bromley Energy Storage LLC.
Description: Baseline eTariff Filing: Market-Based Rate Application and Request for Expedited Action to be effective 1/19/2024.
Filed Date: 1/18/24.
Accession Number: 20240118–5067.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–934–000.
Applicants: Davis UP Energy Storage LLC.
Description: Baseline eTariff Filing: Market-Based Rate Application and Request for Expedited Action to be effective 1/19/2024.
Filed Date: 1/18/24.
Accession Number: 20240118–5069.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–935–000.
Applicants: Frederick Energy Storage LLC.
Description: Baseline eTariff Filing: Market-Based Rate Application and Request for Expedited Action to be effective 1/19/2024.
Filed Date: 1/18/24.
Accession Number: 20240118–5071.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–936–000.
Applicants: Keenesburg Energy Storage LLC.
Description: Baseline eTariff Filing: Market-Based Rate Application and Request for Expedited Action to be effective 1/19/2024.
Filed Date: 1/18/24.
Accession Number: 20240118–5074.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–937–000.
Applicants: Mead Energy Storage LLC.
Description: Baseline eTariff Filing: Market-Based Rate Application and Request for Expedited Action to be effective 1/19/2024.
Filed Date: 1/18/24.
Accession Number: 20240118–5077.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–938–000.
Applicants: Parkway Energy Storage LLC.
Description: Baseline eTariff Filing: Market-Based Rate Application and Request for Expedited Action to be effective 1/19/2024.
Filed Date: 1/18/24.
Accession Number: 20240118–5080.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–939–000.
Applicants: Platte Valley Energy Storage LLC.
Description: Baseline eTariff Filing: Market-Based Rate Application and Request for Expedited Action to be effective 1/19/2024.
Filed Date: 1/18/24.
Accession Number: 20240118–5081.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–940–000.
Applicants: Rattlesnake Ridge Energy Storage LLC.
Description: Baseline eTariff Filing: Market-Based Rate Application and Request for Expedited Action to be effective 1/19/2024.
Filed Date: 1/18/24.
Accession Number: 20240118–5082.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–941–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 3581; NQ–71 to be effective 3/18/2024.
Filed Date: 1/18/24.
Accession Number: 20240118–5132.
Comment Date: 5 p.m. ET 2/8/24.
Docket Numbers: ER24–942–000.
Applicants: Cottontail Solar 4, LLC.
Description: Baseline eTariff Filing: Reactive Power Compensation Baseline Filing to be effective 4/26/2024.

Filed Date: 1/18/24.

Accession Number: 20240118–5134.

Comment Date: 5 p.m. ET 2/8/24.

Docket Numbers: ER24–943–000.

Applicants: Cottontail Solar 5, LLC.

Description: Baseline eTariff Filing: Reactive Power Compensation Baseline Filing to be effective 1/31/2024.

Filed Date: 1/18/24.

Accession Number: 20240118–5145.

Comment Date: 5 p.m. ET 2/8/24.

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.

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Dated: January 18, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–01330 Filed 1–23–24; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2018–0320; FRL–11655–01–OCSPP]

Toxic Substances Control Act Review of CBI Claims for the Identity of Chemicals in the TSCA Inventory; Extension of Review Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the extension of the review period for Confidential Business Information (CBI) claims for specific identify of all active chemical substances listed on the confidential portion of the Toxic Substances Control Act (TSCA) Inventory submitted to the EPA under TSCA. EPA has determined that an extension of the statutory review period for the review of CBI claims under TSCA are necessary to allow the Agency to complete the required reviews under TSCA.

DATES: The review period is extended to February 19, 2025.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2018–0320, is available online at *http://www.regulations.gov.* Additional instructions for visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Jessica Barkas, Project Management and Operations Division (7401), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 250–8880; email address: *barkas.jessica@epa.gov.*

For general information contact: The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

You may be affected by this action if you submitted a Notice of Activity Form A to EPA under TSCA section 8(b)(4) and 40 CFR part 710, subpart B and asserted any CBI claims concerning the specific identities of the chemical substances you reported. Persons who seek information on such submissions may also be affected by this action. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Manufacturers, importers, or processors of chemical substances (NAICS codes 325 and 324110), *e.g.,* chemical manufacturing and petroleum refineries.

If you have any questions regarding the applicability of this action to a particular entity, consult the technical contact person listed under **FOR FURTHER INFORMATION CONTACT**.

II. What is the Agency's authority for taking this action?

TSCA authorizes the extension of the Review Plan deadline in TSCA section 8(b)(4)(E)(ii)(I), 15 U.S.C. 2607(b)(4)(E)(ii)(I).

III. What action is the Agency taking?

EPA is announcing to the public that it is extending an Agency review deadline pursuant to the authority in TSCA section 8(b)(4)(E)(ii)(I), 15 U.S.C. 2607(b)(4)(E)(ii)(I). The additional time is necessary to complete the reviews given the volume of submissions that require review, information technology issues, and other legal and administrative delays that have affected the review process. EPA will evaluate progress toward completing the requirements for the Agency to review CBI substantiations outlined in the final rule entitled ''Procedures for Review of CBI Claims for the Identity of Chemicals in the TSCA Inventory'' (Review Plan rule), (85 FR 13062, March 6, 2020 (FRL–10005–48)), which set a deadline of February 19, 2024. This action will extend the deadline by a year and as this extended deadline approaches the Agency may further extend the deadline as necessary to complete the Review Plan reviews.

IV. What is the TSCA Review Plan?

Pursuant to TSCA section 8(b), EPA finalized the Review Plan rule establishing, *inter alia,* the Agency's plan for reviewing all active TSCA Inventory CBI claims concerning specific chemical identity that had been made in Active-Inactive rule reporting taking place in 2017 and 2018 (see 40 CFR part 710, subparts B (Commercial Activity Notification) and C (Review Plan)). Consistent with TSCA section 8(b)(4)(E)(i), which allows a five-year period for these reviews following compilation of an initial list of active substances, the reviews were targeted for completion by February 19, 2024 (see 40 CFR 710.55(d). Since finalizing

the Review Plan rule, however, EPA has encountered issues that, cumulatively, make reaching this target highly unlikely. Consequently, consistent with TSCA section 8(b)(4)(E)(ii)(I) and 40 CFR 710.55(e) which permit EPA to extend the review period by up to two years, EPA is extending the target review completion date until February 19, 2025. As this extended deadline approaches, EPA will re-evaluate the Review Plan progress and will further extend the deadline, as necessary to complete the Review Plan reviews, up to February 19, 2026.

Several issues and factors caused delays that are expected to prevent EPA from completing its review within the five-year period. Firstly, the volume of claims is significant. EPA received and is reviewing CBI claims for the specific chemical identity of more than 4,805 chemical substances in 5,787 submissions under the Review Plan. At the same time, the Agency is maintaining its CBI review program for new CBI claims under TSCA section 14(g). This involves reviewing numerous and varied types of TSCA submissions, containing a wide array of CBI claims of differing complexity. The Agency receives approximately 600 submissions with multiple CBI claims requiring review under TSCA section 14(g) each year. Also concurrent with these CBI review activities, EPA is processing denied and withdrawn CBI claims for chemical identity so that those chemical identities may be disclosed on the public portion of the TSCA Inventory, consistent with the requirements of TSCA sections 8(b) and 14.

Secondly, adapting the Agency's information technology (IT) systems to complete these reviews has presented issues and contributed to delays as part of processing the voluminous amount of CBI claims. For example, in its reviews, EPA observed duplication of and inconsistencies between confidentiality claims for the same chemicals across and between submissions. Limitations with existing IT tools have made identifying and resolving such issues a largely manual process, which consumes resources and delays Agency reviews. In addition, the size (*i.e.,* very large file size) and other features of certain submissions have caused IT difficulties that have halted the CBI review process for more than six months and these issues have not yet been resolved as available resources have been prioritized to address more critical IT needs.

Finally, EPA could not start its Review Plan reviews until after a delay of approximately six months to a year as a result of the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Environmental Defense Fund* v. *EPA,* 922 F.3d 446 (D.C. Cir. 2019). The Court's decision meant that any company who had voluntarily provided substantiation in their initial Notice of Activity filing (mostly made in 2018) had to ensure those prior submissions included information regarding reverse engineering (generally by answering two additional substantiation questions), and that EPA had to provide a reporting period for doing so prior to beginning any Review Plan reviews. EPA published a supplement to the proposed Review Plan rule to address the Court's decision on November 8, 2019 (84 FR 60363 (FRL–10001–44)). The final rule required substantiation or supplemental substantiation by November 2020 (see 40 CFR 710.47). The additional reporting requirement created confusion among some reporting entities, the resolution of which has further slowed the review process.

These issues and factors together justify extending the review period deadline by at least one year, consistent with TSCA section 8(b)(4)(E)(ii)(I).

Authority: 15 U.S.C. 2607(b).

Dated: January 18, 2024.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2024–01351 Filed 1–23–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2023–0240; FRL–10973–01–ORD]

Scientific Integrity Policy Draft for Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is announcing a 30-day public comment period on the draft updates to its Scientific Integrity (SI) Policy. In accordance with the requirements of the 2021 *Presidential Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-based Policymaking,* EPA is revising our SI Policy. The updated SI Policy will adopt a new Federal definition of scientific integrity and meaningfully strengthen several policy elements that will help ensure a culture of scientific integrity at the Agency. It will incorporate the model scientific integrity policy from the National Science and Technology Council's *A Framework for Federal Scientific Integrity Policy and Practice* (2023), lessons learned over the years, and the results of previous surveys of EPA staff on scientific integrity.

DATES: The 30-day public comment period begins January 24, 2024 and ends February 23, 2024. Comments must be received on or before February 23, 2024 to be considered by EPA.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–ORD–2023–0240, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Research and Development Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m. to 4:30 p.m., Monday through Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this action. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For information on the public comment period, contact the ORD Docket at the EPA Headquarters Docket Center; telephone: 202–566–1752; facsimile: 202–566–9744; or email: *Docket_ORD@epa.gov.* For technical information on the draft guidelines or information on the public comment period, contact Dr. Francesca Grifo, via email at: *grifo.francesca@epa.gov;* or via phone/voicemail at 202–657–8575.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Written Comments: Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2023–0240, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received

to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). Please visit *https://www.epa.gov/dockets/commenting-epa-dockets* for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

II. Background

EPA issued its first Scientific Integrity Policy in 2012 and the Agency appointed its first full time Scientific Integrity Official (SIO) in 2013 based on requirements in both the *2009 Scientific Integrity Presidential Memorandum* and the *2010 Office of Science and Technology Policy (OSTP) Presidential Memorandum on Scientific Integrity.* Those documents together with the *2021 Presidential Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-based Policymaking* guided the draft updates of the 2023 Scientific Integrity (SI) Policy. The draft updates are derived from these documents, the collective experience of Federal agencies, and the informed engagement of stakeholders both inside and outside of government captured in the actions of the 2022 National Science and Technology Council Scientific Integrity Fast Track Action Committee and their report, *Protecting the Integrity of Government Science (SI–FTAC Report)* and the National Science and Technology Council 2023 *A Framework for Federal Scientific Integrity Policy and Practice.*

The draft SI Policy updates include but are not limited to the adoption of a new Federal definition of scientific integrity as well as the introduction and clarification of roles and responsibilities, such as the new role of the EPA Chief Scientist. In addition, the draft policy updates will significantly strengthen several policy elements (*e.g.,* protecting scientific processes, reviewing science, ensuring the free flow of scientific information, supporting decision making processes, ensuring accountability, etc.) that will help ensure a culture of scientific integrity at the Agency.

III. How will comments be used?

EPA values external knowledge and experience with scientific integrity and looks forward to comments pertaining to policy content. Public comment received on the SI Policy will be reviewed and considered to be incorporated into or modify text in the final revised SI Policy. The final revised SI Policy will undergo internal EPA review and revision and be posted on EPA's website.

Maureen R. Gwinn,

EPA Chief Scientist.

[FR Doc. 2024–01313 Filed 1–23–24; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

[Docket No. FMC–2024–0003]

Informal Public Hearing on the Impact of Current Conditions in the Red Sea and Gulf of Aden Regions

AGENCY: Federal Maritime Commission.

ACTION: Notice of informal public hearing and request for information.

SUMMARY: The Federal Maritime Commission will hold an informal public hearing on February 7, 2024, and continuing February 8, 2024, if needed, to examine how conditions in the Red Sea and Gulf of Aden regions are impacting commercial shipping and global supply chains. At this hearing, the Commission will hear from stakeholders in the supply chain on how operations have been disrupted by attacks on commercial shipping, steps taken in response to these events, and the resulting effects.

DATES: The informal public hearing will be held on February 7, 2024, beginning at 10 a.m. EST, and continuing February 8, 2024, at 10 a.m. EST, if needed. This hearing will be open for public attendance and will be streamed live. Stakeholders who wish to present testimony at the hearing must send a request to testify by email addressed to *secretary@fmc.gov* and received no later than 5 p.m. EST on January 31, 2024. Submission of written testimony by hearing stakeholders is optional; any such written testimony, and written comments by any other interested persons, must be submitted to the Commission by email at *secretary@fmc.gov* and received no later than 5 p.m. EST on January 31, 2024.

ADDRESSES: The informal public hearing will be held in the Hearing Room at the Surface Transportation Board, 395 E Street SW, Washington, DC 20423, and will be streamed live. All requests to present testimony at the hearing, and submissions of written testimony and comments for the hearing should be addressed to the Commission and emailed to *secretary@fmc.gov.*

FOR FURTHER INFORMATION CONTACT: David Eng, Secretary; Phone: (202) 523–5725; Email: *secretary@fmc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Commission will hold an informal public hearing to examine how conditions in the Red Sea and Gulf of Aden regions are impacting commercial shipping and global supply chains. The hearing will allow stakeholders in the supply chain to communicate with the Commission regarding how operations have been disrupted by attacks on commercial shipping, steps taken in response to these events, and the resulting effects. In addition, the hearing will allow the Commission to gather information and identify any new issues related to these disruptions that might be subject to Commission statutes and regulations.

The hearing will be held on February 7, 2024, beginning at 10 a.m. EST, and continuing February 8, 2024, at 10 a.m. EST, if needed, in the Hearing Room at the Surface Transportation Board. This hearing will be open for public attendance and will also be streamed live. More information about accessing the live stream will be posted on the Commission's web page at *www.fmc.gov.* If technical issues prevent the Commission from streaming live, the Commission will post a recording of the meeting as soon as possible on the Commission's web page at *www.fmc.gov.* Any person wishing to attend the hearing in person should report to the Surface Transportation Board with enough time to clear building security procedures before the scheduled start time.

II. Public Participation at the Hearing

How do I participate at the hearing?

This hearing will be open for public attendance and will also be streamed live. Stakeholders who wish to present testimony at the hearing must send a request to testify by email addressed to *secretary@fmc.gov* and received no later than 5 p.m. EST on January 31, 2024. The request should include the name, company name and job title, street address, email address, phone number of the requester, a summary of how operations have been disrupted by attacks on commercial shipping, steps

taken in response to these events, and the resulting effects, as applicable. Testifying stakeholders must appear at the hearing in person; there is no virtual option for presentations.

There may not be sufficient time for all interested stakeholders to present testimony, and the Commission will notify stakeholders selected to testify no later than February 2, 2024. To ensure a diversity of views and perspectives from vessel-operating common carriers and shippers, the Commission may also extend invitations to testify. The panels and stakeholders selected to testify will be announced at a later date on the Commission's web page at *www.fmc.gov.*

III. Written Testimony and Comment

How do I submit written testimony or a comment for the hearing?

Any person wishing to submit written testimony or a comment for the hearing must submit their testimony or comment to the Commission by email at *secretary@fmc.gov* and received no later than 5 p.m. EST on January 31, 2024.

What will the Commission do with my written testimony or comment?

All written testimony and comments received will be posted without change, including any personal information provided, at *https://www.regulations.gov,* and will be included in the record and made available to the public. Please do not include personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed.

How do I submit confidential information?

The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If you would like to request confidential treatment of any written testimony or comment, you must submit the following, by email, to *secretary@fmc.gov:*

- A transmittal letter requesting confidential treatment that identifies the specific information in the written testimony or comment for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your written testimony or comment, consisting of the complete filing with a cover page marked ''Confidential-Restricted,'' and the confidential material clearly marked on each page.
- A public version of your written testimony or comment with the confidential information excluded. The public version must state ''Public Version—confidential materials excluded'' on the cover page and on each affected page and must clearly indicate any information withheld.

How can I read written testimony and comments submitted by others?

You may read the written testimony and comments received by the Commission at *www.regulations.gov* under Docket No. FMC–2024–0003.

Alanna Beck,

Federal Register Alternate Liaison Officer, Federal Maritime Commission.

[FR Doc. 2024–01354 Filed 1–23–24; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, 800 North Capitol Street, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**, and the Commission requests that comments be submitted within 7 days on agreements that request expedited review. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012486–001.

Agreement Name: Crowley/King Ocean Vessel Sharing Agreement.

Parties: Crowley Latin America Services, LLC; King Ocean Services Limited, Inc.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The Amendment revises Article 8 to extend the duration of the Agreement.

Proposed Effective Date: 3/4/2024.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/2005.

Agreement No.: 201416.

Agreement Name: CMA CGM to ONE USEC—Caribbean—WCSA Space Charter Agreement.

Parties: CMA CGM S.A.; Ocean Network Express Pte. Ltd.

Filing Party: Draughn Arbona; CMA CGM S.A.

Synopsis: The Agreement authorizes CMA CGM to charter space to ONE in the trade between Colombia, Ecuador, Peru, Chile on the one hand, and the U.S. East Coast on the other hand.

Proposed Effective Date: 1/18/2024.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/86542.

Dated: January 19, 2024.

Alanna Beck,

Federal Register Alternate Liaison Officer, Federal Maritime Commission.

[FR Doc. 2024–01339 Filed 1–23–24; 8:45 am]

BILLING CODE 6730–02–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 February 8, 2024.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri, 64198–0001. Comments can also be sent electronically to *KCApplicationComments@kc.frb.org:*

1. *Patrick Kenner, Hebron, Nebraska;* a member of the Kenner Family Group, to retain additional voting shares of

Thayer Agency, Inc., and thereby indirectly retain additional voting shares of Thayer County Bank, both of Hebron, Nebraska. In addition, Rebecca Schure, Omaha, Nebraska, to become a member of the Kenner Family Group, to retain voting shares of Thayer Agency, Inc., and thereby indirectly retain voting shares of Thayer County Bank.

Board of Governors of the Federal Reserve System.

Ann Misback,

Secretary of the Board.

[FR Doc. 2024–01348 Filed 1–23–24; 8:45 am]

BILLING CODE P

OFFICE OF GOVERNMENT ETHICS

Agency Information Collection Activities; Proposed Collection; Comment Request; Electronic Public Financial Disclosure Extension Request

AGENCY: Office of Government Ethics (OGE).

ACTION: Notice and request for comments.

SUMMARY: The Office of Government Ethics (OGE) seeks comment on the development of a new module allowing filers to request an extension of the time available to file a public financial disclosure report within its *Integrity* electronic filing system. This notice announces that OGE intends to submit this collection to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act.

DATES: Consideration will be given to all written comments received by March 25, 2024.

ADDRESSES: Comments may be submitted to OGE by the following methods:

Email: usoge@oge.gov (Include reference to ''Extension Module PRA Comment'' in the subject line of the message.)

Mail: Office of Government Ethics, 250 E Street SW, Suite 750, Washington DC 20024–3249, Attention: Jennifer Matis, Associate Counsel.

Instructions: Comments may be posted on OGE's website, *www.oge.gov*. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Jennifer Matis at the U.S. Office of Government Ethics; telephone: 202–482–9216; TTY: 800–877–8339; Email: *jmatis@oge.gov*.

SUPPLEMENTARY INFORMATION:

Title: Electronic Public Financial Disclosure Extension Request.

Abstract: The *Integrity* Public Financial Disclosure Extension Request will be a module within OGE's *Integrity* electronic filing application. Certain officers and high-level employees in the executive branch are required to file public financial disclosure reports via the OGE Form 278e and OGE Form 278–T for the purpose of conflict of interest review and public disclosure. The form is also completed by individuals who are nominated by the President for high-level executive branch positions requiring Senate confirmation and individuals entering into and departing from other public reporting positions in the executive branch.

In 2014, OGE sought and received approval to incorporate the OGE Form 278e into its *Integrity* electronic filing application. *Integrity* has been in use since January 1, 2015, and most public financial disclosure filers now use *Integrity* to file the OGE Form 278e and OGE Form 278–T. Although *Integrity* is primarily used by current executive branch federal employees, it is also used to file termination reports by certain filers who have recently left government service.

The proposed module within *Integrity* will allow filers to easily request an extension of time to file their report. The module can be ''turned on'' by the filers' reporting agency, or the agency may choose not to use it. Requests for extensions are currently made by calling or emailing the filer's agency ethics official and require that the filer provide a reason for requesting an extension. The ethics official can then manually enter the number of days granted into *Integrity* and those days will be displayed on the cover page of the printed report, which is made public in accordance with 5 U.S.C. 13107. If the extension was granted because the filer is in a combat zone, the reason for the extension is also noted on the report. Once the new feature is deployed and an agency chooses to enable the feature, their filers will request an extension through the *Integrity* module. The electronic extension request will then be presented within the *Integrity* application to the appropriate ethics official at the employing agency. If the ethics official grants the request, the required information will automatically appear on the filer's report as generated by the *Integrity* application.

OGE believes that many agencies will avail themselves of the option to use the new module. For those that do, automating this process will make it easier for both the filer and the agency ethics officials and will reduce the chance that required information will be omitted from the filer's report. The development of this feature has been ranked a high priority by the *Integrity* Advisory Council (IAC), which is comprised of a diverse group of agencies that have at least 90% of their financial disclosure filers utilizing the *Integrity* application. The IAC was established to advise OGE on proposed enhancements, improvements, and support services.

OMB Control Number: To Be Determined.

Type of Information Collection: New collection.

Type of Review Request: Regular.

Affected Public: Private citizens who file termination reports from such positions after their government service ends.

Estimated Annual Number of Respondents: 511.

Estimated Time per Response: 2 minutes.

Estimated Total Annual Burden: 17 hours.

Request for Comments: Public comment is invited specifically on the need for and practical utility of this information collection, the accuracy of OGE's burden estimate, the enhancement of quality, utility and clarity of the information collected, and the minimization of burden (including the use of information technology). Comments received in response to this notice will be summarized for, and may be included with, the OGE request for OMB approval under the Paperwork Reduction Act. The comments will also become a matter of public record.

Dated: January 18, 2024.

Shelley K. Finlayson,

Acting Director, U.S. Office of Government Ethics.

[FR Doc. 2024–01332 Filed 1–23–24; 8:45 am]

BILLING CODE 6345–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C.,

as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; NHLBI Mentored Patient-Oriented Research Study Section.

Date: February 29–March 1, 2024.

Time: 9:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Fungai Chanetsa, Ph.D., MPH, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 206–B, Bethesda, MD 20817, (301) 402–9394, *fungai.chanetsa@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 18, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–01296 Filed 1–23–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for licensing to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Ben Hurley at 240–669–5092, or *benjamin.hurley@nih.gov*. Licensing information may be obtained by communicating with the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rockville, MD 20852: tel. 301–496–2644. A signed Confidential Disclosure Agreement will be required to receive copies of unpublished information related to the invention.

SUPPLEMENTARY INFORMATION:

Hybridoma Cell Lines 2A4 and 5B12 Against Puromycin Description of Technology

Protein translation is a central cellular function attracting increasing attention from cell biologists as they integrate gene product specific information into a systems view of cellular function. Scientists at NIAID developed the puromycin-specific antibodies that allow for the specific detection of puromycin-containing nascent polypeptides via standard immunofluorescence or flow cytometry. The resulting ribopuromycylation method (RPM) localizes translation in cells and can be applied to any PMY-sensitive eukaryotic or prokaryotic cell to study the dynamics of protein synthesis at the cellular level and investigate translational processes. It can also be used *in vitro* or *in vivo* to measure the number of translating ribosomes using flow cytometry.

This technology is available for licensing for commercial development in accordance with 35 U.S.C. 209 and 37 CFR part 404, as well as for further development and evaluation under a research collaboration.

Potential Commercial Applications:

- Broad application for studying protein translation.

Competitive Advantages:

- This technology generates antibodies specific for puromycin that can be used to localize translating ribosomes in all cell types.

Development Stage:

- Research Materials

Inventors: Jonathan Yewdell, MD, Ph.D., Alexandre David, Ph.D., both of NIAID.

Publications: David A. Dolan BP, Hickman HD, Knowlton JJ, Clavarino G, Pierre P, Bennink JR, Yewdell JW. Nuclear translation visualized by ribosome-bound nascent chain puromycylation. J Cell Biol. 2012 Apr 2;197(1):45–57. doi: 10.1083/jcb.201112145. PMID: 22472439; PMCID: PMC3317795.

Also: PMID 29552591, 27385780, 25311127, 23229864.

Intellectual Property: HHS Reference No. E–003–2021.

Licensing Contact: To license this technology, please contact Ben Hurley at 240–669–5092, or *benjamin.hurley@nih.gov,* and reference E–003–2021.

Collaborative Research Opportunity: The National Institute of Allergy and Infectious Diseases is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize this technology. For collaboration opportunities, please contact Ben Hurley at 240–669–5092, or *benjamin.hurley@nih.gov.*

Dated: January 19, 2024.

Surekha Vathyam,

Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.

[FR Doc. 2024–01364 Filed 1–23–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Biobehavioral Processes.

Date: February 15, 2024.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jeanne M. McCaffery, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–594–3854, *jeanne.mccaffery@nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Chemical Biology and Probes Study Section.

Date: February 15–16, 2024.

Time: 10:00 a.m. to 8:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michael Eissenstat, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, (301) 435–1722, *eissenstatma@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Academic-Industrial Partnerships for Translation of Technologies.

Date: February 15–16, 2024.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jennifer Ann Sanders, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496–3553, *jennifer.sanders@nih.gov*.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Genetic Variation and Evolution Study Section.

Date: February 15–16, 2024.

Time: 10:00 a.m. to 8:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Hybrid Meeting).

Contact Person: Guoqin Yu, Ph.D,. Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1276, *guoqin.yu@nih.gov*.

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Social Sciences and Population Studies B Study Section.

Date: February 15–16, 2024.

Time: 10:30 a.m. to 9:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kate Fothergill, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3142, Bethesda, MD 20892, 301–435–2309, *fothergillke@mail.nih.gov*.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Neurobiology of Pain and Itch Study Section.

Date: February 20–21, 2024.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Anne-Sophie Marie Lucie Wattiez, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–4642, *anne-sophie.wattiez@nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group Health Promotion in Communities Study Section.

Date: February 20–21, 2024.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Helena Eryam Dagadu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3137, Bethesda, MD 20892, (301) 435–1266, *dagaduhe@csr.nih.gov*.

Name of Committee: Applied Immunology and Disease Control Integrated Review Group; Transmission of Vector-Borne and Zoonotic Diseases Study Section.

Date: February 20–21, 2024.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Haruhiko Murata, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–594–3245, *muratah@csr.nih.gov*.

Name of Committee: Biology of Development and Aging Integrated Review Group; Mechanisms of Cancer Therapeutics A Study Section.

Date: February 20–21, 2024.

Time: 9:00 a.m. to 8:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Careen K. Tang-Toth, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, (301)435–3504, *tothct@csr.nih.gov*.

Name of Committee: Oncology 1—Basic Translational Integrated Review Group; Cancer Genetics Study Section.

Date: February 20–21, 2024.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Juraj Bies, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4158, MSC 7806, Bethesda, MD 20892, 301 435 1256, *biesj@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 18, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–01290 Filed 1–23–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; NHLBI Single-Site and Pilot Clinical Trials Study Section.

Date: February 28–29, 2024.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: YingYing Li-Smerin, MD, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6705 Rockledge Drive, Room 207–P, Bethesda, MD 20892–7924, 301–827–7942, *lismerin@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 18, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–01295 Filed 1–23–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Skeletal Biology Structure and Regeneration Study Section.
Date: February 15–16, 2024.
Time: 9:00 a.m. to 7:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Yanming Bi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892, (301) 451–0996, *ybi@csr.nih.gov*.

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Imaging Guided Interventions and Surgery Study Section.
Date: February 15–16, 2024.
Time: 9:00 a.m. to 8:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Ella Fung Jones, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496–0777, *ella.jones@nih.gov*.

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Clinical Translational Imaging Science Study Section.
Date: February 15–16, 2024.
Time: 9:00 a.m. to 8:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Eleni Apostolos Liapi, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20817, (301) 867–5309, *eleni.liapi@nih.gov*.

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Interventions to Prevent and Treat Addictions Study Section.
Date: February 15–16, 2024.
Time: 9:00 a.m. to 7:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701, Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Izabella Zandberg, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–594–0359, *izabella.zandberg@nih.gov*.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neuronal Communications Study Section.
Date: February 15–16, 2024.
Time: 9:00 a.m. to 8:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Prithi Rajan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1042, *prithi.rajan@nih.gov*.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Chronic Dysfunction and Integrative Neurodegeneration Study Section.
Date: February 15–16, 2024.
Time: 9:30 a.m. to 8:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Bernard Rajeev, Srambical Wilfred, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1042, *bernard.srambicalwilfred@nih.gov*.

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Cellular Immunotherapy of Cancer Study Section.
Date: February 15–16, 2024.
Time: 9:30 a.m. to 6:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Shahana Majid, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 867–5309, *shahana.majid@nih.gov*.

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Innovations in Nanosystems and Nanotechnology Study Section.
Date: February 15–16, 2024.
Time: 9:30 a.m. to 7:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Joseph Thomas Peterson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–408–9694, *petersonjt@csr.nih.gov*.

Name of Committee: Interdisciplinary Molecular Sciences and Training Integrated Review Group; Enabling Bioanalytical and Imaging Technologies Study Section.
Date: February 15–16, 2024.
Time: 9:30 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Kenneth Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3218, MSC 7717, Bethesda, MD 20892, 301–435–0229, *kenneth.ryan@nih.hhs.gov*.

Name of Committee: Cell Biology Integrated Review Group; Biology and Development of the Eye Study Section.
Date: February 15–16, 2024.
Time: 10:00 a.m. to 8:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Robert O'Hagan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (240) 909–6378, *ohaganr2@csr.nih.gov*.

Name of Committee: Infectious Diseases and Immunology A Integrated Review Group; Pathogenic Eukaryotes Study Section.
Date: February 15–16, 2024.
Time: 10:00 a.m. to 8:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Jennifer Chien Villa, Ph.D., Scientific Review Officer, The Center for Scientific Review, The National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–496–5436, *jennifer.villa@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 17, 2024.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–01291 Filed 1–23–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Allergy, Immunology, and Transplantation Research Committee; Allergy, Immunology, and Transplantation Research Committee (AITC).

Date: February 8–9, 2024.

Time: 10:00 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, Room 3G51, Rockville, MD 20892 (Video Assisted Meeting).

Contact Person: Thomas F. Conway, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G51, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G51, Rockville, MD 20892, 240–507–9685, *thomas.conway@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 18, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–01288 Filed 1–23–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; 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 Nursing Research Initial Review Group.

Date: February 22–23, 2024.

Time: 9:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Canopy by Hilton, Washington, DC, Bethesda North, 940 Rose Avenue, North Bethesda, MD 20852 (Hybrid Meeting).

Contact Person: Joshua R. Wolff, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Nursing Research, NIH, 6701 Democracy Boulevard, Bethesda, MD 20817, (301) 793–5758, *josh.wolff@nih.gov.*

Name of Committee: National Institute of Nursing Research Special Emphasis Panel: Firearm Injury Prevention and Community Healthcare RFA Review Meeting.

Date: February 28, 2024.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Nursing Research, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Nisan Bhattacharyya, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Nursing Research, NIH, 6701 Democracy Boulevard, Suite 668, Bethesda, MD 20892, 301–451–2405, *nisan.bhattacharyya@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: January 17, 2024.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–01289 Filed 1–23–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; Clinical Trials Review Study Section.

Date: February 29, 2024.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Keary A. Cope, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 209–A, Bethesda, MD 20892–7924, (301) 827–7912, *copeka@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 18, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–01287 Filed 1–23–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Microbiology, Infectious Diseases and AIDS Initial Review Group; Microbiology and Infectious Diseases B Research Study Section Microbiology and

Infectious Diseases B Research Study Section.

Date: February 14–15, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bahia Resort Hotel, 998 West Mission Bay Drive, Shell Room, San Diego, CA 92109.

Contact Person: Mario Cerritelli, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, MSC 9823, Rockville, MD 20892, 240–669–5199, *cerritem@mail.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 18, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–01293 Filed 1–23–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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 Heart, Lung, and Blood Institute Special Emphasis Panel; Maximizing Opportunities for Scientific and Academic Independent Careers.

Date: February 23, 2024.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Giuseppe Pintucci, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 205–H, Bethesda, MD 20892, (301) 827–7969, *Pintuccig@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; NHLBI Program Project Applications (P01).

Date: February 28, 2024.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kazuyo Kegan, Ph.D., AB, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 208–T, Bethesda, MD 20892, (301) 402–1334, *kazuyo.kegan@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 18, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–01294 Filed 1–23–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; NHLBI Mentored Clinical and Basic Science Study Section.

Date: February 22–23, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rajiv Kumar, Ph.D., Chief, Office of Scientific Review/DERA National Heart, Lung, and Blood Institute, 6705 Rockledge Drive, Room 208–W, Bethesda, MD 20892, (301) 827–4612, *rajiv.kumar@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 18, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–01292 Filed 1–23–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–NCTC–2023–N059; FXGO16610900600–234–FF09X35000; OMB Control Number 1018–0176]

Agency Information Collection Activities; Submission to the Office of Management and Budget; Native Youth Climate Adaptation Leadership Congress

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service (Service), are proposing to renew an information collection with revisions.

DATES: Interested persons are invited to submit comments on or before February 23, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be submitted within 30 days of publication of this notice at *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or by email to *Info_Coll@fws.gov.* Please reference ''1018–0176'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Madonna L. Baucum, Service Information Collection Clearance Officer, by email at *Info_Coll@fws.gov,* or by telephone at (703) 358–2503. Individuals in the United States who are

deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act (PRA, 44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

On March 10, 2023, we published in the **Federal Register** (88 FR 15063) a notice of our intent to request that OMB approve this information collection. In that notice, we solicited comments for 60 days, ending on May 9, 2023. In an effort to increase public awareness of, and participation in, our public commenting processes associated with information collection requests, the Service also published the **Federal Register** notice on *Regulations.gov* (Docket FWS–HQ–NCTC–2023–0007) to provide the public with an additional method to submit comments (in addition to the typical *Info_Coll@fws.gov* email and U.S. mail submission methods). We did not receive any comments in response to that notice.

On August 18, 2023, we published in the **Federal Register** (88 FR 56644) a notice to extend the comment period for this renewal. In that notice, we solicited comments for an additional 60 days, ending on October 17, 2023. We also published that **Federal Register** notice on *Regulations.gov* (reopening the comment period in the original Docket No. FWS–HQ–NCTC–2023–0007) to provide the public with an additional opportunity to submit comments (in addition to the typical *Info_Coll@fws.gov* email and U.S. mail submission methods). We received one comment, which did not address the information collection requirements. No response to that comment is required.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. 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 can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The Service offers eligible Native American, Alaska Native, Native Hawaiian, and Pacific Islander high school students the opportunity to apply for the Native Youth Climate Adaptation Leadership Congress (Congress). The mission of the Congress is to develop future conservation leaders with the skills, knowledge, and tools to address environmental change and conservation challenges to better serve their schools and home communities. The Congress supports and operates under the following authorities:

- Executive Order (E.O.) 13175, ''Consultation and Coordination With Indian Tribal Governments'' (November 6, 2000);
- E.O. 13515, ''Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs'' (October 14, 2009);
- E.O. 13592, ''Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities'' (December 2, 2011);
- Public Law 116–9, Section 9003, ''John D. Dingell, Jr. Conservation, Management, and Recreation Act'' (March 12, 2019);
- 16 U.S.C. 1727b, Indian Youth Service Corps;
- White House Memorandum on Government-to-Government Relationships with Tribal Governments (September 23, 2004);
- Secretary's Order (S.O.) 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' issued jointly by the Department of the Interior and the Department of Commerce (June 5, 1997);
- S.O. 3317, ''Department of the Interior Policy on Consultation with Indian Tribes'' (December 1, 2011);
- S.O. 3335, ''Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries'' (August 20, 2014); and
- The Service's Native American Policy (510 FW 1), published January 20, 2016.

The following Federal partners assist and support the Service's administration of the Congress:

- The U.S. Department of the Interior—

—Bureau of Indian Affairs;
—Bureau of Land Management;
—National Park Service; and
—United States Geological Survey;

- The U.S. Department of Agriculture—U.S. Forest Service;
- The U.S. Department of Commerce—National Oceanic and Atmospheric Administration;
- The Federal Emergency Management Agency;
- The National Aeronautics and Space Administration; and
- The Environmental Protection Agency.

The weeklong environmental Congress fosters an inclusive and meaningful educational opportunity for aspiring Indigenous youth leaders interested in addressing environmental issues facing Native American, Alaska Native, and Pacific Islander communities. Eligible students—representing a diverse mix of Indigenous communities from various geographic locations, both urban and rural—compete for the opportunity to represent their communities from across the country. The students learn about environmental change and conservation while strengthening their leadership skills for addressing conservation issues within their own communities.

Through a cooperative agreement with the New Mexico Wildlife

Federation (NMWF), the Service solicits and evaluates applications from eligible students interested in applying for the program. The NMWF notifies successful applicants and arranges all travel for them. Information collected from each applicant via an online application administered by the NMWF includes:

- Applicant's full name, contact information, date of birth, and Tribal/community affiliation;
- Emergency contact information for applicant;
- Name and contact information of applicant's mentor;
- Applicant's school name and address;
- Applicant's current grade in school;
- Applicant's participation in extracurricular activities, school clubs, or community organizations;
- Applicant's volunteer experience; and
- Applicant's accomplishments or awards received.

Each applicant provides essay responses to questions concerning topics such as environmental issues affecting their home/Tribal community, how or whether the environmental issues are addressed, and/or how, as a Native youth leader, they can lead the community in adapting to a changing environment.

In addition to the online application form, the Service uses following forms in conjunction with the Congress:

- Form 3–2525, ''Native Youth Climate Adaptation Leadership Congress Student Medical Information''—collects the following information:

—Student's full name and preferred name;
—Date of birth;
—Age;
—Health insurance policy information;
—Medication information, to include dose and frequency;
—Drug and/or food sensitivities/allergies;
—Medications and immunizations; and
—Pre-existing condition(s).

- Form 3–2546, ''Enrollment Form''—collects the following information:

—Applicant's full name, address, and contact information;
—Parent/guardian name and contact information;
—Student's age, date of birth, and gender;
—Student's high school year;
—Student's high school name, address, and contact information; and
—Chaperone name.

- Form 3–2547, ''Parental Consent Form''—collects the following information:

—Name of student and date of birth;
—Student address, school, grade, and contact information; and
—Student's physician name, address, and contact information.

- Form 3–2548, ''Student Conduct Agreement''—collects the following information:

—Student's full name and preferred name;
—Student signature and signature date; and
—Parent/guardian name, signature, and signature date.

- Form 3–2549, ''Mentor Waiver''—collects the following information:

—Mentor name;
—Mentor signature and signature date;
—Emergency contact name and contact number.

We require successful students to provide basic medical information so that we can assure their health and safety while on site at the National Conservation Training Center. The on-site nurse keeps this information strictly confidential, for use only in an emergency.

Proposed Revisions

With this submission, the Service proposes the following new and revised requirements to the currently approved information collection:

1. (Revision) *Student Enrollment Information Form* (Form 3–2546)—We propose to revise Form 3–2546, Student Enrollment Information Form, to expand options for providing gender identity.

2. (New) *Travel Information* (Form 3–2570)—We propose to add Form 3–2570, Travel Information, which collects travel and personal identification information for students attending the Congress. This new form will collect the following information:

- Name, contact information, date of birth, and group/school/community name for chaperone;
- Identifying information for groups' participants, to include name, date of birth, phone number, and gender (required by airline);
- Airport information;
- Special travel needs;
- Address for travel stipend payments; and
- Additional comments or questions.

3. (New) *Junior Faculty Competitive Nomination Form* (Form 3–2571)—We propose to add Form 3–2571, Junior Faculty Competitive Nomination Form, which collects nominee information, to include name, address, email, phone number, affiliated organization (sponsoring organization information), and a copy of the nominee's resume. We also ask the college-aged junior faculty to complete a Competitive Nomination Form (as part of the review and selection process). The Junior Faculty Competitive Nomination Form collects the following information:

- Student's full name;
- Student's Tribal affiliation;
- Student's phone number;
- Student's email address;
- Student's affiliated/sponsoring organization; and
- Affiliated/sponsoring organization address.

The Junior Faculty Competitive Nomination Form also includes the following four questions, which allow applicants to describe their interest in being nominated for the program:

- What are strengths that you can bring to share with the other junior faculty and larger Congress community?
- How do you hope to grow by participating in Congress?
- What would you like to learn or what opportunities are you looking for?
- What change do you hope to make or impact do you hope to have in your home community?

4. (New) *Adult Enrollment and Emergency Contact Form* (Form 3–2572)—We propose to add Form 3–2572, Adult Enrollment and Emergency Contact Form, which collects emergency contact information, should an event occur where we need to contact outside individuals related to the participant. We also ask the college-aged Junior Faculty to complete a Competitive Nomination Form (as part of the review and selection process) and an Adult Enrollment and Emergency Information Form once selected. The Adult Enrollment and Emergency Contact Form collects the following information (once the student has been accepted):

- Student's full name and preferred name/nickname;
- Student's full home address;
- Student's email address;
- Student's phone number;
- Student's affiliated/sponsoring organization's name and POC;
- Affiliated/sponsoring organization's address;
- Affiliated/sponsoring organizational POC's phone number and email;
- Student's nearest airport (for travel coordination);
- Student's person to notify in case of emergency;
- Student's person to notify phone number and email; and
- Additional information to be aware of (open ended).

5. (Revision) Update to Title of Collection—We updated the title of the collection to ''Native Youth Climate

Adaptation Leadership Congress'' (previously ''Native Youth Community Adaptation and Leadership Congress'').

Title of Collection: Native Youth Climate Adaptation Leadership Congress.

OMB Control Number: 1018–0176.

Form Numbers: Forms 3–2525, 3–2546 through 3–2549, and 3–2570 through 3–2572.

Type of Review: Revision of a currently approved information collection.

Respondents/Affected Public: Eligible high school or college students interested in applying for the program.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

Requirement	Average number of annual responses	Average completion time per response	Estimated annual burden hours
NYCALC Application (Online)	105	4 hours	420
Form 3–2525, Student Medical Information	100	30 Mins	50
Form 3–2546, Student Enrollment Information	100	18 Mins	30
Form 3–2547, Parental Consent Form	100	12 Mins	20
Form 3–2548, Student Conduct Agreement	100	12 Mins	20
Form 3–2549, Mentor Waiver	30	12 Mins	6
Form 3–2570, Travel Form *(NEW)*	100	20 Mins	33
Form 3–2571, Jr. Faculty Competitive Nomination Form *(NEW)*	100	20 Mins	33
Form 3–2572, Enrollment and Emergency Contact Information *(NEW)*	100	10 Mins	17
Totals:	835		629

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2024–01340 Filed 1–23–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_OR_FRN_MO4500177026]

Notice of Public Meeting for the Southeast Oregon Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management's (BLM's) Southeast Oregon Resource Advisory Council (RAC) will meet as follows.

DATES: The Southeast Oregon RAC will meet on March 12–13, 2024, and June 11–12, 2024. The March 12 meeting will be from 9 a.m. to 4:30 p.m. Pacific Time (PT) with a 30-minute public comment period offered at 3:45 p.m. PT, and the March 13 meeting will be from 9 a.m. to 12 p.m. PT, with a 30-minute public comment period offered at 10:45 a.m. PT. The June 11 meeting will be from 9 a.m. to 4:30 p.m. PT with a 30-minute public comment period offered at 3:45 p.m. PT, and the RAC will attend a field tour on June 12 from 9 a.m. to 12 p.m. PT to the National Historic Oregon Trail Interpretive Center.

ADDRESSES: The March meeting will be held in-person at the BLM Burns District Office, 28910 Highway 20 West, Hines, Oregon, 97738. The June 11 meeting will be held at the Four Rivers Cultural Center, 676 SW 5th Ave, Ontario, Oregon, 97914. The June 12 field tour will also commence and conclude at the Cultural Center. A virtual option will be offered for each meeting. Instructions for participating virtually, final agendas, and additional meeting details will be posted at least 10 days in advance of the meeting on the RAC's web page: *https://www.blm.gov/get-involved/resource-advisory-council/near-you/oregon-washington/southeast-oregon-rac.* Previous meeting minutes, membership information, and upcoming agendas are also available at this website.

Public comments can be mailed to the BLM Lakeview District Office, Attn: Lisa McNee, 1301 South G Street, Lakeview, OR 97630 or sent via email to *lmcnee@blm.gov.* All comments received will be provided to the Southeast Oregon RAC members.

FOR FURTHER INFORMATION CONTACT: Lisa McNee, Public Affairs Officer, 1301 South G Street, Lakeview, OR 97630; (541) 219–9180; *lmcnee@blm.gov.* Individuals in the United States who are deaf, blind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their countries to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The Southeast Oregon RAC is chartered, and the 15 members are appointed by the Secretary of the Interior. Their diverse perspectives represent commodity, non-commodity, and local interests. The RAC serves in an advisory capacity to BLM and U.S. Forest Service officials concerning planning and management of public lands and national forest resources located, in whole or part, within the boundaries of the BLM's Vale, Burns, and Lakeview Districts and the Fremont-Winema and Malheur National Forests. All meetings are open to the public in their entirety. Information to be distributed to the RAC is requested before the start of each meeting.

Agenda topics for the March 12 and 13 meetings will include District updates; updates on the Lakeview Resource Management Plan (RMP) Amendment and the aquatic and riparian restoration programmatic environmental assessment; and presentations on wild horse and burro management, mining and minerals, grazing, fire, and recreation.

Agenda topics for the June 11 meeting will include a presentation on Habitat Connectivity, fire, and grazing, and updates on the Lakeview RMP Amendment and the Programmatic Solar Environmental Impact Statement. The RAC will participate in a field tour on June 12 to the National Historic Oregon Trail Interpretive Center.

Members of the public are welcome on the field tour but must provide their

own transportation and meals. Individuals who plan to attend must RSVP to the BLM Lakeview District Office at least 2 weeks in advance of the field tour to the contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Meeting Accessibility/Special Accommodations: For sign language interpreter services, assistive listening devices, or other reasonable accommodations, please contact Lisa McNee, Lakeview District BLM (see **FOR FURTHER INFORMATION CONTACT**) at least 7 business days before the meeting to ensure there is sufficient time to process the request. The Department of the Interior manages accommodation requests on a case-by-case basis.

Public comments can be submitted as described under the **ADDRESSES** section of this notice. Before including your address, phone number, email address, or other personal identifying information in your comments, please be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee we will be able to do so.

(Authority: 5 U.S.C. ch. 10)

Jeffrey Rose,

Burns District Manager.

[FR Doc. 2024–01273 Filed 1–23–24; 8:45 am]

BILLING CODE 4331–24–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[Docket ID BSEE–2023–0007; EEEE500000 234E1700D2 ET1SF0000.EAQ000; OMB Control Number 1014–0018]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Oil and Gas Drilling Operations

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Bureau of Safety and Environmental Enforcement (BSEE) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before February 23, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to Nikki Mason, BSEE ICCO, 45600 Woodland Road, Sterling, VA 20166; or by email to *nikki.mason@bsee.gov.* Please reference OMB Control Number 1014–0018 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Nikki Mason by email at *nikki.mason@bsee.gov,* or by telephone at (703) 787–1607. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice (88 FR 39463) with a 60-day public comment period soliciting comments on this collection of information was published on June 16, 2023. No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The BSEE uses the information to ensure safe drilling operations and to protect the human, marine, and coastal environment. Among other things, BSEE specifically uses the information to ensure: the drilling unit is fit for the intended purpose; the lessee or operator will not encounter geologic conditions that present a hazard to operations; equipment is maintained in a state of readiness and meets safety standards; each drilling crew is properly trained and able to promptly perform well-control activities at any time during well operations; compliance with safety standards; and the current regulations will provide for safe and proper field or reservoir development, resource evaluation, conservation, protection of correlative rights, safety, and environmental protection. We also review well records to ascertain whether drilling operations have encountered hydrocarbons or H2S and to ensure that H2S detection equipment, personnel protective equipment, and training of the crew are adequate for safe operations in zones known to contain H2S and zones where the presence of H2S is unknown.

This ICR includes three forms. The forms use and information consist of the following:

End of Operations Report, BSEE–0125

This information is used to ensure that industry has accurate and up-to-date data and information on wells and leasehold activities under their

jurisdiction and to ensure compliance with approved plans and any conditions placed upon a suspension or temporary probation. It is also used to evaluate the remedial action in the event of well equipment failure or well control loss. The Form BSEE–0125 is updated and resubmitted in the event the well status changes. In addition, except for proprietary data, BSEE is required by the OCS Lands Act to make available to the public certain information submitted on BSEE–0125.

Information on the form:

Heading—ascertain the well name, status of completion/abandonment, and operator name.

Well at Total Depth—ascertain the lease No., area name, block No., and the latitude/longitude at total depth.

Well Status Information—ascertain well status data and measured/true vertical depth of the well.

Well at Producing Zone—ascertain the location and latitude/longitude of the producing zone.

Perforated Interval(s) This Completion—ascertain well measured/true vertical depth at the top and bottom of intervals perforated for production.

Hydrocarbon Bearing Intervals—identify the top and bottom of hydrocarbon bearing intervals penetrated by the well and the type hydrocarbon (oil/gas) present.

List of Significant Markers Penetrated—to make structural correlations, in conjunction with seismic data, with other wells drilled in the area. Anticipated marker areas not penetrated (*i.e.,* not present) also provide valuable reservoir information.

Subsea Completion—Identify wells that are completed with the wellhead (tree) at the ocean floor (mud line). This data is needed to ascertain that the wellhead is protected from being damaged and that the location is marked with a buoy.

Abandonment History of Well (Casing & Obstruction)—ensure that, upon permanent plugging, the casing is cut and removed to an elevation below the ocean floor (mud line) to eliminate any hazard to navigation (fishing, trawling) unless otherwise protected and/or the location marked with a buoy.

Well Activity Report, BSEE–0133 and –0133S

The BSEE uses this information to monitor the conditions of a well and status of drilling operations. We review the information to be aware of the well conditions and current drilling activity (*i.e.,* well depth, drilling fluid weight, casing types and setting depths, completed well logs, and recent safety equipment tests and drills). The engineer uses this information to determine how accurately the lessee anticipated well conditions and if the lessee or operator is following the other approved forms that were submitted. With the information collected on BSEE–0133 available, the reviewers can analyze the proposed revisions (*e.g.,* revised grade of casing or deeper casing setting depth) and make a quick and informed decision on the request.

In addition, except for proprietary data, BSEE is required by the OCS Lands Act to make available to the public certain information submitted on Forms BSEE–0133 and –0133S.

BSEE–0133

General Information—Identifies the well name, lease operator, name of the contractor and rig or unit conducting drilling or remedial work, the water depth and the elevation.

Current Well Bore Information—This information is used to identify the well, surface location, and dates operations are initiated and concluded. Also identified is the bottom hole location, measured and true vertical depth of the well, drilling fluid (mud) weight, and blowout preventer test information needed to evaluate approval or modification applications to ensure safety and environmental protection.

Well Bore Historical Information—Identifies the dates drilling is initiated and completed or the well is abandoned, and final measured and true vertical depths reached. This information is needed to evaluate modification applications to ensure safety and protection of the environment.

Casing/Liner/Tubing Record—Identifies casing/liner/tubing hole size, pipe size, weight, grade, test pressures, setting depths, and cement volumes. This information is used to evaluate modification applications and to ascertain that operations are conducted in a safe manner as approved.

Well Activity Summary—This narrative summary provides the details of daily operations needed to confirm that operations are being conducted consistent with approved plans.

Open Hole Log Date—Serves to identify whether open hole logs, formation samples and surveys have been conducted so as to trigger the submittal of Form BSEE–0133S.

Significant Well Events—Serves to identify significant events, hazards or problems encountered during well operations and to provide narrative information detailing those events which occurred. BSEE needs this information in the assessment and approval of other well operations in the area that may encounter the same or similar hazards, risks or problems. Provides narrative information concerning any significant events. Attachments may be required, if necessary.

BSEE–0133S

General Information—Identifies the well number/name, operator name, sidetrack/bypass number, and contact name/telephone/email.

Open Hole Tools, Mud Logs, and Directional Surveys—Identifies the dates and types of open hole operations, logs, tests, or surveys conducted; the service company(s) conducting the operations; and the top and bottom of those formations logged or surveyed. Serves as an inventory to ensure that BSEE receives the data from all open hole logs/tests/surveys conducted. Open hole data is utilized in the determination of oil and gas recoverable reserves and production limits. As permitted by the regulations, the data is also made available to the public.

Identify Other Open Hole Data Collection—Identifies the conduct of other specific analyses, samples and surveys and requires the narrative description of any other surveys conducted.

Title of Collection: 30 CFR 250, Subpart D, Oil and Gas Drilling Operations.

OMB Control Number: 1014–0018.

Form Number: Forms BSEE–0125, *End of Operations Report,* BSEE–0133, *Well Activity Report,* and BSEE–0133S *Supplemental.*

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Potential respondents include Federal OCS oil, gas, and sulfur lessees and/or operators and holders of pipeline rights-of-way.

Total Estimated Number of Annual Respondents: Currently there are approximately 555 Federal OCS oil, gas, and sulfur lessees and holders of pipeline rights-of-way. Not all the potential respondents will submit information in any given year, and some may submit multiple times.

Total Estimated Number of Annual Responses: 63,744.

Estimated Completion Time per Response: Varies from 15 minutes to 23 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 83,993.

Respondent's Obligation: Responses are mandatory.

Frequency of Collection: Submissions are generally on occasion, daily, weekly, monthly, quarterly, annually, and varies by section.

Total Estimated Annual Nonhour Burden Cost: $16,000.

An agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Kirk Malstrom,

Chief, Regulations and Standards Branch.

[FR Doc. 2024–01281 Filed 1–23–24; 8:45 am]

BILLING CODE 4310–VH–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[Docket ID BSEE–2023–0006; EEEE500000 245E1700D2 ET1SF0000.EAQ000; OMB Control Number 1014–0022]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; General

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Bureau of Safety and Environmental Enforcement (BSEE) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before February 23, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to Nikki Mason, BSEE ICCO, 45600 Woodland Road, Sterling, VA 20166; or by email to *nikki.mason@bsee.gov.* Please reference OMB Control Number 1014–0022 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Nikki Mason by email at *nikki.mason@bsee.gov,* or by telephone at (703) 787–1607. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on June 16, 2023 (88 FR 39467). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The BSEE uses the information collected under the Subpart A regulations to ensure that operations on the OCS are carried out in a safe and pollution-free manner, do not interfere with the rights of other users on the OCS, and balance the protection and development of OCS resources. Specifically, we use the information collected to:

- Review records of formal crane operator and rigger training, crane operator qualifications, crane inspections, testing, and maintenance to ensure that lessees/operators perform operations in a safe and workmanlike manner and that equipment is maintained in a safe condition. The BSEE also uses the information to make certain that all new and existing cranes installed on OCS fixed platforms must be equipped with anti-two block safety devices, and to assure that uniform methods are employed by lessees for load testing of cranes.
- Review welding plans, procedures, and records to ensure that welding is conducted in a safe and workmanlike manner by trained and experienced personnel.
- Provide lessees/operators greater flexibility to comply with regulatory requirements through approval of alternative equipment or procedures and departures to regulations if they demonstrate equal or better compliance with the appropriate performance standards.
- Ensure that injection of gas promotes conservation of natural resources and prevents waste.
- Record the agent and local agent empowered to receive notices and comply with regulatory orders issued.
- Provide for orderly development of leases using information to determine the appropriateness of lessee/operator requests for suspension of operations, including production.
- Improve safety and environmental protection on the OCS through collection and analysis of accident reports to ascertain the cause of the accidents and to determine ways to prevent recurrences.
- Ascertain when the lease ceases production or when the last well ceases production in order to determine the 180th day after the date of completion of the last production. The BSEE will use this information to efficiently maintain the lessee/operator lease status.
- Allow lessees/operators who exhibit unacceptable performance an

incremental approach to improving their overall performance prior to a final decision to disqualify a lessee/operator or to pursue debarment proceedings through the execution of a performance improvement plan (PIP). The Subpart A regulations do not address the actual process that we will follow in pursuing the disqualification of operators under §§ 250.135 and 250.136; however, our internal enforcement procedures include allowing such operators to demonstrate a commitment to acceptable performance by the submission of a PIP.

We will not be making any changes to the forms this renewal cycle.

The BSEE forms use and information consists of the following:

Form BSEE–0132, Hurricane and Tropical Storm Evacuation and Production Curtailment Statistics (GOMR)

• Be informed when there could be a major disruption in the availability and supply of natural gas and oil due to natural occurrences/hurricanes, to advise the U.S. Coast Guard (USCG) in case of the need to rescue offshore workers in distress, to monitor damage to offshore platforms and drilling rigs, and to advise the news media and interested public entities when production is shut-in and when resumed. The Gulf of Mexico OCS Region (GOMR) uses Form BSEE–0132, Hurricane and Tropical Storm Evacuation and Production Curtailment Statistics, for respondents to report evacuation statistics when necessary. This form requires the respondent to submit general information such as company name, contact, date, time, telephone number, as well as number of platforms and drilling rigs evacuated and not evacuated. We also require production shut-in statistics for oil (BOPD) and gas (MMSCFD).

Form BSEE–0143, Facility/Equipment Damage Report

• Assists lessees, lease operators, and pipeline right-of-way holders when reporting damage by a hurricane, earthquake, or other natural phenomenon. They are required to submit an initial damage report to the Regional Supervisor within 48 hours after completing the initial evaluation of the damage and then, subsequent reports, monthly and immediately, whenever information changes until the damaged structure or equipment is returned to service. Information on the form includes—instructions, general information, a description of the damage, an initial damage assessment, production rate at time of shut-in (BPD and/or MMCFPD), cumulative production shut-in (BPD and/or MMCFPD), and estimated time to return to service (in days).

Form BSEE–1832, Notification of Incident(s) of Noncompliance

• Determine that respondents have corrected all Incident(s) of Noncompliance (INCs), identified during inspections. Everything on the INC form is filled out by a BSEE inspector/representative. The only thing industry does with this form is sign the document upon receipt and respond to BSEE when each INC has been corrected, no later than 14 days from the date of issuance.

Title of Collection: 30 CFR part 250, subpart A, General.

OMB Control Number: 1014–0022.

Form Number: Form BSEE–0132, *Hurricane and Tropical Storm Evacuation and Production Curtailment Statistics (GOMR),* Form BSEE–0143, *Facility/Equipment Damage Report,* and Form BSEE–1832, *Notification of Incident(s) of Noncompliance.*

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Potential respondents include Federal OCS oil, gas, and sulfur lessees and/or operators and holders of pipeline rights-of-way.

Total Estimated Number of Annual Respondents: Currently there are approximately 555 Federal OCS oil, gas, and sulfur lessees and holders of pipeline rights-of-way. Not all the potential respondents will submit information in any given year, and some may submit multiple times.

Total Estimated Number of Annual Responses: 22,294.

Estimated Completion Time per Response: Varies from 30 minutes to 106 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 102,221.

Respondent's Obligation: Most responses are mandatory, while others are required to obtain or retain benefits, or voluntary.

Frequency of Collection: Submissions are generally on occasion, daily, monthly, and vary by section.

Total Estimated Annual Nonhour Burden Cost: $246,268.

An agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Kirk Malstrom,

Chief, Regulations and Standards Branch.

[FR Doc. 2024–01279 Filed 1–23–24; 8:45 am]

BILLING CODE 4310–VH–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[Docket ID BSEE–2023–0005; EEEE500000 245E1700D2 ET1SF0000.EAQ000; OMB Control Number 1014–0015]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Unitization

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Bureau of Safety and Environmental Enforcement (BSEE) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before February 23, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to Nikki Mason, BSEE ICCO, 45600 Woodland Road, Sterling, VA 20166; or by email to *nikki.mason@bsee.gov.* Please reference OMB Control Number 1014–0015 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Nikki Mason by email at *nikki.mason@bsee.gov,* or by telephone at (703) 787–1607. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may

also view the ICR at *http://www.reginfo.gov/public/do/PRAMain*.

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on June 16, 2023 (88 FR 39458). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: BSEE must approve any lessee's proposal to enter an agreement to unitize operations under two or more leases and for modifications when warranted. We use the information to ensure that operations under the proposed unit agreement will result in preventing waste, conserving natural resources, and protecting correlative rights including the government's interests.

Title of Collection: Unitization.

OMB Control Number: 1014–0015.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Potential respondents include Federal OCS oil, gas, and sulfur lessees and/or operators and holders of pipeline rights-of-way.

Total Estimated Number of Annual Respondents: Currently there are approximately 555 Federal OCS oil, gas, and sulfur lessees and holders of pipeline rights-of-way. Not all the potential respondents will submit information in any given year, and some may submit multiple times.

Total Estimated Number of Annual Responses: 79.

Estimated Completion Time per Response: Varies from 1 hour to 300 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 5,998.

Respondent's Obligation: Responses are voluntary, and some are required to obtain or retain benefits.

Frequency of Collection: Submissions are generally on occasion.

Total Estimated Annual Nonhour Burden Cost: $149,836.

BURDEN BREAKDOWN

Citation 30 CFR 250 subpart M	Recordkeeping and reporting requirement	Hour burden	Average number annual responses	Annual burden hours
		Non-hour cost burdens *		
1301	Description of requirements	Burden included in the following sections.		0
1300–1304	General departure and alternative compliance requests under subpart M regulations.	Burden covered under Subpart A [1014–0022].		0
1301(a), 1303	Apply for voluntary unitization, including submitting unit agreement, unit operating agreement, initial plan of operation, obtain approval of Regional Supervisor if required, and supporting data; request for variance from model agreement and other related requirements.	520	8 apps/plans	4,160
		$12,619 fee × 8 applications/plans = $100,952.		
1301(d), (f)(3), (g)(1), (g)(2) (ii).	Request suspension of production or operations	Burden covered under Subpart A [1014–0022].		0
1302(b)	Request preliminary determination on competitive reservoir	116	1 request	116
1302(b)	Submit concurrence or objection on competitiveness with supporting evidence.	47	1 request	47
1302(c), (d)	Submit joint competitive reservoir development program, supplemental plans, or a separate plan if agreement cannot be reached.	68	1 plan	68
1303; 1304	* Submit revisions or modifications to unit agreement, unit operating agreement, plan of operation, change of unit operator, etc.	10	54 revs/mods	540
		$896 fees × 54 revisions/modifications = $48,384.		
1303; 1304	* Submit initial, and revisions to participating area	76	10 submissions	760

BURDEN BREAKDOWN—Continued

Citation 30 CFR 250 subpart M	Recordkeeping and reporting requirement	Hour burden	Average number annual responses	Annual burden hours
		Non-hour cost burdens *		
1304(b)	Request compulsory unitization, including submitting unit agreement, unit operating agreement, initial plan of operation, obtain approval of Regional Supervisor if required, and supporting data; serving non-consenting lessees with documents.	300	1 request	300
1304(d)	Request hearing on required unitization	1	1 request	1
1304(d)	Submit statement at hearing on compulsory unitization	5	1 statement	5
1304(e)	Pay for and submit three copies of verbatim transcript of hearing	1	1 submission	1
		Court reporter and 3 transcript copies for 1 hearing = $500.		
1304(f)	Appeal final order of compulsory unitization	Exempt as defined in 5 CFR 1320.4(a)(2), (c).		0
Total Burden			79 Responses	5,998
			$149,836 Non-Hour Cost Burdens.	

An agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Kirk Malstrom,

Chief, Regulations and Standards Branch.

[FR Doc. 2024–01285 Filed 1–23–24; 8:45 am]

BILLING CODE 4310–VH–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0043]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Previously Approved Collection; Drug Use Statement

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Drug Enforcement Administration, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until March 25, 2024.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Kannessia Jordan, Section Chief, Office of Compliance, Policy Administration Section, 700 Army Navy Drive, Arlington, VA 22202, telephone: 571–776–2262, email: *Kannessia.S.Jordan@DEA.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Abstract: This collection requires the drug history of any individual seeking employment with DEA. DEA policy states that a past history of illegal drug use may result in ineligibility for employment. The form asks job applicants specific questions about their personal history, if any, of illegal drug use.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a previously approved collection.

2. *The Title of the Form/Collection:* Drug Questionnaire.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form number: DEA–341 (Common Form). The sponsoring component is the Drug Enforcement Administration.

4. *Affected public who will be asked or required to respond, as well as the obligation to respond:* Affected Public: Individuals or households. The obligation to respond is voluntary but applications will not be reviewed without the completion of the form.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond*: The total or estimated number of respondents for the Drug Questionnaire is 4,727. The time per response is seven minutes.

6. *An estimate of the total annual burden (in hours) associated with the*

collection: The total annual burden hours for this collection is 551 hours.

7. *An estimate of the total annual cost burden associated with the collection, if applicable:* $0.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Time per response (min)	Total annual burden (hours)
Drug Questionnaire	4,727	1/annually	4,727	7	551
Unduplicated Totals	4,727	1/annually	4,727	7	551

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: January 19, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–01335 Filed 1–23–24; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0051]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Previously Approved Collection; Final Disposition Report (R–84), With Supplemental Questions R–84(a), R–84(b), R–84(c), R–84(d), R–84(e), R–84(f), R–84(g), R–84(h), R–84(i), and R–84(j)

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Federal Bureau of Investigation, Criminal Justice Information Service Division, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until March 25, 2024.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Brian A. Cain, Management and Program Analyst, FBI, CJIS, Criminal History Information and Policy Unit, BTC–3, 1000 Custer Hollow Road, Clarksburg, WV 26306; phone: 304–625–5590 or email *fbi-iii@fbi.gov*.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Abstract: Title 28, U.S.C., section 534, allows the FBI to acquire, collect, classify, and preserve identification, criminal identification, crime, and other records. The FBI permits such exchange of records and information with, and for the official use of, authorized officials of the Federal Government, including the United States Sentencing Commission; the States and cities; and penal and other institutions. It is essential the Final Disposition Report (R–84) and supplemental(s) be utilized in order for the FBI CJIS Division, to assure identity history information is collected, stored, and disseminated in a manner to ensure accuracy, completeness, currency, integrity, and security of such information in an effort to protect individual privacy and provide maximum service to all law enforcement and governmental agencies. All of which is imposed on the FBI, CJIS Division, by 28 CFR 20.1.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a previously approved collection.

2. *The Title of the Form/Collection:* Final Disposition Report.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* (R–84), with supplemental questions R–84(a), R–84(b), R–84(c), R–84(d), R–84(e), R–84(f), R–84(g), R–84(h), R–84(i), and R–84(j); CJIS, FBI, DOJ.

4. *Affected public who will be asked or required to respond, as well as the obligation to respond:* Primary: City, county, state, federal and tribal law enforcement agencies. This collection is needed to report completion of an arrest event. Acceptable data is stored as part of the Next Generation Identification (NGI) system of the FBI. The obligation to respond is mandatory (Title 28, U.S.C., section 534).

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The total number of respondents is 542,460 (R–84). The estimated time per response is five minutes.

6. *An estimate of the total annual burden (in hours) associated with the collection:* The total annual burden hours for this collection is 45,205 hours.

7. An estimate of the total annual cost burden associated with the collection, if applicable: $0.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Time per response	Total annual burden (hours)
Ex: Survey (individuals or households)	542,460	1/annually	542,460	5 min	45,205
Unduplicated Totals	542,460	1/annually	542,460		45,205

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: January 19, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–01336 Filed 1–23–24; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0026]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Report of Theft or Loss—Explosive Materials

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register**, on November 15, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until February 23, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: John J. Basile, EIPB by email at *john.basile@atf.gov,* or by telephone at 307–287–9200.

SUPPLEMENTARY INFORMATION:

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1140–0026. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of this information collection:

1. *Type of Information Collection:* Revision of a previously approved collection.

2. *Title of the Form/Collection:* Report of Theft or Loss—Explosive Materials.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* ATF Form 5400.5. Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected Public: Private Sector—businesses or not for profit institutions.

Abstract: Any licensee or permittee who has knowledge of the theft or loss of any explosive materials from his stock shall, within 24 hours of discovery, report the theft or loss by telephoning 1–800–800–3855 (nationwide toll free number) and on the Report of Theft or Loss—Explosives—ATF Form 5400.5, in accordance with the instructions on the form. The information collection (IC) OMB #1140–0026 is being revised to include material changes to the form, such as added categories that include checkboxes (with a description and example scenarios), instruction clarification, and header revision (to include reference to voluntary reporting of explosives recovered or located).

5. *Obligation to Respond:* Mandatory under the provision of 27 CFR 555.30 (a).

6. *Total Estimated Number of Respondents:* 130 respondents.

7. *Estimated Time per Respondent:* 1 hour and 48 minutes.

8. *Frequency:* Once annually.

9. *Total Estimated Annual Time Burden:* 234 hours.

10. *Total Estimated Annual Other Costs Burden:* $0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218 Washington, DC 20530.

Dated: January 19, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–01334 Filed 1–23–24; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0154]

Proposed Extension of Information Collection: Performance Reports for MSHA Grants

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor (DOL), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed collections of information, in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Mine Safety and Health Administration (MSHA) is soliciting comments on the information collection regarding the extension of Performance Reports for MSHA Grants.

DATES: All comments must be received on or before March 25, 2024.

ADDRESSES: Comments concerning the information collection requirements of this notice may be sent by any of the methods listed below. Please note that late, comments received after the deadline will not be considered.

- *Federal E-Rulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments for docket number MSHA–2023–0021.
- *Mail/Hand Delivery:* DOL–MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.
- MSHA will post all comments as well as any attachments, except for information submitted and marked as confidential, in the docket at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances, MSHA, at *MSHA.information.collections@dol.gov* (email); (202) 693–9440 (voice); or (202) 693–9441 (facsimile). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(h) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 813(h), authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, section 101(a) of the Mine Act, 30 U.S.C. 811(a), authorizes the Secretary of Labor (Secretary) to develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal and metal and nonmetal mines.

MSHA works to prevent death, illness, and injury from mining and to promote safe and healthful workplaces for U.S. miners. Section 115 of the Mine Act, 30 U.S.C. 825, requires MSHA to approve mine operators' health and safety training programs for miners. MSHA administers two grant programs: State Grants and Brookwood-Sago Mine Safety Grants. The grant programs provide training for individuals, miners, employers, and contractors in the recognition, avoidance, and prevention of unsafe and unhealthful working conditions in accordance with section 503 of the Mine Act, 30 U.S.C. 953, and section 14 of the Mine Improvement and New Emergency Response Act of 2006 (MINER Act), 30 U.S.C. 965.

State Grants

Under section 503 of the Mine Act, 30 U.S.C. 953, the Secretary may award grants to States to assist in developing and enforcing State mine health and safety laws and regulations, to improve State workers' compensation and mining occupational disease laws and programs, and to improve health and safety conditions in the Nation's mines through Federal-State coordination and cooperation. Any State in which mining takes place may apply for the State Grants. 30 U.S.C. 953(g) requires that MSHA may fund up to 80 percent of the State Grants activities and a Grant recipient must provide matching funds of no less than 20 percent of the total costs. This Grant program supports federally mandated training of miners and mine operators working at surface and underground coal, metal, and nonmetal mines. 30 U.S.C. 953(e) of the Mine Act also allows the program to train State inspectors.

MSHA recognizes that State training programs are a key source of mine safety and health training and education for individuals who work or will work at mines. MSHA encourages State training programs to prioritize health and safety training for small mining operations and underserved mines and miners within the mining industry, and to prioritize diversity, equity, inclusion, and accessibility. MSHA has recently expanded the priority to include underserved operators and miners including limited English proficient (LEP) and low literacy individuals.

MSHA supports programs that emphasize training on miners' statutory rights, including the right to be provided a safe working environment, to refuse an unsafe task, and to have a voice in the safety and health conditions at the mine. In particular, MSHA encourages grant recipients to address, in their training and education programs, occupational health hazards caused by exposures to respirable coal mine dust and respirable crystalline silica, powered haulage and mobile equipment safety, mine emergency preparedness, mine rescue, electrical safety, contract and customer truck drivers, improving training for new and inexperienced miners, managers and supervisors performing mining tasks, pillar safety for underground mines, and preventing falls from heights.

Brookwood-Sago Mine Safety Grants

Section 14 of the MINER Act, 30 U.S.C. 965, established the Brookwood-Sago Mine Safety Grants. This competitive grant program provides funding for education and training programs to better identify, avoid, and prevent unsafe working conditions in and around mines. Grantees can use these funds to establish and implement education and training programs or to create training materials and programs on MSHA-identified safety priorities. Funds can also be used to develop and implement training and related materials for mine emergency preparedness as well as for the prevention of accidents in underground mines.

MSHA expects Brookwood-Sago Mine Safety grantees to develop training or educational materials and/or provide mine safety training or educational programs, to recruit mine operators and miners to participate in training, and to conduct and evaluate the training program. 30 U.S.C. 965 mandates that

the Secretary must emphasize programs and materials that target smaller mines, including training mine operators and miners about new MSHA standards, high risk activities, or hazards. The Brookwood-Sago Mine Safety Grants give priority to the funding of pilot and demonstration projects that will provide opportunities for broad applicability for mine safety. Special attention will also be given to programs and materials that serve underserved mines and miners within the mining industry, and that prioritize diversity, equity, inclusion, and accessibility.

30 U.S.C. 965 also requires the Brookwood-Sago Mine Safety Grants to conduct follow-up evaluations with the people who received the provided training to measure how the training promotes the DOL's strategic goal to ''Ensure Safe Jobs, Essential Protections, and Fair Workplaces,'' and MSHA's goal to ''prevent fatalities, disease, and injury from mining, and secure safe and healthful working conditions for America's miners.'' Evaluations will focus on determining how effective the subject training was in either reducing hazards, improving miners' skills, or in improving safety and health conditions in mines. Grantees must also fully cooperate with MSHA evaluators, which may include providing MSHA evaluators relevant data, educational or training materials, or information on training methods and equipment.

Under both State Grants and Brookwood-Sago Mine Safety Grants programs, each grantee is required by U.S. DOL regulations to submit quarterly performance reports for the preceding 3-month period; and a final report no later than 90 days after the end of the grant period. Grantees of State Grants program have an additional requirement of submitting MSHA Form 5000–50, State Grants Progress Report, on a quarterly basis.

The required content of each report is specified in the funding opportunity announcement (FOA) of each grant program.

(1) *Performance Project Reports:* A grantee submits a quarterly performance project report to MSHA no later than 30 days after the deadlines. The performance report needs to contain a narrative assessment of performance under the grants and to include both quantitative and qualitative information. The narrative assessment includes the summary of progress over the previous 3 months, submitted in an open free format of the grantee's choice. Specifically, the narrative reports contain the following information:

(a) A comparison of actual accomplishments to the objectives established for the period.

(b) Reasons for any objectives that are not met.

(c) A description of any significant developments or problems affecting the grantee's ability to accomplish the work.

(d) An evaluation of the impact or results of the program's activities.

(e) An explanation of current grant progress against the overall grant goals.

In addition, the grantees are required to submit quarterly financial reports on the status of all funds awarded, matching funds, and, if applicable, program income received and expended, during the funding period.

Between reporting dates, the grantee also needs to provide interim reports to inform MSHA of significant developments or problems affecting the organization's ability to accomplish the work specified in the FOA.

(2) *Final Reports:* At the end of the grant period, each grantee is required to provide a final close-out financial report, a final performance report, and an evaluation report. The final report is due no later than 90 days after the end of the 12-month performance period.

(3) *MSHA Form 5000–50, State Grants Progress Report (State Grants Only):* State Grants recipients are also required to submit MSHA Form 5000–50 in their quarterly reports to MSHA. This form is used only by the State Grants program. This form consists of a technical progress report with quantitative performance information. Recipients of the State Grants are required to submit a final MSHA 5000–50 form at the end of the 12-month performance period.

II. Desired Focus of Comments

MSHA is soliciting comments concerning the information collection related to Performance Reports for MSHA Grants. MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information has practical utility;
- Evaluate the accuracy of MSHA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

The information collection request will be available on *http://www.regulations.gov.* MSHA cautions the commenter against providing any information in the submission that should not be publicly disclosed. Full comments, including personal information provided, will be made available on *www.regulations.gov* and *www.reginfo.gov.*

The public may also examine publicly available documents at DOL–MSHA, 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452. Sign in at the receptionist's desk on the 4th floor via the East elevator. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION** section of this notice.

III. Current Actions

This information collection request concerns provisions for Performance Reports for MSHA Grants, specifically, including an extension of Performance Project Reports and Final Reports submitted by the recipients of both State and Brookwood-Sago Mine Safety Grants, and MSHA Form 5000–50 used for the State Grants. MSHA has updated the data with respect to the number of respondents, responses, burden hours, and burden costs supporting this information collection request from the previous information collection request.

Type of Review: Extension, without change, of a currently approved collection.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0154.

Affected Public: Business or other for-profits.

Number of Annual Respondents: 76.

Frequency: Quarterly and annually.

Number of Annual Responses: 380.

Annual Burden Hours: 850 hours.

Annual Respondent or Recordkeeper Cost: $0.

MSHA Forms: MSHA Performance Report Narratives; MSHA Form 5000–50, MSHA State Grants Progress Report.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the proposed information collection request; they will become a matter of

public record and will be available at *https://www.reginfo.gov.*

Song-ae Aromie Noe,

Certifying Officer, Mine Safety and Health Administration.

[FR Doc. 2024–01284 Filed 1–23–24; 8:45 am]

BILLING CODE 4520–43–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (24–006)]

Heliophysics Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Heliophysics Advisory Committee (HPAC). This Committee functions in an advisory capacity to the Director, Heliophysics Division, in the NASA Science Mission Directorate. The meeting will be held for the purpose of soliciting, from the science community and other persons, scientific and technical information relevant to program planning.

DATES: Monday, February 12, 2024, 10 a.m.–5 p.m., eastern time; and Tuesday, February 13, 2024, 9:30 a.m.–5 p.m., eastern time.

ADDRESSES: Meeting will be virtual. See dial-in and Webex information below under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Mrs. KarShelia Kinard, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355, or *karshelia.kinard@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will take place telephonically and via WebEx. Any interested person must use a touch-tone phone to participate in this meeting. To join by telephone, the numbers are: 1–929–251–9612 or 1–415–527–5035, for each day.

The WebEx link is *https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=m0b61b2c74c8e576e96639583bb9d89ed* and the meeting number is 2762 932 6795. The password is HPACWinter2024! (47229468 from phones and video systems) (case sensitive), on both days.

The agenda for the meeting includes the following topics:

- Heliophysics Division (HPD) News, Updates, and New Initiatives
- Specific HPD Research and Analysis Program, Operating Mission and Mission Planning Topics

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2024–01347 Filed 1–23–24; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Privacy Act of 1974; System of Records

AGENCY: National Science Foundation.

ACTION: Notice of a new system of records.

SUMMARY: The National Science Foundation (NSF) is establishing a new system of records, ''Student Loan Repayment Program Case Files, NSF–82,'' in connection with the recruitment of highly qualified job candidates and retention of highly qualified employees by paying off their Federally insured student loans. The agency will use this system to maintain and retrieve applications from individuals seeking such student loan repayment benefits, service agreements signed by individuals receiving such benefits, lender information, loan balances and repayment history, and other related program information and documentation for such individuals. Information in this system of records will be collected through various sources, including directly from the individual to whom the information applies, and from NSF officials, official NSF documents, student loan lenders or other agencies or third parties.

DATES: This system of records notice is effective as of January 24, 2024. The routine uses described in this notice will take effect on February 26, 2024, unless modified by a subsequent notice to incorporate comments received from the public. Submit comments on or before February 23, 2024.

ADDRESSES: You may submit comments, identified as ''SORN NSF–82 (Student Loan Repayment Program),'' by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email:* Jennifer Carter, Human Resources Specialist, at *jecarter@nsf.gov.* Include ''SORN NSF–82 (Student Loan Repayment Program)'' in the subject line of the message.
- *Mail:* Jennifer Carter, Human Resources Specialist, Division of Human Resource Management, National Science Foundation, 2415 Eisenhower Ave., Alexandria, VA 22314.

Instructions: NSF will post all comments on the NSF's website (*https://www.nsf.gov/*). All comments submitted in response to this Notice will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Jennifer Carter, Human Resources Specialist, *jecarter@nsf.gov,* 703–292–8060, or Sandra Evans, NSF FOIA/PA Officer, *sevans@nsf.gov,* 703–292–8060.

SUPPLEMENTARY INFORMATION: The Student Loan Repayment Program authority (5 U.S.C. 5379) is one of several hiring flexibilities made available to agencies to attract and retain highly qualified individuals for Federal service by allowing agencies to repay their Federally insured student loans. Individuals approved for this benefit must agree to complete a specified period of service with the agency, or to reimburse the agency if they fail to complete that term of service or violate certain other conditions of their service agreement. See 5 CFR part 537 (Office of Personnel Management (OPM) student loan repayment regulations). This NSF system of records will be used to document requests (applications) from such individuals for such repayment benefits, service agreements signed by individuals approved to receive such benefits, benefit amounts, lender and loan history, and other loan repayment or loan benefit reimbursement information (including any request to waive the reimbursement obligation) specific to each individual. Information maintained in this system will be used to administer, document, and track the repayment of these loans (or reimbursement of the loan repayment benefit, where applicable), to make individual case files available to, and prepare annual reports for, OPM on NSF's use of the student loan repayment program authority, and to seek and collect reimbursement from individuals who fail to fulfill their service obligation or violate other terms and conditions of their agreement.

SYSTEM NAME AND NUMBER:

Student Loan Repayment Program Case Files, NSF–82.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

National Science Foundation (NSF), 2415 Eisenhower Ave., Alexandria, VA 22314.

SYSTEM MANAGER(S):

Branch Chief, Division of Human Resource Management, NSF, 2415 Eisenhower Ave., Alexandria, VA 22314.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 5379; 5 CFR part 537.

PURPOSE(S) OF THE SYSTEM:

These records are maintained in order to process requests (applications) from or on behalf of highly qualified current or prospective NSF employees for student loan repayment benefits; to determine their eligibility for such benefits; to administer and document the agency's repayment of such loans, including service agreements that these individuals must sign in order to receive loan repayment benefits; and for debt collection purposes, in the case of individuals who fails to fulfill that agreement and must reimburse the agency, if the agency does not waive that obligation. In such cases, records may be incorporated, as relevant and necessary, into NSF's Privacy Act system of delinquent debtor files, and routinely used and disclosed as described in the system of records notice (SORN) for that system, SORN NSF–57. Furthermore, where the records indicate false statements, fraud, or other possible law violations, they may also be referred to law enforcement for investigation, prosecution, or other enforcement action. The records in this system are also used by NSF to prepare reports for OPM, and to make loan repayment case records available for OPM inspection upon request, as required by 5 CFR part 537.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records (Including related correspondence) retrieved by the name or other identifier(s) personally assigned to individuals who have been or are being considered for student loan repayment benefits under NSF's Student Loan Repayment Program, which includes individuals who have been approved for or denied such benefits.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains correspondence and any other documents or information relating to or resulting from requests made by highly qualified job candidates or current NSF employees, or on their behalf, to receive student loan repayment benefits from NSF. System records include: (1) Request letters from a selecting official or supervisor of the individual with supporting documentation; (2) information from or about these individuals, including names, home and work addresses, Social Security numbers, student loan account numbers, loan balances, repayment schedule, repayment history, and repayment status, and copies of their individual service agreements; (3) information about the lending institution, servicer, or other holder of an individual's student loan(s), including's name, address and telephone number; and (4) agency determinations on requests for loan repayment benefits, including whether the request was approved or denied, and any additional correspondence or other documentation relating to the administration or denial of the loan repayment benefit to the individual. Where an individual is or may be required to reimburse the agency for failure to complete the required period of service or to fulfill other conditions of their service agreement, system records may also notices, demand letters or other communications with the individual regarding that obligation, requests from or on behalf of such individuals for the agency to waive that obligation, and the agency's determination or disposition of such requests, including any referral for collection purposes, if the request is denied in whole or part.

RECORD SOURCE CATEGORIES:

Information in the system of records is obtained from the individual to whom the information applies, lending institutions holding student loans for the individual, NSF officials, and from other NSF or third-party records, as appropriate and necessary.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The following NSF standard routine uses apply:

1. Members of Congress. Information from a system may be disclosed to congressional offices in response to inquiries from the congressional offices made at the request of the individual to whom the record pertains.

2. Freedom of Information Act/ Privacy Act Compliance. Information from a system may be disclosed to the Department of Justice or the Office of Management and Budget in order to obtain advice regarding NSF's obligations under the Freedom of Information Act and the Privacy Act.

3. Counsel. Information from a system may be disclosed to NSF's legal representatives, including the Department of Justice and other outside counsel, where the agency is a party in litigation or has an interest in litigation and the information is relevant and necessary to such litigation, including when any of the following is a party to the litigation or has an interest in such litigation: (a) NSF, or any component thereof; (b) any NSF employee in his or her official capacity; (c) any NSF employee in his or her individual capacity, where the Department of Justice has agreed to, or is considering a request to, represent the employee; or (d) the United States, where NSF determines that litigation is likely to affect the agency or any of its components.

4. National Archives, General Services Administration. Information from a system may be disclosed to representatives of the General Services Administration and the National Archives and Records Administration (NARA) during the course of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

5. Response to an Actual or Suspected Compromise or Breach of Personally Identifiable Information. NSF may disclose information from the system to appropriate agencies, entities, and persons when: (1) NSF suspects or has confirmed that there has been a breach of the system of records; (2) NSF has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals; NSF (including its information systems, programs, and operations); the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with NSF efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm. Furthermore, NSF may disclose information from the system to another Federal agency or Federal entity, when NSF determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in: (1) Responding to a suspected or confirmed breach; or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

6. Courts. Information from a system may be disclosed to the Department of Justice or other agencies in the event of a pending court or formal administrative proceeding, when the information is

relevant and necessary to that proceeding, for the purpose of representing the government, or in the course of presenting evidence, or the information may be produced to parties or counsel involved in the proceeding in the course of pre-trial discovery.

7. Contractors. Information from a system may be disclosed to contractors, agents, experts, consultants, or others performing work on a contract, service, cooperative agreement, job, or other activity for NSF and who have a need to access the information in the performance of their duties or activities for NSF.

8. Audit. Information from a system may be disclosed to government agencies and other entities authorized to perform audits, including financial and other audits, of the agency and its activities.

9. Law Enforcement. Information from a system may be disclosed, where the information indicates a violation or potential violation of civil or criminal law, including any rule, regulation or order issued pursuant thereto, to appropriate Federal, State, or local agencies responsible for investigating, prosecuting, enforcing, or implementing such statute, rule, regulation, or order.

10. Disclosure When Requesting Information. Information from a system may be disclosed to Federal, State, or local agencies which maintain civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary, to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

11. To the news media and the public when: (1) A matter has become public knowledge, (2) the NSF Office of the Director determines that disclosure is necessary to preserve confidence in the integrity of NSF or is necessary to demonstrate the accountability of NSF's officers, employees, or individuals covered by this system, or (3) the Office of the Director determines that there exists a legitimate public interest in the disclosure of the information, except to the extent that the Office of the Director determines in any of these situations that disclosure of specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

In addition to the above standard routine uses, the following routine uses shall apply:

12. Personnel Management Disclosure. NSF may disclose as a routine use to the U.S. Office of Personnel Management (OPM) any records or information in this system of records that OPM requests or requires pursuant to OPM's oversight and regulatory functions of this program.

13. Salary Offset or Debt Collection Disclosures. NSF may disclose records in this system to other Federal agencies, hearing or court officials, and present employers of the subject individual in order for NSF to obtain repayment, if the individual fails to complete the period of employment under a service agreement and fails to reimburse NSF the amount of any student loan repayment benefits the individual received from NSF. (Records may also be incorporated where relevant and necessary into NSF's system of delinquent debtor files, and routinely used and disclosed in accordance with the system of records (SORN) notice for that system. See SORN NSF–57, or any successor SORN.)

14. Disclosure to other Federal agencies. NSF may disclose records in this system to its payroll processing provider in order to calculate tax withholdings and disburse payments of student loan repayment benefits to loan holders on behalf of employees approved to receive this benefit.

15. Disclosure to Student Lending Institutions or Loan Holders. NSF may disclose to student lending institutions or loan holders records from this system as a routine use disclosure in order to obtain information (such as the borrower's account number, original and current loan balance, repayment schedule, repayment history, and current repayment status) to allow NSF to determine an individual's initial and continuing eligibility for this program, to facilitate accurate payments to student loan holders on behalf of eligible individuals, and to ensure NSF discontinues making student loan repayments to individuals who do not remain eligible for them during the period of the service agreement. For the same reason, and to ensure that loan payments made by the agency do not exempt an employee from his or her responsibility and/or liability for any loan(s) the individual has taken out, NSF also may disclose to loan holders records from this system of records as a routine use disclosure in the event it becomes known to NSF during the course of its program eligibility determinations that an individual is past due, delinquent, or in default of a federally insured student loan.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically in secure facilities or on paper. Electronic records are maintained in a secure password-protected environment. Permission-level assignments will allow internal agency users access only to those functions for which they are authorized. All paper records are maintained in secure, access-controlled areas or buildings. Paper records are stored in a locked drawer, behind a locked door or at a secure offsite location.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by an individual's name or other personally assigned identifier such as an email address or phone number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

System records are retained and destroyed in accordance with the NARA Records Schedule 2.4; item 090 (incentive package records).

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable law, rules, and policies, including all applicable NSF automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing electronic records in this system is limited to those individuals who have a need to know the information for the performance of their official duties. These records are maintained in a secure password-protected environment. All users are required to take annual NSF IT Security and Privacy Awareness Training, which covers the procedures for handling Controlled Unclassified Information, including personally identifiable information (PII).

RECORD ACCESS PROCEDURES:

Individuals seeking to access information about themselves contained in this system are required to follow the procedures found at 45 CFR part 613.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest information about themselves contained in this system are required to follow the procedures found at 45 CFR part 613.

NOTIFICATION PROCEDURES:

Individuals requesting access to or contesting records contained in this

system will be notified according to the procedures found at 45 CFR part 613.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

Dated: January 19, 2024.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2024–01356 Filed 1–23–24; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–275 and 50–323; NRC–2023–0192]

Notice of Intent To Conduct Scoping Process and Prepare Environmental Impact Statement; Pacific Gas and Electric Company; Diablo Canyon Nuclear Power Plant, Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; public scoping meeting and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) will conduct a scoping process to gather information necessary to prepare an environmental impact statement (EIS) to evaluate the environmental impacts for an application for the renewal of Facility Operating License Nos. DPR–80 and DPR–82, which authorize Pacific Gas and Electric Company (PG&E, the applicant) to operate Diablo Canyon Nuclear Power Plant (DCPP), Units 1 and 2. The NRC is seeking public comment on this action and has scheduled both an in-person public scoping meeting and a virtual public scoping meeting.

DATES: The NRC will hold a virtual public scoping meeting on February 1, 2024, at 10 a.m. Pacific time (PT) and an in-person public scoping meeting on February 8, 2024, at 6 p.m. PT. Details on both meetings can be found on the NRC's Public Meeting Schedule at *https://www.nrc.gov/pmns/mtg.* Submit comments on the scope of the EIS by February 23, 2024. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. See section IV, ''Public Scoping Meeting,'' of this notice for additional information.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to *https://regulations.gov* and search for Docket ID NRC–2023–0192. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email:* Comments may be submitted to the NRC electronically using the email address *DiabloCanyonEnvironmental@nrc.gov.*
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Kim Conway, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1335; email: *Kimberly.Conway@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0192 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://regulations.gov* and search for Docket ID NRC–2023–0192.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if it is available in ADAMS) is provided the first time that it is referenced.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.
- *Public Library:* A copy of the license renewal application for DCPP, including the environmental report (ER), is available for public review at the following public library location: San Luis Obispo Library, 995 Palm St., San Luis Obispo, CA 93403.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0192 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

By letter dated November 7, 2023 (ADAMS Accession No. ML23311A154), PG&E submitted to the NRC an application to renew the operating licenses for DCPP for an additional 20 years of operation. This submission initiated the NRC's proposed action of determining whether to grant the license renewal application. DCPP consists of two pressurized-water reactors designed by Westinghouse and is located in Avila Beach, California. The operating licenses for DCPP expire as follows: Unit 1 on November 2, 2024, and Unit 2 on August 26, 2025. The license renewal application was submitted pursuant to part 54, ''Requirements for Renewal of Operating Licenses for Nuclear Power Plants,'' of title 10 of the *Code of Federal Regulations* (10 CFR)

and seeks to extend the operating licenses for Units 1 and 2 to November 2, 2044, and August 26, 2045, respectively. A notice of receipt and availability of the application was published in the **Federal Register** on November 20, 2023 (88 FR 80780). A notice of acceptance for docketing of the application and of opportunity to request a hearing was published in the **Federal Register** on December 19, 2023 (88 FR 87817) and is available on the Federal Rulemaking Website (*https://www.regulations.gov*) by searching for Docket ID NRC–2023–0192.

III. Request for Comment

This notice informs the public of the NRC's intention to conduct environmental scoping and prepare an EIS related to the license renewal application for DCPP, and provides the public an opportunity to participate in the environmental scoping process, as defined in 10 CFR 51.29, ''Scoping-environmental impact statement and supplement to environmental impact statement,'' and 10 CFR 51.116, ''Notice of intent.''

The regulations in 36 CFR 800.8, ''Coordination with the National Environmental Policy Act,'' allow agencies to use their National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321, *et seq.*) (NEPA), process to fulfill the requirements of section 106 of the National Historic Preservation Act of 1966, as amended (54 U.S.C. 300101, *et seq.*) (NHPA). Therefore, pursuant to 36 CFR 800.8(c), the NRC intends to use its process and documentation required for the preparation of the EIS on the proposed action to comply with section 106 of the NHPA in lieu of the procedures set forth at 36 CFR 800.3 through 800.6.

In accordance with 10 CFR 51.53(c) and 10 CFR 54.23, PG&E submitted an ER as part of the license renewal application for DCPP. The ER was prepared pursuant to 10 CFR part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' and is publicly available in ADAMS under Accession No. ML23311A154. The ER will also be available for viewing at *https://www.nrc.gov/reactors/operating/licensing/renewal/applications.html.* In addition, the license renewal application, including the ER, is available for public review at the San Luis Obispo Library, 995 Palm St., San Luis Obispo, CA 93403.

The NRC intends to gather the information necessary to prepare a plant-specific supplement to NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants'' (ADAMS Package Accession No. ML13107A023) (GEIS), related to the license renewal application for DCPP. The NRC is required by 10 CFR 51.95 to prepare a plant-specific supplement to the GEIS in connection with the renewal of an operating license. This notice is being published in accordance with NEPA and the NRC's regulations at 10 CFR part 51.

The supplement to the GEIS will evaluate the environmental impacts of license renewal for DCPP, and reasonable alternatives thereto. Possible alternatives to the proposed action include the no-action alternative and reasonable alternative energy sources.

As part of its environmental review, the NRC will first conduct a scoping process for the plant-specific supplement to the GEIS and, as soon as practicable thereafter, will prepare a draft supplement to the GEIS for public comment. Participation in this scoping process by members of the public and local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the supplement to the GEIS will be used to accomplish the following:

a. Define the proposed action that is to be the subject of the supplement to the GEIS;

b. Determine the scope of the supplement to the GEIS and identify the significant issues to be analyzed in depth;

c. Identify and eliminate from detailed study those issues that are peripheral or are not significant or that have been covered by prior environmental review;

d. Identify any environmental assessments and other ElSs that are being or will be prepared that are related to, but are not part of, the scope of the supplement to the GEIS under consideration;

e. Identify other environmental review and consultation requirements related to the proposed action;

f. Indicate the relationship between the timing of the preparation of the environmental analyses and the NRC's tentative planning and decision-making schedule;

g. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the supplement to the GEIS to the NRC and any cooperating agencies; and

h. Describe how the supplement to the GEIS will be prepared, including any contractor assistance to be used.

The NRC invites the following entities to participate in scoping:

a. The applicant, PG&E;

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or that is authorized to develop and enforce relevant environmental standards;

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards;

d. Any affected Indian Tribe;

e. Any person who requests or has requested an opportunity to participate in the scoping process; and

f. Any person who has petitioned or intends to petition for leave to intervene under 10 CFR 2.309.

IV. Public Scoping Meeting

In accordance with 10 CFR 51.26(b), the scoping process for an EIS may include a public scoping meeting to help identify significant issues related to the proposed action and to determine the scope of issues to be addressed in the EIS.

The NRC is announcing that it will hold an online webinar and teleconference call and an in-person public scoping meeting for the DCPP license renewal supplement to the GEIS. The online webinar and teleconference call will be held on February 1, 2024, at 10 a.m. PT. The in-person public scoping meeting will be held on February 8, 2024, at 6 p.m. PT. A court reporter will transcribe all comments received during the public scoping meetings. To be considered, comments must be provided either at a transcribed public meeting or in writing, as discussed in the **ADDRESSES** section of this notice. Persons interested in attending these meetings should monitor the NRC's Public Meeting Schedule website at *https://www.nrc.gov/pmns/mtg* for additional information and agenda for the meetings. Please contact Kim Conway no later than January 31, 2024, if accommodations or special equipment is needed to attend or to provide comments, so that the NRC can determine whether the request can be accommodated.

The public scoping meetings will include: (1) an overview by the NRC of the environmental and safety review processes, the proposed scope of the supplement to the GEIS, and the proposed review schedule; and (2) the opportunity for interested government agencies, organizations, and individuals to submit comments or suggestions on environmental issues or the proposed scope of the supplement to the GEIS.

Participation in the scoping process for the DCPP license renewal

supplement to the GEIS does not entitle participants to become parties to the proceeding to which the supplement to the GEIS relates. Matters related to participation in any hearing are outside the scope of matters to be discussed at these public meetings.

Dated: January 19, 2024.

For the Nuclear Regulatory Commission.

Stephen S. Koenick,

Chief, Environmental Project Management Branch 1, Division of Rulemaking, Environment, and Financial Support, Office of Nuclear Material Safety, and Safeguards.

[FR Doc. 2024–01355 Filed 1–23–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0217]

Service Contract Inventory

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is publishing this notice to advise the public of the availability of its Fiscal Year (FY) 2021 Service Contract Inventory and FY 2020 Service Contract Inventory Analysis. The NRC's FY 2021 Service Contract Inventory is included as part of a Government-wide service contract inventory. The inventory includes covered service contracts that were awarded in FY 2021. The FY 2020 Inventory Analysis provides information on specific contract actions that were analyzed as part of the NRC's FY 2020 Service Contract Inventory.

DATES: January 24, 2024.

ADDRESSES: Please refer to Docket ID NRC–2023–0217 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0217. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov*. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov*. The FY 2020 Service Contract Inventory Analysis can be found in ADAMS under Accession No. ML23317A062. The FY 2020 Service Contract Inventory Analysis was published on the NRC's public website at the following location: *https://www.nrc.gov/about-nrc/contracting.html.*
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time, Monday through Friday, except Federal holidays.
- *Availability of the Service Contract Inventory:* The NRC's FY 2021 Service Contract Inventory data is included in a Government-wide service contract inventory that was published at the following location: *https://www.acquisition.gov/service-contract-inventory.*

FOR FURTHER INFORMATION CONTACT: Raissa Forakis, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1104; email: *Raissa.Forakis@nrc.gov.*

SUPPLEMENTARY INFORMATION: In accordance with section 743 of Division C of the FY 2010 Consolidated Appropriations Act (31 U.S.C. 501 note) and 10 U.S.C. 2330a (renumbered at 10 U.S.C. 4505), the NRC is publishing this notice to advise the public of the availability of its FY 2021 Service Contract Inventory and FY 2020 Service Contract Inventory Analysis.

The inventory provides information on service contracts with a value of $150,000.00 or more that were awarded in FY 2021. The inventory includes the following:

1. A description of the services purchased;
2. The role the contracted services played in achieving agency objectives;
3. The dollar amount obligated for the services under the contract, and the funding source for the contract;
4. The contract type and date of the award;
5. The name of the contractor and place of performance;
6. The dollar amount invoiced for services under the contract;
7. The number and work location of contractor and first-tier subcontractor employees, expressed as full-time equivalents for direct labor, compensated under the contract;
8. Whether the contract is a personal services contract; and
9. Whether the contract was awarded on a non-competitive basis.

The FY 2020 Inventory Analysis provides information on specific service contract actions that were analyzed as part of the NRC's FY 2021 Service Contract Inventory.

The purpose of the analysis is to determine if contract labor is being used in an effective and appropriate manner and if the mix of federal employees and contractors in the agency is effectively balanced.

Dated: January 19, 2024.

For the Nuclear Regulatory Commission.

Eleni Jernell,

Division Director, Acquisition Management Division, Office of Administration.

[FR Doc. 2024–01353 Filed 1–23–24; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Performance Review Board Members

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) announces the appointment of members of the PBGC Performance Review Board.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), made applicable by PBGC's Senior Level Performance Management System, PBGC announces the appointment of those individuals who have been selected to serve as members of PBGC's Performance Review Board. The Performance Review Board is responsible for making recommendations on each senior level (SL) professional's annual summary rating, performance-based adjustment, and performance award to the appointing authority.

The following individuals have been designated as members of PBGC's 2023 Performance Review Board:

1. Gordon Hartogensis, Director
2. Kristin Chapman, Chief of Staff
3. David Foley, Chief of Benefits Administration
4. Patricia Kelly, Chief Financial Officer
5. Alice Maroni, Chief Management Officer

Issued in Washington, DC, by

Gordon Hartogensis,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2024–01361 Filed 1–23–24; 8:45 am]

BILLING CODE 7709–02–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35094; File No. 812–15493]

CAZ Strategic Opportunities Fund, et al.

January 19, 2024.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

ACTION: Notice.

Notice of application for an order (''Order'') under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

Summary of Application: Applicants request an order to permit certain business development companies and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

Applicants: CAZ Strategic Opportunities Fund, CAZ Investments LP, CAZ Investments Registered Adviser LLC, CAZ AI Fund, L.P., CAZ Barbell Fund, L.P., CAZ Barbell (QP) Fund, L.P., CAZ Barbell Offshore Fund, Ltd., CAZ Co-Investment Opportunities Fund, L.P.—100T Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—ACP Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—CLS Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—Didi Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—Didi B Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—Fundbox Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—HPE Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—HPE (UB) Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—IF Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—ISQ Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—MCP Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—MSouth Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—ORTF2 Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—PLT Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—PLT (UB) Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—RS Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—RVS Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—STP Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—STP-RVS Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—VEP (UB) Portfolio, CAZ Co-Investment Opportunities Fund, L.P.—VEP Portfolio, CAZ Co-Investment Opportunities Liquid Fund, L.P.—Opendoor II Portfolio, CAZ Co-Investment Opportunities Liquid Fund, L.P.—Didi II Portfolio, CAZ Credit Opportunity, L.P., CAZ Credit Opportunity (TE), L.P., CAZ DFG Diversified Fund, L.P.—Vintage I Portfolio, CAZ Disruptive Technology Fund, L.P.—KV Portfolio, CAZ Dislocation Opportunities Fund, L.P., CAZ Dislocation Opportunities Fund—TE, L.P., CAZ Diversified Alternatives Fund, L.P., CAZ Diversified Private Investments Founders Class Fund, L.P., CAZ Diversified Private Investments Class A Fund, L.P., CAZ Diversified Private Investments Class B Fund—TE, L.P., CAZ Diversified Private Investments Class C Fund, L.P., CAZ Diversified Private Investments Class D Fund—TE, L.P., CAZ Energy Evolution Fund, L.P., CAZ Energy Evolution Fund—TE, L.P., CAZ Energy Infrastructure Fund III, L.P., CAZ Energy Infrastructure Fund III-C, L.P., CAZ Energy Infrastructure Fund IV, L.P., CAZ Enterprise Software Opportunities Fund, L.P., CAZ eSports Fund, L.P.—Artist eSports Edge Portfolio, CAZ eSports Fund, L.P.—Artist SPV D Portfolio, CAZ GP Ownership Class A Fund, L.P., CAZ GP Ownership Class B Fund—TE, L.P., CAZ GP Ownership Class C Fund, L.P., CAZ GP Ownership Class D Fund—TE, L.P., CAZ GP Ownership Class E Fund, L.P., CAZ GP Ownership Class F Fund—TE, L.P., CAZ Halcyon Strategic Opportunities Fund, L.P., CAZ Halcyon Offshore Strategic Opportunities Fund, L.P., CAZ Healthcare Fund—Israel II, L.P., CAZ ICON Fund, L.P., CAZ ICON B Fund, L.P., CAZ Medical Royalty Fund II, L.P., CAZ Medical Royalty Fund III, L.P., CAZ Merchant WP I Fund, L.P., CAZ Partners Fund, L.P., CAZ Partners Fund Liquid Income (TE), L.P., CAZ Private Energy Fund, L.P., CAZ Private Equity Access Fund II, L.P.—Onshore Series, CAZ Private Equity Access Fund II, L.P.—Onshore (QP) Series, CAZ Private Equity Access Fund II, L.P.—Offshore Series, CAZ Private Equity Access Fund II, L.P.—Non-Conduit Series, CAZ Private Equity Ownership Fund, L.P., CAZ Private Equity Ownership (TE) Fund, L.P., CAZ Private Equity Ownership Fund II, L.P., CAZ Private Equity Ownership Fund II (NC), L.P., CAZ Private Equity Ownership Fund III, L.P., CAZ Private Equity Ownership Fund III-F, L.P., CAZ Private Equity Ownership BCP2 Fund, L.P., CAZ Private Equity Ownership D5 Fund, L.P., CAZ Private Equity Ownership D5 Fund—TE, L.P., CAZ Private Income Fund, L.P., CAZ Professional Sports Ownership Fund I, L.P., CAZ Professional Sports Ownership Fund I—TE, L.P., CAZ Risk Mitigation Fund, L.P.—Pure Hedge Portfolio, CAZ Risk Mitigation Fund, L.P.—Risk Mitigation Portfolio, CAZ Risk Mitigation Fund, L.P.—Risk Mitigation Plus Income Portfolio, CAZ Risk Mitigation Plus Income Fund (TE), L.P., CAZ Secondary Opportunities Fund, L.P., CAZ Secondary Opportunities Fund—TE, L.P., and CAZ Valley Forge Fund, L.P.

Filing Dates: The application was filed on August 10, 2023 and amended on December 1, 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 13, 2024, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Christopher Alan Zook, *caz@cazinvestments.com;* Thomas Friedmann, *thomas.friedmann@dechert.com;* Matthew Carter, *matthew.carter@dechert.com;* Alexander Karampatsos, *alexander.karampatsos@dechert.com.*

FOR FURTHER INFORMATION CONTACT: Jill Ehrlich, Senior Counsel, or Lisa Reid

Ragen, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' first amended and restated application, dated December 1, 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 *http://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.

[FR Doc. 2024–01362 Filed 1–23–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99391; File No. SR–LCH SA–2024–001]

Self-Regulatory Organizations; LCH SA; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the CDSClear Fee Grid for 2024

January 18, 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 January 4, 2024, Banque Centrale de Compensation, which conducts business under the name LCH SA (''LCH SA''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change (''Proposed Rule Change'') described in Items I, II and III below, which Items have been prepared primarily by LCH SA. LCH SA filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(2)[4] thereunder, so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the Proposed Rule Change, from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

LCH SA is proposing to amend its CDSClear fee grid for single name and index CDS and options products (''Fee Grid'') by incorporating changes in the CDSClear business and new clearing services offered (the ''Proposed Rule Change''). The text of the Proposed Rule Change has been annexed hereto [sic] as Exhibit 5. No amendments to the LCH SA CDS Clearing Rule Book (''Rule Book'') or the CDS Clearing Procedures (''Procedures'') are required to effect these changes.[5] The text of the Proposed Rule Change has been annexed [sic] as Exhibit 5 to File No. SR–LCH SA–2024–001.[6]

The implementation of the Proposed Rule Change will be contingent on LCH SA's receipt of all necessary regulatory approvals, including the approval by the Commission of the Proposed Rule Change described herein.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, LCH SA 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. LCH SA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the Proposed Rule Change is for LCH SA CDSClear to amend its Fee Grid for single name and index CDS and options products by incorporating changes in the CDSClear business and new clearing services offered. The Proposed Rule Change reflects the ongoing development and new product scope of the CDSClear service with the objective to meet Clearing Members' and Clients' evolving business needs. For example, among other changes, LCH SA is proposing to remove the €200,000 rebate under the General Member Introductory Tariff for total notional cleared below €10bn for single name and sovereign CDS, as this rebate was established to incentivize new clearing memberships as the business evolved. Likewise, LCH SA is also proposing to reduce the onboarding fee for options products from €30,000 to €15,000 to incentivize clearing of credit index options.

LCH SA is proposing to amend the CDSClear Fee Grid for 2024 as follows for CDS products:

Self-Clearing Tariff for Corporates, Financials and Sovereign Index and Single Name CDS

i. General Member Unlimited Tariff

LCH SA is proposing to clarify that the Annual Fixed Fee of €1,350,000 will be charged at a rate of 1/12th for each month the Clearing Member group is live. A footnote will be added to the Fee Grid to state that a Clearing Member is considered live for the whole month regardless of the go-live date within the considered month. LCH SA also proposes to amend the ''Details'' column of the Fee Grid to clarify that the Annual Fixed Fee applies to all indices and all non-sovereign single names activity for a Financial Group of a Clearing Member. This change is being made to simplify the existing language and has no impact on the General Member unlimited tariff amounts. LCH SA also proposes to remove reference to the full discount applied to sovereign single name variable fees, as the discount will no longer apply beginning in 2024.

ii. General Member—Introductory Tariff

LCH SA is proposing to apply a single annual fixed fee of €400,000 for the General Member's Introductory Tariff. As such, LCH SA is subsequently proposing to remove the €200,000 rebate if a General Member's notional amount cleared is below €10bn. LCH SA also proposes to delete the reference to the rebate under the Introductory Tariff heading, as this would no longer be applicable. In addition, as part of this revision to the Fee Grid, LCH SA is proposing to clarify that the fixed fee will be charged at a rate of 1/12th for each month the General Member is live. Finally, LCH SA will add a footnote to state that a General Member is considered live for the whole month regardless of the go-live date within the considered month.

iii. Select Members

For Select Members, LCH SA is proposing amendments to certain footnotes under the ''Select Membership'' heading. Specifically, LCH SA is proposing to clarify that the

[5] All capitalized terms not defined herein shall have the same definition as in the Rule Book or Procedures, as applicable.

[6] All capitalized terms not defined herein have the same definition as in the CDS Clearing Rule Book available at *https://www.lch.com/system/files/media_root/CDSClear_Rule_Book__26.09.2023.pdf.*

Annual Fixed Fee for Select Members will be charged 1/12th for each month the Select Member is live. This amended footnote will apply to the Annual Fixed Fee of €450,000. LCH SA also proposes to add a footnote clarifying the rebate available to Select Members. If a Select Member's total annual gross notional cleared is under €10bn and the Select Member is live for the whole calendar year (January 1–December 31), LCH SA will provide a €200,000 rebate in the Select Member's December bill, resulting in a reduced Annual Fixed Fee of €250,000.

iv. High Turnover Fee Plan

LCH SA offers a High Turnover Fee Plan (''HTFP'') based on notional cleared. LCH SA is proposing to clarify that the HTFP applies on the notional cleared in a calendar year but excludes from the determination of the total cleared notional, the trades not charged under the Switch Programme. The HTFP will also continue to exclude the notional cleared for which a CCP Switch credit note was used to zero out the clearing fees and the notional cleared part of a CCP Switch that thus did not attract any clearing fees (*i.e.,* only those trades which attract a fee will count towards the HTFP notionals). Finally, LCH SA is proposing to clarify that the HTFP does not apply to General Members.

v. Onboarding Fees

For new Clearing Member onboardings in 2024, LCH SA is proposing to add a €15,000 onboarding fee for the purposes of cost recovery and to align with other LCH SA services.[7] LCH SA will apply this to all application files received after January 1, 2024.

vi. Annual Account Structure Fees

LCH SA currently offers Legally Segregated Operationally Commingled (''LSOC'') accounts to Clearing Members of CDSClear, in addition to Individual Segregated Accounts and Omnibus Segregated Accounts. LCH SA is proposing to continue not to charge a yearly fee for LSOC accounts under the Proposed Rule Change and thus no change is being made to the Fee Grid.

Client Clearing Tariff for Corporate, Financials and Sovereign Index and Single Names CDS

i. Intraday Trading Fee Plan

LCH SA is proposing to add an intraday trading fee discount which will be applied by only charging the maximum notional of buys and sells per contract per day per trade account, where trade date is equal to clearing date (*i.e.,* trades that are backloaded or the result of an option exercise are excluded from the discount, as trade date will be before the clearing date for these trades). LCH SA is proposing the intraday trading fee plan to clients in order to incentivize clients to sign up for CDSClear services. Clearing Members that would benefit from this tariff are usually market makers who would buy and sell the same instrument multiple times a day. Such Clearing Members can instead already benefit from the Unlimited tariff available to General Members.

ii. CCP Switch Programme

LCH SA is proposing to amend the first footnote to clarify that the CCP Switch Programme (''Switch Programme'') is available to market participants and applicable to live CCP trades beginning on January 4, 2024 onwards.[8] LCH SA is not proposing any other amendments to this section of the Fee Grid.

iii. High Turnover Fee Plan

LCH SA is proposing to amend the footnote to clarify that the HTFP applies on the notional cleared in a calendar year but excludes from the determination of the total cleared notional, the trades not charged under the Intraday Trading Fee Plan or the Switch Programme. The HTFP will also continue to exclude the notional cleared for which a CCP Switch credit note was used to zero out the clearing fees and the notional cleared part of a CCP Switch that thus did not attract any clearing fees (*i.e.,* only those trades which attract a fee will count towards the HTFP notionals). Finally, LCH SA is proposing to clarify that the HTFP does not apply to General Members.

LCH SA is proposing to amend the CDSClear Fee Grid for 2024 as follows for options products:

General Members

i. Introductory Tariff

LCH SA is proposing to clarify the Introductory Tariff floor on clearing fees will be charged 1/12th for each month a General Member Group is live. A footnote will be added to the Fee Grid to state that a General Member is considered live for the whole month regardless of the go-live date within the considered month. LCH SA also proposes to clarify that there will be no Electronic Exercise Platform for exercising credit index options (''EEP'') usage fees in 2024, as reference to 2023 will no longer be applicable.

ii. Unlimited Tariff

LCH SA is proposing to clarify the Unlimited Tariff annual fixed fee will be charged 1/12th for each month a Member Group is live. A footnote will be added to the Fee Grid to state that a Member is considered live for the whole month regardless of the go-live date or the membership termination date within the considered month. LCH SA also proposes to clarify that there will be no EEP usage fees in 2024, as reference to 2023 will no longer be applicable. LCH SA also currently offers a discounted rate of €115,000 for notional cleared strictly above €15bn. LCH SA is proposing to clarify that it will provide a €260,000 rebate to the Clearing Member's December bill if the General Member Group is live for the whole calendar year (January 1–December 31).

iii. New Market Participant Tariff

LCH SA is proposing to clarify that there will be no EEP usage fees in 2024, as reference to 2023 will no longer be applicable. LCH SA is also proposing to add that in-year switches are not permitted, in order to align with other General Member tariffs.

iv. Onboarding Fees

LCH SA is proposing to reduce its current onboarding fee from €30,000 to €15,000 per legal entity under the Introductory Tariff or per Financial Group of a Clearing Member under the Unlimited Tariff. LCH SA is not proposing any other amendments to this section of the Fee Grid.

Select Members

v. Introductory Tariff

LCH SA is proposing to clarify that there will be no EEP usage fees in 2024, as reference to 2023 will no longer be applicable. LCH SA is not proposing any other amendments to this section of the Fee Grid.

vi. Unlimited Tariff

LCH SA is proposing to clarify that there will be no EEP usage fees in 2024, as reference to 2023 will no longer be applicable. LCH SA is also proposing to clarify the Unlimited Tariff annual fixed fee will be charged 1/12th for each month a Select Member is live. A footnote will be added to the Fee Grid

[7] LCH SA currently assesses an onboarding fee of €15,000 for its EquityClear SA and CommodityClear SA services.

[8] Under the CCP switch Incentive Programme, Members and Clients may benefit from the programme by closing out existing CDS transactions at their current CDS CCP and clearing new transactions at LCH SA. Any trades that were moved to LCH SA from another CCP prior to 1 Jan 2024 will be rebated in 2023 and cannot be claimed for after this date.

to state that a Select Member is considered live for the whole month regardless of the go-live date within the considered month. LCH SA also currently offers a discounted rate of €115,000 for notional cleared strictly above €15bn. LCH SA is proposing to clarify that it will provide a €285,000 rebate to the Select Member's December bill if the Select Member is live for the whole calendar year (January 1–December 31).

vii. Onboarding Fees

LCH SA is proposing to reduce its current onboarding fee from €30,000 to €15,000 per Legal Entity under the Introductory Tariff or per Financial Group of a Select Clearing Member under the Unlimited Tariff. LCH SA is not proposing any other amendments to this section of the Fee Grid.

Clients

i. Variable Fees

LCH SA is proposing to apply the full discount of client variable fees to 2024, as 2023 will no longer be applicable. LCH SA is not proposing any other amendments to this section of the Fee Grid.

LCH SA is also proposing to establish a fee structure for the retrieval of archived files. This proposed change will establish the fee structure currently applicable to LCH SA's EquityClear and RepoClear services. Specifically, LCH is proposing to charge a fee of €500 for the first archived file retrieval and €250 for each additional archived file retrieval. For ancillary requests, including ad hoc requests related to investigations, analysis and data and analytics, LCH SA is proposing to charge a fee based on time spent on the request. LCH SA is proposing to charge €500 for ½ day, €1,000 for 1 day and €500 for each additional ½ day. LCH SA is also proposing to clarify that the charge for certain large requests (*i.e.,* >50 files) will be provided in a quote as determined by LCH SA. In addition, LCH SA is also proposing to clarify that it will provide a more tailored estimate for each ancillary request received. To clarify, the proposed archived report fee structure is currently implemented for EquityClear and RepoClear, and LCH SA is proposing to extend to CDSClear as well.

2. Statutory Basis

LCH SA believes that the Proposed Rule Change is consistent with the requirements of section 17A of the Exchange Act [9] and the regulations thereunder applicable to LCH SA.

[9] 15 U.S.C. 78q–1.

section 17A(b)(3)(D) of the Act [10] requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees and other charges among its participants.

LCH SA believes the amendments to the Fee Grid are reasonable given the changes to its CDSClear service and equitable for both existing and new Clearing Members. Specifically, the Proposed Rule Change reflects the evolution and further maturity of LCH SA's CDSClear service, including the expansion of the CDSClear service in the United States and to support the LSOC model, and provides for additional clarity to existing and new Clearing Members. LCH SA is proposing to introduce an onboarding fee of €15,000 per entity beginning in 2024 to align with the onboarding fees assessed for other services of LCH SA.[11] In an effort to further align fees assessed for each service, LCH SA is proposing to reduce the options onboarding fee from €30,000 to €15,000. For house accounts, LCH SA is proposing a single annual fixed fee of €400,000 for General Members' Introductory Tariff and removing the €200,000 rebate for notional cleared below €10bn. LCH SA is also clarifying the application of the rebate pertaining to the fixed fee for Select Members. Specifically, a rebate of €200,000 will be applied to a Select Member's December invoice, such that the Select Member will only pay a fixed fee of €250,000 instead of €450,000, provided that the Select Member is live for the whole calendar year (January 1–December 31) and its annual notional cleared is below €10bn.

To provide clarity on the application of the fixed fee for General Members and Select Members for both single name and index CDS and options products, LCH SA is proposing to add clarifying language stating that 1/12th of the annual fixed fee will be charged to General Members Unlimited, General Members Introductory and Select Members that are live for any part of a calendar month. This clarification will address mid-year joiners and leavers.

For client clearing, LCH SA proposes to institute an Intraday Trading Fee Plan discount, whereby only the maximum notional of buys and sells per contract per day per trade account will be charged and only in the case where the trade date and clearing date are equal. LCH SA also proposes to clarify that under its current HTFP, only chargeable trades will count towards HTFP notionals, however trades not charged under the Intraday Trading Fee Plan or the Switch Programme would not be included. The HTFP will also continue to exclude the notional cleared for which a CCP Switch credit note was used to zero out the clearing fees and the notional cleared part of a CCP Switch that thus did not attract any clearing fees.

LCH SA will continue to incentivize market participants clearing new transactions at LCH SA CDSClear. Currently, General Members and Select Members and Clients can benefit from LCH SA's Switch Programme by closing out existing CDS transactions at their current CDS CCP and clearing new transactions at LCH SA CDSClear. After registration, such Members will not be charged variable fees for new transactions cleared at LCH SA CDSClear under the Switch Programme during a 6-month period and a credit note will be applied to Members' and Clients' clearing accounts, covering the fees associated with closing out positions at another CDS CCP. The credit note will be applicable towards fees associated with future transactions cleared at LCH SA CDSClear. LCH SA is proposing to clarify that the Switch Programme is available to market participants and applicable to live CCP trades beginning January 4, 2024, onwards.

Finally, LCH SA is proposing to continue the fee holiday for options Clients for 2024 and will continue not to charge for EEP usage fees in 2024 for options General Members, Select Members and Clients. LCH SA will also provide Members with the option to request archived reports and proposes to align the fee associated with retrieval and any ancillary requests thereto, with other LCH SA services.[12] LCH SA therefore believes that the Proposed Rule Change is consistent with the requirements of section 17A(b)(3)(D) of the Act [13] in that the amendments to the Fee Grid for 2024 are reasonable and equitable among its participants.

B. Clearing Agency's Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act [14] requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. LCH SA does not believe that the Proposed Rule Change

[10] 15 U.S.C. 78q–1(b)(3)(D).

[11] LCH SA currently assesses an onboarding fee of €15,000 for its EquityClear SA and CommodityClear SA services. Please see LCH SA onboarding fees available at: *https://www.lch.com/membership/sa-membership/sa-fees.*

[12] LCH SA currently offers this service for its EquityClear SA and RepoClear SA services.

[13] 15 U.S.C. 78q–1(b)(3)(D).

[14] 15 U.S.C. 78q–1(b)(3)(I).

would impose any burden on competition. The purpose of the Proposed Rule Change is for LCH SA to amend its Fee Grid for 2024 by incorporating changes to the CDSClear business and new clearing services offered to meet Clearing Members' and Clients' evolving business needs. As part of this effort LCH SA is proposing to align certain fees with other LCH SA service offerings, further incentivize competition by offering certain discounts and make clarifying changes on how fees will be calculated and applied. LCH SA believes the Proposed Rule Change would not burden any Clearing Members or other market participants given that amendments to the Fee Grid will be applied equally for all CDSClear Clearing Members and Clients. Therefore, LCH SA does not believe that the Proposed Rule Change would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the Proposed Rule Change have not been solicited or received. LCH SA will notify the Commission of any written comments received by LCH SA.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to section 19(b)(3)(A) [15] of the Act and paragraph (f) of Rule 19b–4 [16] 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.

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–LCH SA–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–LCH SA–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 LCH SA and on LCH SA's website at: *https://www.lch.com/resources/rulebooks/proposed-rule-changes.*

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–LCH SA–2024–001 and should be submitted on or before February 14, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–01308 Filed 1–23–24; 8:45 am]

BILLING CODE 8011–01–P

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(2).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–777, OMB Control No. 3235–0729]

Proposed Collection; Comment Request; Extension: Form N–CEN

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

The title for the collection of information is ''Form N–CEN under the Investment Company Act of 1940.'' Form N–CEN is used to collect annual, census-type information for registered funds. Filers must submit this report electronically using the Commission's electronic filing system ''(EDGAR'') in Extensible Markup Language (''XML'') format. The purpose of Form N–CEN is to satisfy the filing and disclosure requirements of Section 30 of the Investment Company Act, and of rule 30a–1 thereunder.

We estimate that the average annual hour burden to complete the generally applicable items on Form N–CEN response will be 18 hours per year. We estimate that the aggregate annual hour burden to complete the generally applicable items will be 59,490 hours per year. We therefore estimate that filers would have total average annualized paperwork related expenses related to complete the generally applicable items of $605,520 for reports on Form N–CEN.

The requirements of this collection of information are mandatory. Responses will not be kept confidential. 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.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the

quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by March 25, 2024.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 19, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–01350 Filed 1–23–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99390; File No. SR–CboeBZX–2023–095]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To List and Trade Shares of the Fidelity Ethereum Fund Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

January 18, 2024.

On November 17, 2023, Cboe BZX Exchange, Inc. (''BZX'' or ''Exchange'') 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] a proposed rule change to list and trade shares of the Fidelity Ethereum Fund under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on December 6, 2023.[3]

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is January 20, 2024. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on 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 Act,[5] designates March 5, 2024, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–CboeBZX–2023–095).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–01307 Filed 1–23–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99386; File No. SR–C2–2024–003]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 5.34

January 18, 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 3, 2024, Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2'') 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 Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 C2 Exchange, Inc. (the ''Exchange'' or ''C2 Options'') proposes to amend Rule 5.34. The text of the proposed rule change is provided below.

(additions are *italicized;* deletions are [bracketed])

* * * * *

Rules of Cboe C2 Exchange, Inc.

* * * * *

Rule 5.34. Order and Quote Price Protection Mechanisms and Risk Controls

The System's acceptance and execution of orders, quotes, and bulk messages, as applicable, pursuant to the Rules, including Rules 5.31 through 5.33, are subject to the following price protection mechanisms and risk controls, as applicable.

(a) Simple Orders.

(1)–(3) No change.

(4) Drill-Through Price Protection.

(A)–(B) No change.

(C) The System enters a market order with a Time-in-Force of Day or limit order with a Time-in-Force of Day, GTC, or GTD (or unexecuted portion) not executed pursuant to subparagraph (A) in the Book with a displayed price equal to the drill-through price.

(i)–(vii) No change.

(D) This protection does not apply to bulk messages *or ISOs.*

* * * * *

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/*), 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 99045 (Nov. 30, 2023), 88 FR 84840. Comments on the proposed rule change are available at: *https://www.sec.gov/comments/sr-cboebzx-2023-095/srcboebzx2023095.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

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 Rule 5.34. Specifically, the Exchange proposes to exclude Intermarket Sweep Orders (''ISOs'') from its drill-through protection. Pursuant to Rule 5.34(a)(4)(A), if a buy (sell) order enters the book at the conclusion of the opening auction process or would execute or post to the book when it enters the book, the Exchange's system executes the order up to an Exchange-determined buffer amount (determined on a class and premium basis) above (below) the offer (bid) limit of the Opening Collar [5] or the National Best Offer (''NBO'') (National Best Bid (''NBB'')) that existed at the time of order entry, respectively (the ''drill-through price''). The System cancels or rejects any market order with a time-in-force of immediate-or-cancel (''IOC'') (or unexecuted portion or limit order with time-in-force of IOC or fill-or-kill (''FOK'') (or unexecuted portion not executed pursuant to the previous sentence.[6] Rule 5.34(a)(4)(C) establishes an iterative drill-through process, whereby the Exchange permits orders to rest in the book for multiple time periods and at more aggressive displayed prices during each time period. Specifically, the Exchange system enters a market order with a time-in-force of day or limit order with a time-in-force of day, good-til-cancelled (''GTC''), or good-til-gate (''GTD'') (or unexecuted portion) in the book with a displayed price equal to the drill-through price. The order (or unexecuted portion) will rest in the book at the drill-through price for the duration of consecutive time periods (the Exchange determines on a class-by-class basis the length of the time period in milliseconds, which may not exceed three seconds), which are referred to as ''iterations.'' Following the end of each period, the Exchange system adds (if a buy order) or subtracts (if a sell order) one buffer amount (the Exchange determines the buffer amount on a class-by-class basis) to the drill-through price displayed during the immediately preceding period (each new price becomes the ''drill-through price''). The order (or unexecuted portion) rests in the book at that new drill-through price for the duration of the subsequent period. The Exchange system applies a timestamp to the order (or unexecuted portion) based on the time it enters or is re-priced in the book for priority reasons. The order continues through this iterative process until the earliest of the following to occur: (a) the order fully executes; (b) the user cancels the order; and (c) the buy (sell) order's limit price equals or is less (greater) than the drill-through price at any time during application of the drill-through mechanism, in which case the order rests in the book at its limit price.

Currently, the drill-through protection applies to ISOs. An ISO is a limit order for an options series that meets the following requirements: (1) when routed to an Eligible Exchange,[7] the order is identified as an ISO; and (2) simultaneously with the routing of the order, one or more additional ISOs, as necessary, are routed to execute against the full displayed size of any Protected Bid, in the case of a limit order to sell, or any Protected Offer, in the case of a limit order to buy, for the options series with a price that is superior to the limit price of the ISO, with such additional orders also marked as ISOs.[8]

The Exchange proposes to exclude ISOs from the drill-through protection.[9] The primary purpose of the drill-through price protection is to prevent orders from executing at prices ''too far away'' from the market when they enter the book for potential execution. This is inconsistent with the primary purpose of ISOs, which is to permit orders to trade at prices outside of the market. The Exchange believes excluding ISOs from the drill-through is consistent with the purpose of each type of functionality.

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.[10] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [11] 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) [12] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a national market system, and protect investors and the public interest, because it will increase instances in which ISOs receive executions up to their limit prices, including outside of the market prices when the ISOs were submitted to the Exchange, which the Exchange believes is consistent with the expectations of users that submit those orders. As noted above, the primary purpose of ISOs is to permit orders to trade at prices outside of the market. The primary purpose of the drill-through price protection is to prevent orders from executing at prices ''too far away'' from the market when they enter the book for potential execution. The Exchange believes excluding ISOs from the drill-through is consistent with the purpose of each type of functionality. Therefore, the Exchange believes the proposed rule

[5] *See* Rule 5.31(a) for the definition of Opening Collars.

[6] *See* Rule 5.34(a)(4)(B).

[7] An ''Eligible Exchange'' means a national securities exchange registered with the SEC in accordance with section 6(a) of the Securities Exchange Act of 1934 (the ''Act'') that: (a) is a Participant Exchange in OCC (as that term is defined in Section VII of the OCC by-laws); (b) is a party to the OPRA Plan (as that term is described in Section I of the OPRA Plan); and (c) if the national securities exchange chooses not to become a party to this Plan, is a participant in another plan approved by the Securities and Exchange Commission (the ''Commission'') providing for comparable Trade-Through and Locked and Crossed Market protection. The term ''Trade-Through'' means a transaction in an options series at a price that is lower than a Protected Bid or higher than a Protected Offer. A ''Protected Bid'' or ''Protected Offer'' means a bid or offer in an options series, respectively, that (a) is disseminated pursuant to the OPRA Plan; and (b) is the best bid or best offer, respectively, displayed by an Eligible Exchange. A ''Locked Market'' means a quoted market in which a Protected Bid is equal to a Protected Offer in a series of an options class, and a ''Crossed Market'' means a quoted market in which a Protected bid is higher than a Protected Offer in a series of an options class. *See* Cboe Options, Inc. (''Cboe Options'') Rule 5.65(e), (g), (i), (o), and (q) (incorporated by reference into the Exchange's Rules, as set forth in Chapter 5, Section E of the Rulebook).

[8] *See* Rule 5.6(c) (definition of ISO) and Cboe Options Rule 5.65(h) (incorporated by reference into the Exchange's Rules, as set forth in Chapter 5, Section E of the Rulebook).

[9] *See* proposed Rule 5.34(a)(4)(D).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] *Id.*

change will enhance the Exchange system by aligning its drill-through protection with the intended purpose of ISOs.[13] The Exchange believes the proposed rule change may ultimately result in additional executions consistent with the expectations of users that submit ISOs, which ultimately benefits investors. The Exchange further believes the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, as it will apply to ISOs of all users.

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, because it will apply in the same manner to ISOs of all Trading Permit Holders. 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, because it relates solely to the application of one of the Exchange's price protection mechanisms to ISOs. Additionally, the proposed rule change substantively identical to a recent rule change by Cboe EDGX Exchange, Inc. (''EDGX Options'').[14] The Exchange also notes at least one other options exchange excludes ISOs from certain of its price protection measures.[15]

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.

[13] The Exchange notes ISOs will continue to receive price protection, such as from the limit order fat finger check. *See* Rule 5.34(c)(1).

[14] *See* SR–CboeEDGX–2023–082 (December 21, 2023).

[15] *See* Miami International Securities Exchange, LLC (''MIAX'') Rule 515(c)(1) (ISOs excluded from MIAX's price protection on non-market maker orders in non-proprietary products, which prevents orders from executing more than a specified number of increments away from the national best bid or offer (''NBBO'') at the time the order is received).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

A. significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act[16] and Rule 19b–4(f)(6)[17] thereunder.[18] 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 (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–C2–2024–003 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–C2–2024–003. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 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–C2–2024–003 and should be submitted on or before February 14, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–01305 Filed 1–23–24; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–821, OMB Control No. 3235–0776]

Proposed Collection; Comment Request; Extension: Rule 18f–4

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit the existing collection of information to the Office of

Management and Budget (''OMB'') for extension and approval.

Rule 18f–4 (17 CFR 270.18f–4) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (the ''Investment Company Act'') permits a fund to enter into derivatives transactions, notwithstanding the prohibitions and restrictions on the issuance of senior securities under section 18 of the Investment Company Act. A fund that relies on rule 18f–4 to enter into derivatives transactions generally is required to: adopt a derivatives risk management program; have its board of directors approve the fund's designation of a derivatives risk manager and receive direct reports from the derivatives risk manager about the derivatives risk management program; and comply with a VaR-based test designed to limit a fund's leverage risk consistent with the investor protection purposes underlying section 18 of the Investment Company Act. Rule 18f–4 includes an exception from the derivatives risk management program requirement and limit on fund leverage risk if a fund limits its derivatives exposure to 10% of its net assets (the fund may exclude from this calculation derivatives transactions that it uses to hedge certain currency and interest rate risks). A fund relying on this exception will be required to adopt policies and procedures that are reasonably designed to manage its derivatives risks.

Rule 18f–4 also includes an exception from the VaR-based limit on leverage risk for a leveraged/inverse fund that cannot comply with rule 18f–4's limit on fund leverage risk and that, as of October 28, 2020, is: (1) in operation, (2) has outstanding shares issued in one or more public offerings to investors, and (3) discloses in its prospectus that it has a leverage multiple or inverse multiple that exceeds 200% of the performance or the inverse of the performance of the underlying index (for purposes of this Supporting Statement, such a fund is an ''over-200% leveraged/inverse fund''). A fund relying on this exception must disclose in its prospectus that it is not subject to rule 18f–4's limit on fund leverage risk.

Finally, rule 18f–4 permits funds to enter into reverse repurchase agreements (and similar financing transactions) and ''unfunded commitments'' to make certain loans or investments, and to invest in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle, subject to conditions tailored to these transactions.

The respondents to rule 18f–4 are registered open- and closed-end management investment companies and BDCs. Compliance with rule 18f–4 is mandatory for all funds that seek to engage, in reliance on the rule, in derivatives transactions and certain other transactions that the rule addresses, which would otherwise be subject to the restrictions of section 18 of the Investment Company Act.

The information collection requirements of rule 18f–4 are designed to ensure that funds maintain the required written derivatives risk management programs that promote compliance with the federal securities laws and protect investors, and otherwise comply with the requirements of the rule. The information collections also assist the Commission's examination staff in assessing the adequacy of funds' derivatives risk management programs and their compliance with the other requirements of the rule, and identifying weaknesses in a fund's derivatives risk management if violations occur or are uncorrected.

The respondents to rule 18f–4 are registered open- and closed-end management investment companies and BDCs. Compliance with rule 18f–4 is mandatory for all funds that seek to engage, in reliance on the rule, in derivatives transactions and certain other transactions that the rule addresses, which would otherwise be subject to the restrictions of section 18 of the Investment Company Act. To the extent that records required to be created and maintained by funds under the rule are provided to the Commission in connection with examinations or investigations, such information will be kept confidential subject to the provisions of applicable law.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by March 25, 2024.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 18, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–01282 Filed 1–23–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99385; File No. SR–CBOE–2024–004]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 5.34

January 18, 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 3, 2024, 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 Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 Rule 5.34. The text of the proposed rule change is provided below.

(additions are *italicized;* deletions are [bracketed])

* * * * *

Rules of Cboe Exchange, Inc.

* * * * *

Rule 5.34. Order and Quote Price Protection Mechanisms and Risk Controls

The System's acceptance and execution of orders, quotes, and bulk messages, as applicable, pursuant to the Rules, including Rules 5.31 through

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

5.33, and orders routed to PAR pursuant to Rule 5.82 are subject to the following price protection mechanisms and risk controls, as applicable.

(a) Simple Orders.

(1)–(3) No change.

(4) Drill-Through Price Protection.

(A)–(B) No change.

(C) The System enters a market order with a Time-in-Force of Day or limit order with a Time-in-Force of Day, GTC, or GTD (or unexecuted portion) not executed pursuant to subparagraph (A) in the Book with a displayed price equal to the drill-through price.

(i)–(vii) No change.

(D) This protection does not apply to bulk messages *or ISOs.*

* * * * *

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 Rule 5.34. Specifically, the Exchange proposes to exclude Intermarket Sweep Orders (''ISOs'') from its drill-through protection. Pursuant to Rule 5.34(a)(4)(A), if a buy (sell) order enters the book at the conclusion of the opening auction process or would execute or post to the book when it enters the book, the Exchange's system executes the order up to an Exchange-determined buffer amount (determined on a class and premium basis) above (below) the offer (bid) limit of the Opening Collar [5] or the National Best Offer (''NBO'') (National Best Bid (''NBB'')) that existed at the time of order entry, respectively (the ''drill-through price''). The System cancels or rejects any market order with a time-in-force of immediate-or-cancel (''IOC'') (or unexecuted portion or limit order with time-in-force of IOC or fill-or-kill (''FOK'') (or unexecuted portion not executed pursuant to the previous sentence.[6] Rule 5.34(a)(4)(C) establishes an iterative drill-through process, whereby the Exchange permits orders to rest in the book for multiple time periods and at more aggressive displayed prices during each time period. Specifically, the Exchange system enters a market order with a time-in-force of day or limit order with a time-in-force of day, good-til-cancelled (''GTC''), or good-til-gate (''GTD'') (or unexecuted portion) in the book with a displayed price equal to the drill-through price. The order (or unexecuted portion) will rest in the book at the drill-through price for the duration of consecutive time periods (the Exchange determines on a class-by-class basis the length of the time period in milliseconds, which may not exceed three seconds), which are referred to as ''iterations.'' Following the end of each period, the Exchange system adds (if a buy order) or subtracts (if a sell order) one buffer amount (the Exchange determines the buffer amount on a class-by-class basis) to the drill-through price displayed during the immediately preceding period (each new price becomes the ''drill-through price''). The order (or unexecuted portion) rests in the book at that new drill-through price for the duration of the subsequent period. The Exchange system applies a timestamp to the order (or unexecuted portion) based on the time it enters or is re-priced in the book for priority reasons. The order continues through this iterative process until the earliest of the following to occur: (a) the order fully executes; (b) the user cancels the order; and (c) the buy (sell) order's limit price equals or is less (greater) than the drill-through price at any time during application of the drill-through mechanism, in which case the order rests in the book at its limit price.

Currently, the drill-through protection applies to ISOs. An ISO is a limit order for an options series that meets the following requirements: (1) when routed to an Eligible Exchange,[7] the order is identified as an ISO; and (2) simultaneously with the routing of the order, one or more additional ISOs, as necessary, are routed to execute against the full displayed size of any Protected Bid, in the case of a limit order to sell, or any Protected Offer, in the case of a limit order to buy, for the options series with a price that is superior to the limit price of the ISO, with such additional orders also marked as ISOs.[8]

The Exchange proposes to exclude ISOs from the drill-through protection.[9] The primary purpose of the drill-through price protection is to prevent orders from executing at prices ''too far away'' from the market when they enter the book for potential execution. This is inconsistent with the primary purpose of ISOs, which is to permit orders to trade at prices outside of the market. The Exchange believes excluding ISOs from the drill-through is consistent with the purpose of each type of functionality.

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.[10] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [11] 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

[5] *See* Rule 5.31(a) for the definition of Opening Collars.

[6] *See* Rule 5.34(a)(4)(B).

[7] An ''Eligible Exchange'' means a national securities exchange registered with the SEC in accordance with section 6(a) of the Securities Exchange Act of 1934 (the ''Act'') that: (a) is a Participant Exchange in OCC (as that term is defined in Section VII of the OCC by-laws); (b) is a party to the OPRA Plan (as that term is described in Section I of the OPRA Plan); and (c) if the national securities exchange chooses not to become a party to this Plan, is a participant in another plan approved by the Securities and Exchange Commission (the ''Commission'') providing for comparable Trade-Through and Locked and Crossed Market protection. The term ''Trade-Through'' means a transaction in an options series at a price that is lower than a Protected Bid or higher than a Protected Offer. A ''Protected Bid'' or ''Protected Offer'' means a bid or offer in an options series, respectively, that (a) is disseminated pursuant to the OPRA Plan; and (b) is the best bid or best offer, respectively, displayed by an Eligible Exchange. A ''Locked Market'' means a quoted market in which a Protected Bid is equal to a Protected Offer in a series of an options class, and a ''Crossed Market'' means a quoted market in which a Protected bid is higher than a Protected Offer in a series of an options class. *See* Rule 5.65(e), (g), (i), (o), and (q).

[8] *See* Rules 5.6(c) (definition of ISO) and 5.65(h).

[9] *See* proposed Rule 5.34(a)(4)(D).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

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) [12] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a national market system, and protect investors and the public interest, because it will increase instances in which ISOs receive executions up to their limit prices, including outside of the market prices when the ISOs were submitted to the Exchange, which the Exchange believes is consistent with the expectations of users that submit those orders. As noted above, the primary purpose of ISOs is to permit orders to trade at prices outside of the market. The primary purpose of the drill-through price protection is to prevent orders from executing at prices ''too far away'' from the market when they enter the book for potential execution. The Exchange believes excluding ISOs from the drill-through is consistent with the purpose of each type of functionality. Therefore, the Exchange believes the proposed rule change will enhance the Exchange system by aligning its drill-through protection with the intended purpose of ISOs.[13] The Exchange believes the proposed rule change may ultimately result in additional executions consistent with the expectations of users that submit ISOs, which ultimately benefits investors. The Exchange further believes the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, as it will apply to ISOs of all users.

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, because it will apply in the same manner to ISOs of all Trading Permit Holders. 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, because it relates solely to the application of one of the Exchange's price protection mechanisms to ISOs. Additionally, the proposed rule change substantively identical to a recent rule change by Cboe EDGX Exchange, Inc. (''EDGX Options'').[14] The Exchange also notes at least one other options exchange excludes ISOs from certain of its price protection measures.[15]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

A. significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6) [17] thereunder.[18] 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 (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–CBOE–2024–004 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–2024–004. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 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–2024–004 and should be submitted on or before February 14, 2024.

[12] *Id.*

[13] The Exchange notes ISOs will continue to receive price protection, such as from the limit order fat finger check. *See* Rule 5.34(c)(1).

[14] *See* SR–CboeEDGX–2023–082 (December 21, 2023).

[15] *See* Miami International Securities Exchange, LLC (''MIAX'') Rule 515(c)(1) (ISOs excluded from MIAX's price protection on non-market maker orders in non-proprietary products, which prevents orders from executing more than a specified number of increments away from the national best bid or offer (''NBBO'') at the time the order is received).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–01304 Filed 1–23–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 3235–0346, File No. 270–305]

Proposed Collection; Comment Request; Extension: Rule 34b–1

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 34b–1 under the Investment Company Act (17 CFR 270.34b–1) governs sales material that accompanies or follows the delivery of a statutory prospectus (''sales literature''). Rule 34b–1 deems to be materially misleading any investment company (''fund'') sales literature required to be filed with the Securities and Exchange Commission (''Commission'') by Section 24(b) of the Investment Company Act (15 U.S.C. 80a–24(b)) that includes performance data, unless the sales literature also includes the appropriate uniformly computed data and the legend disclosure required in investment company advertisements by rule 482 under the Securities Act of 1933 (17 CFR 230.482) (''rule 482''). Additionally, rule 34b–1 deems to be materially misleading any fund sales literature intended for distribution to prospective investors that includes fee and expense information, unless that sales literature complies with the disclosure and timeliness requirements of rule 482.[1] These requirements are designed to prevent misleading performance claims by funds and to enable investors to make meaningful comparisons among funds.

The Commission estimates that on average approximately 8,289[2] responses that include the information required by rule 34b–1 each year. The burden resulting from the collection of information requirements of rule 34b–1 is estimated to be 11 hours per response.[3] The total hourly burden for rule 34b–1 is approximately 91,179 hours per year in the aggregate.[4]

The collection of information under rule 34b–1 is mandatory. The information provided under rule 34b–1 is not kept confidential. The Commission 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.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by March 25, 2024.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 19, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–01349 Filed 1–23–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99387; File No. SR–CboeBZX–2024–005]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 21.17

January 18, 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 3, 2024, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') 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 Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') proposes to amend Rule 21.17. The text of the proposed rule change is provided below.

(additions are *italicized;* deletions are [bracketed])

* * * * *

Rules of Cboe BZX Exchange, Inc.

* * * * *

Rule 21.17. Additional Price Protection Mechanisms and Risk Controls

The System's acceptance and execution of orders, quotes, and bulk messages, as applicable, are subject to the price protection mechanisms and risk controls in Rule 21.16, this Rule 21.17 and as otherwise set forth in

[19] 17 CFR 200.30–3(a)(12).

[1] These provisions of rule 34b–1 apply to any registered investment company or business development company advertisement, pamphlet, circular, form letter, or other sales literature addressed to or intended for distribution to prospective investors in connection with a public offering. *See* rule 34b–1(c).

[2] The estimated average number of responses to rule 34b–1 for the two-year period from October 1, 2021, to November 30, 2023, comprises 7,912 filings submitted to FINRA and 377 filings submitted to the Commission.

[3] Previous PRA extensions for rule 34b–1 assumed an estimated annual burden of 6 hours per response in complying with paragraphs a and b of rule 34b–1, 3 hours per response in complying with the fee and expense figure disclosure requirements of paragraph c, and 2 hours for the fee waivers/expense reimbursement arrangements disclosure requirements of paragraph c, while estimating that only 96% of relevant responses would need to comply with all of the paragraph c requirements. For purposes of this extension, we are assuming that 100% of the responsive filings identified will incur burdens for all of the rule's requirements, such that a total of 11 hours per response per year (6 + 3 + 2 = 11). We recognize that this might overstate the total burden.

[4] 8,289 responses × 11 hours per response = 91,179 hours.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

the Rules. All numeric values established by the Exchange pursuant to this Rule will be maintained by the Exchange in publicly available specifications and/or published in a Regulatory Circular. Unless otherwise specified the price protections set forth in this Rule, including the numeric values established by the Exchange, may not be disabled or adjusted. The Exchange may share any of a User's risk settings with the Clearing Member that clears transactions on behalf of the User.

(a)–(c) No change.

(d) Drill-Through Price Protection.

(1)–(2) No change.

(3) The System enters a market order with a Time-in Force of Day or limit order with a Time-in-Force of Day, GTC, or GTD (or unexecuted portion) not executed pursuant to subparagraph (1) in the BZX Options Book with a displayed price equal to the Drill-Through Price, unless the terms of the order instruct otherwise.

(A)–(G) No change.

([H]*4*) This protection does not apply to bulk messages *or ISOs.*

* * * * *

The text of the proposed rule change is also 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 amend Rule 21.17. Specifically, the Exchange proposes to exclude Intermarket Sweep Orders (''ISOs'') from its drill-through protection. Pursuant to Rule 21.17(d)(1), if a buy (sell) order enters the book at the conclusion of the opening auction process or would execute or post to the book when it enters the book, the Exchange's system executes the order up to an Exchange-determined buffer amount (determined on a class and premium basis) above (below) the offer (bid) limit of the Opening Collar [5] or the National Best Offer (''NBO'') (National Best Bid (''NBB'')) that existed at the time of order entry, respectively (the ''drill-through price''). The System cancels or rejects any market order with a time-in-force of immediate-or-cancel (''IOC'') (or unexecuted portion or limit order with time-in-force of IOC or fill-or-kill (''FOK'') (or unexecuted portion not executed pursuant to the previous sentence.[6] Rule 21.17(d)(3) establishes an iterative drill-through process, whereby the Exchange permits orders to rest in the book for multiple time periods and at more aggressive displayed prices during each time period. Specifically, for a market order with a time-in-force of day or limit order with a time-in-force of day, good-til-cancelled (''GTC''), or good-til-gate (''GTD'') (or unexecuted portion), the Exchange system enters the order in the book with a displayed price equal to the drill-through price (unless the terms of the order instruct otherwise). The order (or unexecuted portion) will rest in the book at the drill-through price for the duration of consecutive time periods (the Exchange determines on a class-by-class basis the length of the time period in milliseconds, which may not exceed three seconds), which are referred to as ''iterations.'' Following the end of each period, the Exchange system adds (if a buy order) or subtracts (if a sell order) one buffer amount (the Exchange determines the buffer amount on a class-by-class basis) to the drill-through price displayed during the immediately preceding period (each new price becomes the ''drill-through price''). The order (or unexecuted portion) rests in the book at that new drill-through price for the duration of the subsequent period. The Exchange system applies a timestamp to the order (or unexecuted portion) based on the time it enters or is re-priced in the book for priority reasons. The order continues through this iterative process until the earliest of the following to occur: (a) the order fully executes; (b) the user cancels the order; and (c) the buy (sell) order's limit price equals or is less (greater) than the drill-through price at any time during application of the drill-through mechanism, in which case the order rests in the book at its limit price, subject to a user's instructions.

Currently, the drill-through protection applies to ISOs. An ISO is a limit order for an options series that meets the following requirements: (1) when routed to an Eligible Exchange,[7] the order is identified as an ISO; and (2) simultaneously with the routing of the order, one or more additional ISOs, as necessary, are routed to execute against the full displayed size of any Protected Bid, in the case of a limit order to sell, or any Protected Offer, in the case of a limit order to buy, for the options series with a price that is superior to the limit price of the ISO, with such additional orders also marked as ISOs.[8]

The Exchange proposes to exclude ISOs from the drill-through protection.[9] The primary purpose of the drill-through price protection is to prevent orders from executing at prices ''too far away'' from the market when they enter the book for potential execution. This is inconsistent with the primary purpose of ISOs, which is to permit orders to trade at prices outside of the market. The Exchange believes excluding ISOs from the drill-through is consistent with the purpose of each type of functionality.

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

[5] *See* Rule 21.7(a) for the definition of Opening Collars.

[6] *See* Rule 21.17(d)(2).

[7] An ''Eligible Exchange'' means a national securities exchange registered with the SEC in accordance with section 6(a) of the Securities Exchange Act of 1934 (the ''Act'') that: (a) is a Participant Exchange in OCC (as that term is defined in Section VII of the OCC by-laws); (b) is a party to the OPRA Plan (as that term is described in Section I of the OPRA Plan); and (c) if the national securities exchange chooses not to become a party to this Plan, is a participant in another plan approved by the Securities and Exchange Commission (the ''Commission'') providing for comparable Trade-Through and Locked and Crossed Market protection. The term ''Trade-Through'' means a transaction in an options series at a price that is lower than a Protected Bid or higher than a Protected Offer. A ''Protected Bid'' or ''Protected Offer'' means a bid or offer in an options series, respectively, that (a) is disseminated pursuant to the OPRA Plan; and (b) is the best bid or best offer, respectively, displayed by an Eligible Exchange. A ''Locked Market'' means a quoted market in which a Protected Bid is equal to a Protected Offer in a series of an options class, and a ''Crossed Market'' means a quoted market in which a Protected bid is higher than a Protected Offer in a series of an options class. *See* Rule 27.1(a)(5), (7), (10), (18), and (22).

[8] *See* Rules 21.1(d)(9) and 27.1(a)(9).

[9] *See* proposed Rule 21.17(d)(4). As set forth in current Rule 21.17(d)(3)(H), the drill-through protection does not apply to bulk messages. The proposed rule change moves this current exclusion to proposed Rule 21.17(d)(4) so that all orders and quotes that are excluded from the drill-through protection are maintained in the same rule provision, and the Exchange believes proposed subparagraph (4) is a more appropriate place for listing excluded orders and quotes. This nonsubstantive change regarding the exclusion of bulk messages from the drill-through protection has no impact on current behavior and merely moves the exclusion to a different subparagraph.

and, in particular, the requirements of section 6(b) of the Act.[10] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[11] 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)[12] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a national market system, and protect investors and the public interest, because it will increase instances in which ISOs receive executions up to their limit prices, including outside of the market prices when the ISOs were submitted to the Exchange, which the Exchange believes is consistent with the expectations of users that submit those orders. As noted above, the primary purpose of ISOs is to permit orders to trade at prices outside of the market. The primary purpose of the drill-through price protection is to prevent orders from executing at prices ''too far away'' from the market when they enter the book for potential execution. The Exchange believes excluding ISOs from the drill-through is consistent with the purpose of each type of functionality. Therefore, the Exchange believes the proposed rule change will enhance the Exchange system by aligning its drill-through protection with the intended purpose of ISOs.[13] The Exchange believes the proposed rule change may ultimately result in additional executions consistent with the expectations of users that submit ISOs, which ultimately benefits investors. The Exchange further believes the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, as it will apply to ISOs of all users.

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, because it will apply in the same manner to ISOs of all Members. 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, because it relates solely to the application of one of the Exchange's price protection mechanisms to ISOs. Additionally, the proposed rule change substantively identical to a recent rule change by Cboe EDGX Exchange, Inc. (''EDGX Options'').[14] The Exchange also notes at least one other options exchange excludes ISOs from certain of its price protection measures.[15]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

A. significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act[16] and Rule 19b–4(f)(6)[17] thereunder.[18] 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 (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2024–005 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–2024–005. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] *Id.*

[13] The Exchange notes ISOs will continue to receive price protection, such as from the limit order fat finger check. *See* Rule 21.17(b).

[14] *See* SR–CboeEDGX–2023–082 (December 21, 2023).

[15] *See* Miami International Securities Exchange, LLC (''MIAX'') Rule 515(c)(1) (ISOs excluded from MIAX's price protection on non-market maker orders in non-proprietary products, which prevents orders from executing more than a specified number of increments away from the national best bid or offer (''NBBO'') at the time the order is received).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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–2024–005 and should be submitted on or before February 14, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–01306 Filed 1–23–24; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 12311]

Notification of Meetings of the United States-Peru Environmental Affairs Council, Environmental Cooperation Commission, and Sub-Committee on Forest Sector Governance

AGENCY: Department of State.

ACTION: Notice of meetings and requests for comments; invitation to public session.

SUMMARY: The U.S. Department of State and the Office of the United States Trade Representative (USTR) are providing notice that on February 13–14, 2024, the United States and Peru will hold meetings of the Environmental Affairs Council (the ''Council''), the Environmental Cooperation Commission (the ''Commission''), and the Sub-Committee on Forest Sector Governance (the ''Sub-Committee''). The public sessions for the Council, Commission, and Sub-Committee meetings will be held on February 14, 2024. All meetings will take place in Lima, Peru. The purpose of the meetings is to review the implementation of Chapter 18 (Environment) of the United States-Peru Trade Promotion Agreement (PTPA); the PTPA Annex on Forest Sector Governance (Annex 18.3.4); and the United States-Peru Environmental Cooperation Agreement (ECA).

All interested persons are invited to attend the public session, and to submit written comments or questions regarding the implementation of Chapter 18, Annex 18.3.4, and the ECA. Specifically, the public may submit input for the Council meeting agenda; views and comments on the issues the public considers relevant to the Council's work; and views with respect to the forthcoming update of the 2024–2027 United States-Peru Environmental Cooperation Work Program. In preparing comments, submitters are encouraged to refer to Chapter 18 of the PTPA, including Annex 18.3.4, and the ECA (available at *https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/current-trade-agreements-with-environmental-chapters/#peru*). Instructions on how to submit comments are under the heading ''*Comments and RSVP*''.

DATES: The public sessions of the Council, Commission, and Sub-Committee meetings will be held on February 14, 2024. Confirmation of attendance and comments or suggestions are requested in writing no later than February 9, 2024.

ADDRESSES: Please contact Elizabeth Linske and Sigrid Simpson for the location of this meeting.

Comments and RSVP: Written comments or suggestions should be submitted to both:

(1) Elizabeth Linske, U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Office of Environmental Quality, by email at *LinskeE@state.gov* with the subject line ''UNITED STATES-PERU EAC/ECC MEETING'' and

(2) Sigrid Simpson, Office of the United States Trade Representative, Office of Environment and Natural Resources, by email at *Sigrid.A.Simpson@ustr.eop.gov* with the subject line ''UNITED STATES-PERU EAC/ECC MEETING.''

In your email, please include your full name and affiliation.

If you have access to the internet, you can view and comment on this notice by going to: *http://www.regulations.gov/#!home* and searching for docket number DOS–2024–0002.

FOR FURTHER INFORMATION CONTACT: Elizabeth Linske (telephone: 202–344–9852; email: *LinskeE@state.gov*) or Sigrid Simpson (telephone: 202–881–6592; email: *Sigrid.A.Simpson@ustr.eop.gov*).

SUPPLEMENTARY INFORMATION: The PTPA entered into force on February 1, 2009. Article 18.6 of the PTPA establishes an Environmental Affairs Council, which is required to meet once a year unless otherwise agreed by the Parties to discuss the implementation of Chapter 18. Annex 18.3.4 to the PTPA establishes a Sub-Committee on Forest Sector Governance. The Sub-Committee is a specific forum for the Parties to share views and information on any matter arising under the PTPA Annex on Forest Sector Governance. The ECA entered into force on August 23, 2009. Article III of the ECA establishes an Environmental Cooperation Commission and makes the Commission responsible for developing a Work Program. Article 18.6 of the PTPA and Article VI of the ECA provide that meetings of the Council and Commission respectively include a public session, unless the Parties otherwise agree. At its first meeting, the Sub-Committee on Forest Sector Governance committed to hold a public session after each Sub-Committee meeting.

Scott B. Ticknor,

Director, Office of Environmental Quality, Department of State.

[FR Doc. 2024–01299 Filed 1–23–24; 8:45 am]

BILLING CODE 4710–09–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 290 (Sub–No. 4)]

Railroad Cost Recovery Procedures—Productivity Adjustment

AGENCY: Surface Transportation Board.

ACTION: Presentation of the Board's calculation for the change in railroad productivity for the 2018–2022 averaging period.

SUMMARY: In a decision served on January 19, 2024, the Board proposed to adopt 1.011 (1.1% per year) as the measure of average (geometric mean) change in railroad productivity for the 2018–2022 (five-year) period. The Board's January 19, 2024 decision stated that comments may be filed addressing any perceived data and computational errors in the Board's calculation. The decision also stated that, unless a further order is issued postponing the effective date, the decision will take effect on March 1, 2024.

DATES: Comments are due by February 5, 2024.

ADDRESSES: Comments may be filed via e-filing on the Board's website at *www.stb.gov*. Comments must be served on all parties appearing on the service list.

FOR FURTHER INFORMATION CONTACT: Pedro Ramirez at (202) 245–0333. If you require accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: Additional information is contained in

[19] 17 CFR 200.30–3(a)(12).

the Board's decision, which is available at *www.stb.gov* under Docket No. EP 290 (Sub–No. 4).

Decided: January 18, 2024.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2024–01303 Filed 1–23–24; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2024–0004]

Agency Information Collection Activities: Request for Comments for a New Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for an information collection, which is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by March 25, 2024.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 0004 by any of the following methods:

Website: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Cynthia Essenmacher, (202) 780–6178, Department of Transportation, Federal Highway Administration, Office of Operations, Office of Transportation Management (HOTM–1), 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 7 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Innovative Finance and Equal Access for Over the Road Busses.

Background:

Abstract Innovative Finance: The Federal Highway Administration (FHWA), Office of Operations and Office of the Chief Financial Officer, jointly collection information related to State Infrastructure Banks (SIB), Grant Anticipation Revenue Vehicles, and Toll Credits. This information is published on FHWA's public websites to monitor activity in each innovative finance program. This information satisfies the requirement under 23 U.S.C. 610(g)(7) for each SIB to make an annual report to the Secretary on its status no later than September 30 of each year and such other reports as the Secretary may require. The data will also satisfy new requirements under section 11503 of the Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58, effective November 15, 2021, requiring the Secretary to make available a publicly accessible website on which States shall post the amount of toll credits that are available for sale or transfer.

The data includes activity, volume, and balances. The data is published annually on the Center for Innovative Finance's website. Information from this collection is used for the proper stewardship and oversight of each program, as well as compliance with each program's Federal statute.

Abstract Equal Access for Over the Road Busses: Section 11523 of the recently enacted Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act, Public Law 117–58 (Nov. 15, 2021) amended 23 U.S.C. 129 to add reporting requirements to the equal access provisions for over the road busses. Specifically, not later than 90 days after the date of enactment of the BIL, a public authority that operates a toll facility shall report to the Secretary any rates, terms, or conditions for access to the toll facility by public transportation vehicles that differ from the rates, terms, or conditions applicable to over-the-road buses.

Further, a public authority that operates a toll facility shall report to the Secretary any change to the rates, terms, or conditions for access to the toll facility by public transportation vehicles that differ from the rates, terms, or conditions applicable to over-the-road buses by not later than 30 days after the date on which the change takes effect.

Respondents: State governments of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Marianas, and the Virgin Islands share this burden.

Frequency: Annually August 1st to October 31st.

Estimated Average Burden per Response: The estimated average reporting burden per response for the annual collection and processing of the data is 149 hours for each of the States (including local governments), the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Marianas, and the Virgin Islands.

Estimated Total Annual Burden Hours: The estimated total annual burden for all respondents is 8,195 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, 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.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued On: January 18, 2024.

Jazmyne Lewis,

Information Collection Officer.

[FR Doc. 2024–01276 Filed 1–23–24; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0152]

National Registry of Certified Medical Examiners: Proposed Removal of Medical Examiners for Noncompliance With Login.gov Requirement

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

ACTION: Notice of proposed removal from the National Registry of Certified Medical Examiners (National Registry).

SUMMARY: FMCSA proposes to remove medical examiners (ME) from its National Registry who have failed to

access their National Registry account using *login.gov* and have failed to update the profile information in their National Registry account as required. Since June 2018, by using the email, physical address, and telephone number these MEs provided to the Agency in their National Registry account, FMCSA has attempted to notify them of the requirement to access their account using *login.gov*. There are approximately 15,727 MEs who have not accessed their National Registry account using *login.gov* and as a result, are not able to fulfill regulatory requirements such as reporting results of physical qualification examinations performed on commercial motor vehicle (CMV) drivers, receiving FMCSA communications, and completing required training. MEs who are removed from the National Registry will no longer be certified to perform physical qualification examinations of CMV drivers. To avoid being removed from the National Registry, MEs to whom this notice applies must complete the corrective actions set forth below. A list of MEs subject to this notice is provided in the docket for this proceeding.

DATES: On or before February 23, 2024, MEs who are subject to this Notice must: (1) create a *login.gov* account using the same email address as their National Registry account or sign into the National Registry with an existing *login.gov* account using the same email address as their National Registry account, through the National Registry website at *https://nationalregistry.fmcsa.dot.gov* (Select ''Login''); and (2) once logged in, correct all outdated contact information in their National Registry profile. MEs who fail to complete these actions will be removed from the National Registry on February 26, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; (202) 366–4001; *fmcsamedical@dot.gov.* If you have questions on viewing documents in the docket, contact Dockets Operations, (202) 366–9317 or (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Availability of Documents

To view the list of MEs subject to this Notice, go to *https://www.regulations.gov/docket/FMCSA-2023-0152/document* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Dockets Operations at DOT, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

II. Legal Basis

FMCSA is required to establish and maintain a current national registry of MEs who are qualified to perform physical qualification examinations and issue medical examiner's certificates to operators of CMVs (49 U.S.C. 31149(d)(1)). FMCSA is also required to remove from the registry the name of any ME who fails to meet or maintain the requirements established by the Agency for being listed in the registry (49 U.S.C. 31149(d)(2)).

Accordingly, by publication of this Notice, FMCSA provides written notice of proposed removal of the affected MEs from the National Registry and sets forth corrective actions necessary for the MEs to remain listed. This Notice provides actual or constructive notice of the Agency's action (44 U.S.C. 1507).

III. Background

Among the requirements to be certified as an ME on the National Registry, MEs are required to register on the National Registry website and establish an account by providing current contact information and other required information (49 CFR 390.103(a)(2)). MEs are also required to update their National Registry account within 30 days of any changes in such information (49 CFR 390.111(a)(2)).

On June 22, 2018, FMCSA implemented a new security requirement for all National Registry users to access their account using *login.gov*. *Login.gov* is a secure sign-in service used by FMCSA to allow users to securely access certain FMCSA information systems. The use of *login.gov* is required to meet National Institute of Standards and Technology requirements for secure validation and verification. As a result of this requirement, FMCSA notified all National Registry users by email, using the email address provided in each user's National Registry account, that they must access their National Registry account using *login.gov*. The notification explained that the use of *login.gov* is a requirement and would provide an extra layer of security to help protect National Registry accounts against security breaches. Once the email notification was sent to all National Registry users, it was posted on the National Registry page of the FMCSA website and later posted in the Resource Center of the National Registry website.

When registering to become certified by FMCSA, and on an annual basis, each ME agrees to accept any written communication from FMCSA relating to their participation on the National Registry by electronic mail at the email address(es) they provided in their National Registry account. In response to the email notifications regarding the *login.gov* requirement, FMCSA was notified that an email delivery failure had occurred for the MEs now proposed for removal. Accordingly, FMCSA determined that the email addresses in the National Registry accounts of those MEs were not valid and had not been updated by the MEs as required. Therefore, FMCSA staff made repeated attempts to contact those MEs through phone calls and/or letters sent by U.S. mail. When those efforts were also unsuccessful, the Agency made attempts as recently as June 2023 to contact Medical Examiner Administrative Assistants and Third Party Organizations designated by the MEs proposed for removal to obtain current contact information for these MEs. The MEs proposed for removal have not responded to FMCSA's attempts to contact them and have failed to access their National Registry account using *login.gov*.

On February 28, 2022, FMCSA launched a new National Registry system and has continued its efforts to ensure the accuracy of the data in the system. This includes removing any MEs who are not in compliance with the regulatory requirements. FMCSA wants to ensure when the public is searching for an ME on the website, that only MEs who are compliant with the regulatory requirements are listed as certified by FMCSA and that those who are not will be listed as removed. There are 92,625 MEs listed on the National Registry who have been certified by FMCSA to conduct physical qualification examinations. Approximately 76,898 of these MEs are accessing their National Registry account using *login.gov* and 38,707 of these MEs are actively performing physical qualification examinations and reporting results to the National Registry. To date, FMCSA has not received any complaints from CMV drivers indicating difficulties in locating MEs and scheduling appointments for their physical qualification examinations. In addition, the Agency continues to monitor the geographic distribution of MEs to identify potential challenges for drivers in locating MEs. Therefore, FMCSA does not anticipate any concerns that there are too few MEs to meet the

demand for physical qualification examinations and the possible removal of approximately 15,727 MEs, as proposed in this Notice, will not have any impact on the availability of certified MEs to perform physical qualification examinations of CMV drivers.

It is imperative that FMCSA remove these MEs from the National Registry now, before the final provisions of the Medical Examiner's Certification Integration (NRII) final rule are implemented on June 23, 2025 (80 FR 22790, Apr. 23, 2015). On that date, FMCSA will begin electronically transmitting medical certification information for CMV drivers required to hold a commercial learner's permit or a commercial driver's license from the National Registry to the State Driver's Licensing Agencies (SDLAs). If an ME does not access their National Registry account using *login.gov* and report results of physical qualification examinations performed, FMCSA will not be able to electronically transmit those results to the SDLA for posting to the drivers' records.

IV. Proposed Action To Remove Medical Examiners

FMCSA proposes to remove MEs from its National Registry who have failed to access their National Registry account using *login.gov* and have failed to update their National Registry account information.

There are approximately 15,727 MEs who have not accessed their National Registry account using *login.gov* and as a result, are not able to fulfill regulatory requirements such as reporting results of physical qualification examinations performed on CMV drivers, receiving FMCSA communications, and completing required training. Despite multiple attempts, FMCSA staff has not been able to reach these MEs. Accordingly, FMCSA is proposing to remove these MEs from the National Registry for failure to comply with the requirement to access their National Registry account using *login.gov* and to maintain current contact information. A list of the MEs whom FMCSA proposes to remove can be found in the docket for this proceeding (see *https://www.regulations.gov/docket/FMCSA-2023-0152/document*).

V. Required Corrective Actions

MEs proposed for removal must complete the following corrective actions on or before February 23, 2024 to avoid being removed from the National Registry: (1) create a *login.gov* account using the same email address as their National Registry account or sign into the National Registry with an existing *login.gov* account using the same email address as their National Registry account, through the National Registry website at *https://nationalregistry.fmcsa.dot.gov* (Select ''Login''); and (2) once logged in, correct all outdated contact information in their National Registry profile. MEs who do not complete these corrective actions will be removed from the National Registry on February 24, 2024. If assistance is needed to complete these corrective actions, affected MEs may contact the National Registry Technical Support Help Desk at *fmctechsup@dot.gov* or (617) 494–3003.

VI. Effect of Removal From the National Registry

Removal of an ME pursuant to this Notice will not invalidate any Medical Examiner's Certificates, Form MCSA–5876, issued by that ME to CMV drivers prior to the date they are removed from the National Registry. However, after an ME has been removed from the National Registry, they will no longer be authorized to perform physical qualification examinations of CMV drivers and issue Medical Examiner's Certificates, Form MCSA–5876 (49 U.S.C. 31149(d)(3)). MEs removed from the National Registry will continue to appear on the public website for 3 years following the date of their removal with an indication that they are no longer certified as an ME and have been removed from the National Registry with a removal date. FMCSA encourages CMV drivers and other stakeholders to use the National Registry website public search feature to verify that an ME is certified by FMCSA, as this will have the most current information, including a removal date where applicable.

MEs who are removed from the National Registry pursuant to this Notice may request reinstatement to the National Registry after completing the corrective actions set forth in Section V above. To request reinstatement MEs must log in to their National Registry account, select ''My Profile'' from the main menu on the left side of the screen, select ''Request Reinstatement,'' follow the instructions provided, and submit the reinstatement request to FMCSA for consideration.

Robin Hutcheson,

Administrator.

[FR Doc. 2024–01283 Filed 1–23–24; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2023–0002–N–39]

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 4, 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 23, 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 Ms. Arlette Mussington, Information Collection Clearance Officer, at email: *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 4, 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 76269. 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 30day 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: Locomotive Crashworthiness.

OMB Control Number: 2130–0564.

Abstract: Under 49 CFR part 229, subpart D, FRA prescribes minimum crashworthiness standards for locomotives. These crashworthiness standards are intended to help protect locomotive cab occupants in the event of a train collision or derailment. FRA uses this collection of information to ensure railroads operate locomotives that meet the prescribed minimum performance standards and design load requirements for newly manufactured and re-manufactured locomotives.

Type of Request: Extension without change (with changes in estimates) of a currently approved collection.

Affected Public: Businesses/Public/Interested Parties.

Form(s): N/A.

Respondent Universe: 783 railroads, 4 locomotive manufacturers.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 554.

Total Estimated Annual Burden: 407 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $34,960.

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. 2024–01319 Filed 1–23–24; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2023–0002–N–43]

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 did not receive any substantive comment on this ICR.

DATES: Interested persons are invited to submit comments on or before February 23, 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. Arlette Mussington, Information Collection Clearance Officer, at email: *arlette.mussington@dot.gov* or telephone: (571) 609–1285 or Ms. Joanne Swafford, Information Collection Clearance Officer, at email: *joanne.swafford@dot.gov* or telephone: (757) 897–9908.

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 public comment on the ICR for which it is now seeking OMB approval. *See* 88 FR 75367. FRA received one comment filed under this docket number. However, the comment does not refer to this ICR, or any activity involving FRA, and appears to have been filed under this docket number by mistake.

Before OMB decides whether to approve this proposed collection of information, it must provide 30 days' notice 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: Reflectorization of Rail Freight Rolling Stock.

OMB Control Number: 2130–0566.

Abstract: FRA issued this regulation to mandate the reflectorization of freight rolling stock (properly installing retroreflective material on freight cars and locomotives) to enhance the visibility of trains to help reduce the number and severity of accidents at highway-rail grade crossings when

visibility is low.[1] FRA uses the information collected to verify that the person responsible for the car reporting mark is notified after the required visual inspection if the freight rail stock has less than 80 percent of the required retroreflective sheeting present, undamaged, or unobscured.

Moreover, FRA uses the information collected to verify that the required locomotive records of retroreflective sheeting defects found during required locomotive inspections are kept in the locomotive cab or in an electronic database that FRA can access upon request. Finally, FRA uses the information collected to help confirm railroads/car owners meet the prescribed standards for the inspection and maintenance of the required retroreflective material.

Type of Request: Extension without change of a currently approved collection.

Affected Public: Businesses (Railroads).

Form(s): N/A.

Respondent Universe: 783 railroads and freight car owners.

Frequency of Submission: On occasion/monthly.

Total Estimated Annual Responses: 36,001.

Total Estimated Annual Burden: 3,159 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $215,017.

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. 2024–01320 Filed 1–23–24; 8:45 am]

BILLING CODE 4910–06–P

[1] *See* 70 FR 144, Jan. 3, 2005.

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0232]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: BUTTERCUP (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 23, 2024.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0232 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0232 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is U.S. Department of Transportation, MARAD–2023–0232, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email: *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel BUTTERCUP is:

—*Intended Commercial Use of Vessel:* Requester intends to use boat for cruises on Lake Champlain.
—*Geographic Region Including Base of Operations:* Vermont, New York. Base of Operations: Burlington, VT.
—*Vessel Length and Type:* 26′ Motor.

The complete application is available for review identified in the DOT docket as MARAD 2023–0232 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *https://www.regulations.gov,* keyword search MARAD–2023–0232 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you

should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2024–01315 Filed 1–23–24; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0233]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: RELENTLESS (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 23, 2024.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0233 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0233 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is U.S. Department of Transportation, MARAD–2023–0233, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email: *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel RELENTLESS is:

—*Intended Commercial Use of Vessel:* Requester intends to use boat for bareboat charters.

—*Geographic Region Including Base of Operations:* Puerto Rico. Base of Operations: Puerto del Rey, Fajardo, PR.

—*Vessel Length and Type:* 62′ Motor yacht.

The complete application is available for review identified in the DOT docket as MARAD 2023–0233 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *https://www.regulations.gov,* keyword search MARAD–2023–0233 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible,

please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2024–01316 Filed 1–23–24; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0234]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: WHATEVER IT TAKES (Sail); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 23, 2024.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0234 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0234 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is U.S. Department of Transportation, MARAD–2023–0234, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email: *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel WHATEVER IT TAKES is:

—*Intended Commercial Use of Vessel:* Requester intends to use boat for sailing trips.
—*Geographic Region Including Base of Operations:* Florida, Georgia, South Carolina, North Carolina, Virginia, Delaware, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Maine. Base of Operations: St. Petersburg, FL.
—*Vessel Length and Type*: 99.97′ Sail.

The complete application is available for review identified in the DOT docket as MARAD 2023–0234 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *https://www.regulations.gov,* keyword search MARAD–2023–0234 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA

regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2024–01317 Filed 1–23–24; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2010–0211]

RIN 2105–AE07

Notice of Submission of Proposed Information Collection to OMB Agency Request for Renewal of a Previously Approved Information Collection Request: Reports by Air Carriers on Incidents Involving Animals During Air Transport

AGENCY: Office of the Secretary (OST), Department of Transportation (Department or DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, this notice announces the Department's intention to reinstate the previously approved information collection request (ICR) Office of Management and Budget (OMB) control number 2105–0552, ''Reports by Air Carriers on Incidents Involving Animals During Air Transport.'' The information collection involves requirements in the Code of Federal Regulations for carriers to file reports with DOT on the loss, injury, or death of animals during air transport.

DATES: Comments on this notice must be received BY March 25, 2024. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may file comments identified by docket number DOT–OST–2010–0211 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, West Building, Ground Floor, 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal Holidays.
- *Fax:* 202–493–2251.

Instructions: You must include the agency name and docket number DOT–OST–2010–0211 at the beginning of your comment. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

Privacy Act: Anyone can search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *www.dot.gov/privacy.*

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* and follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Vinh Q. Nguyen, Office of the General Counsel, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, 202–366–9342 (Voice), 202–366–7152 (Fax), or *vinh.nguyen@dot.gov* (email). Arrangements to receive this document in an alternative format may be made by contacting the above-named individual.

SUPPLEMENTARY INFORMATION:

Title: Reports by Air Carriers on Incidents Involving Animals During Air Transport.

OMB Control Number: 2105–0552.

Type of Request: Reinstatement of Information Collection Request.

Background: The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century or ''AIR–21'' (Pub. L. 106–181), which was signed into law on April 5, 2000, includes section 710, ''Reports by Carriers on Incidents Involving Animals During Air Transport.'' This provision was codified as 49 U.S.C. 41721. The statute requires air carriers that provide scheduled passenger air transportation to submit monthly to the Secretary of Transportation a report on any incidents involving the loss, injury, or death of an animal (as defined by the Secretary of Transportation) during air transport provided by the air carrier.

On August 11, 2003, DOT, through its Federal Aviation Administration (FAA), issued a final rule implementing section 710 of AIR–21.[1] The rule required air carriers that provide scheduled passenger air transportation to submit a report to APHIS on any incident involving the loss, injury, or death of an animal during air transportation provided by the air carrier. Due to issues regarding whether APHIS had the capability to accept such information directly from the carriers, DOT made a technical change in the rule on February 14, 2005 to require air carriers to submit the required information directly to DOT's Aviation Consumer Protection Division (ACPD) rather than APHIS and to make the rule part of DOT's economic regulations.[2]

On July 3, 2014, DOT published a final rule amending the requirement that air carriers file reports with DOT on the loss, injury, or death of animals during air transport.[3] The rule (1) expanded the reporting requirement from the largest U.S. carriers (*i.e.,* U.S. carriers that account for at least 1 percent of domestic scheduled passenger revenue) to U.S. carriers that operate scheduled service with at least one aircraft with a design capacity of more than 60 seats; (2) expanded the definition of ''animal'' from only a pet in a family household to include all cats and dogs transported by covered carriers, regardless of whether the cat or dog is transported as a pet by its owner or as part of a commercial shipment (*e.g.,* shipped by a breeder); (3) required covered carriers to file a calendar-year report in December, even if the carrier did not have any reportable incidents during the calendar year; (4) required covered carriers to provide in their December reports the total number of animals that were lost, injured, or died during air transport in the calendar year; and (5) required covered carriers to provide in their December reports the total number of animals transported in

[1] *Reporting Directive Regarding Incidents Involving Animals During Air Transport,* 68 FR 47,798 (August 11, 2003).

[2] *Reports by Air Carriers on Incidents Involving Animals During Air Transport,* 70 FR 7,392 (February 14, 2005).

[3] Reports by Air Carriers on Incidents Involving Animals During Air Transport, 79 FR 37,938 (July 3, 2014) (codified at 14 CFR part 235).

the calendar year. The ICR, ''Reports by Air Carriers on Incidents Involving Animals During Air Transport,'' OMB Control Number 2105–0552, was renewed twice: on August 25, 2015, OMB approved the renewal of the ICR through August 31, 2018, and on October 11, 2018, OMB approved the renewal of the ICR through October 31, 2021.

DOT is publishing this notice to announce its intent to request reinstatement of the previously approved ICR described above. The Paperwork Reduction Act of 1995 (PRA) 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. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to monetary penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB Control Number.[4]

Respondents: U.S. carriers that operate scheduled passenger service with at least one aircraft having a designed seating capacity of more than 60 seats.

Estimated Number of Respondents: 30.

Frequency: For each respondent, one information set for the month of December, plus one information set during some other months (1 to 12).

Estimated Total Burden on Respondents: (1) Monthly reports of incidents involving the loss, injury, or death of animals during air transport: 0 to 360 hours (Respondents [30] × Time to Prepare One Monthly Report [1 hour] × Frequency [0 to 12 per year]). (2) December report containing the total number of animals that were lost, injured, or died during air transport in the calendar year and the total number of animals that were transported in the calendar year: 15 hours (Respondents [30] × Time to Prepare One December Report [0.5 hour] × Frequency (1 per year)].

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 the Department's performance; (b) the accuracy of the estimated burden; (c) ways for the Department 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.

All comments will become a matter of public record. All responses to this notice will be summarized and included in the request for OMB approval.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.26, 1.27, 1.48 and 1.49; DOT Order 1351.29.

Signed in Washington, DC, on this 19th day of January 2024, under authority delegated at 49 U.S.C. 1.27(n).

Kimberly Graber,

Deputy Assistant General Counsel, Office of Aviation Consumer Protection.

[FR Doc. 2024–01342 Filed 1–23–24; 8:45 am]

BILLING CODE 4910–9X–P

[4] *See* 5 CFR 1320.5(a) and 1320.6.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Examination Survey

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning the renewal of its information collection titled, ''Examination Survey.''

DATES: Comments must be submitted by March 25, 2024.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0199, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 293–4835.

Instructions: You must include ''OCC'' as the agency name and ''1557–0199'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Following the close of this notice's 60-day comment period, the OCC will publish a second notice with a 30-day comment period. You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection by the method set forth in the next bullet.

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Hover over the ''Information Collection Review'' tab and click on ''Information Collection Review'' from the drop-down menu. From the ''Currently under Review'' drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0199'' or ''Examination Survey.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined

in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 generally requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the renewal of this collection.

The OCC is requesting to extend the approval of the following information collection:

Title: Examination Survey.

OMB Control No.: 1557–0199.

Affected Public: Businesses or other for-profit.

Type of Review: Regular.

Abstract: The OCC provides each national bank, Federal savings association, and Federal branch or agency (bank) with an Examination Survey at the end of its supervisory cycle (12- or 18-month period). This information collection permits banks to assess the OCC's bank supervisory activities, including the:

- Effectiveness of OCC communications with the bank;
- Reasonableness of OCC requests for data and information;
- Quality of OCC decision making during the exam process;
- Professionalism of OCC examining staff; and
- Responsiveness of OCC examiners.

The OCC developed the survey in 1994, at the suggestion of banking industry members who expressed a desire to provide examination-related feedback to the OCC. The Comptroller of the Currency and OCC supervisory staff considered that expressed desire and concurred. The information collection continues to be an important tool for the OCC to measure OCC examination performance, design more efficient and effective examinations, and target examiner training.

This information collection continues to formalize and promote a long-standing OCC program. The OCC always has given the institutions it supervises the opportunity to provide input regarding the examination process.

Estimated Burden:

Estimated Number of Respondents: 542.

Estimated Number of Responses per Respondent: 1.

Estimated Annual Burden: 90 hours.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2024–01333 Filed 1–23–24; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; System of Records

AGENCY: Veterans Health Administration (VHA), Department of Veterans Affairs (VA).

ACTION: Rescindment of a system of records.

SUMMARY: VA is rescinding an outdated system of records titled, ''Veteran, Employee and Citizen Health Care Facility Investigation Records—VA'' (32VA10Q). This system was used to conduct statistical studies and analyses which supported the formulation of departmental policies and plans by identifying the total current health care usage of the VA patient population. The records and information were also used by VA for audit and evaluation of department programs, determinations of eligibility for benefits, and to conduct research. The system was discontinued on September 30, 2002.

DATES: Comments on this rescinded system of records must be received no later than 30 days after date of publication in the **Federal Register**. If no public comment is received during the period allowed for comment or unless otherwise published in the **Federal Register** by the VA, the rescindment will become effective a minimum of 30 days after date of publication in the **Federal Register**. If VA receives public comments, VA shall review the comments to determine whether any changes to the notice are necessary.

ADDRESSES: Comments may be submitted through *https://www.Regulations.gov* or mailed to VA Privacy Service, 810 Vermont Avenue NW, (005X6F), Washington, DC 20420. Comments should indicate that they are submitted in response to ''Veteran, Employee and Citizen Health Care Facility Investigation Records—VA'' (32VA10Q). Comments received will be available at *regulations.gov* for public viewing, inspection or copies.

FOR FURTHER INFORMATION CONTACT: Stephania Griffin, VHA Chief Privacy Officer, Department of Veterans Affairs, 810 Vermont Avenue NW, (105HIG), Washington, DC 20420; *Stephania.Griffin@va.gov,* telephone (704) 245–2492 (Note: this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Categories of individuals covered by the system were the following: Veterans, employees and private citizens who have been injured as a result of accident or assault; Veterans who have died as a result of violence or accident, such as suicide, homicide, reaction to anesthesia or drugs, assault, transfusion accident, blood incompatibility, error in treatment, neglect of patient, fire, firearms, explosion, etc.; employees and private citizens who have died as a result of violence or accident; Veterans who have left the health care facility without authorization; Veterans, employees and private citizens who have alleged the loss of personal property, funds or valuables; Veterans and private citizens who have alleged abuse by members of the health care facility staff; employees who have alleged discrimination, abuse or threats of violence by other employees, Veterans and private citizens; Veterans, employees and visitors who have assaulted other individuals; Veterans, employees or private citizens who have been involved in the sale of illegal drugs or alcohol within the health care facility; Veterans, employees and private citizens who have been accused of stealing from other individuals or from the VA health care facility; employees who have been accused of improper and unethical conduct; and Veterans, employees and private citizens who have willfully or accidentally destroyed or damaged Federal property.

Records were maintained on paper documents and photographs. This

system of records is being rescinded as a result of the Veteran, Employee and Citizen Health Care Facility Investigation Records being merged with the electronic system within Office of Medical Inspector. This information is now located within the system of records titled, ''Investigative Database—VA'' (162VA10E1B). The records associated with the Veteran, Employee and Citizen Health Care Facility Investigation Records were destroyed in accordance with VHA Records Control Schedule 10–1, item number 1160.1.

Signing Authority

The Senior Agency Official for Privacy, or designee, approved this document 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. Kurt D. DelBene, Assistant Secretary for Information and Technology and Chief Information Officer, approved this document on January 18, 2024 for publication.

Dated: January 19, 2024.

Amy L. Rose,

Government Information Specialist, VA Privacy Service, Office of Compliance, Risk and Remediation, Office of Information and Technology, Department of Veterans Affairs.

SYSTEM NAME:

''Veteran, Employee and Citizen Health Care Facility Investigation Records—VA'' (32VA10Q)''

HISTORY:

58 FR 40852 (July 30, 1993); 74 FR 44902 (August 31, 2009).

[FR Doc. 2024–01331 Filed 1–23–24; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–XXXX]

Agency Information Collection Activity: Labor Market Information Report-Veteran Readiness and Employment

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed new collection and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 25, 2024.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–10290'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–XXXX'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 3116 and 3117.

Title: Labor Market Information Report-Veteran Readiness and Employment.

OMB Control Number: 2900–XXXX.

Type of Review: New collection.

Abstract: VA Form 28–10290 will be used to collect information on individualized labor market information to include specific occupational trends, required qualifications, skillsets, salaries, physical and educational requirements for the Veteran's identified occupational career path. The information collected will be used to conduct an evaluation to assist the Veteran in selecting a suitable vocational goal that is consistent with his or her abilities, aptitudes, interests and does not aggravate his or her disability(ies). Vocational planning is a critical element in selecting a suitable vocational goal for the purpose of the development of a rehabilitation plan for a Veteran within the Veteran Readiness and Employment (VR&E) program. The foundation of a successful rehabilitation program is a well-developed plan of action. Comprehensive labor market information is the first step in developing a successful rehabilitation plan for each Veteran. The VR&E staff subsequently, will use the information on this form to ensure a suitable vocational goal is identified as part of the Veteran's rehabilitation plan to assist him or her in obtaining and maintaining suitable employment.

This form will be obtained through electronic methods to include *VA.gov* or by the referring Vocational Rehabilitation Counselor. Upon compilation of the data, the form will be electronically submitted to the appropriate VR&E staff.

Affected Public: Individuals and households.

Estimated Annual Burden: 16,586 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 66,344 per year.

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. 2024–01301 Filed 1–23–24; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 89 Wednesday,
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Part II

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2570

Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2570

RIN 1210–AC05

Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (the Department) is adopting amendments to its existing procedure governing the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code of 1986 (the Code), and the Federal Employees' Retirement System Act of 1986 (FERSA) (the Amendments). The Secretary of Labor (the Secretary) is authorized to grant exemptions from the prohibited transaction provisions of ERISA, the Code, and FERSA and to establish an exemption procedure to provide for such relief. The Amendments update and supersede the Department's existing prohibited transaction exemption procedures.

DATES: The amendments in this rule are effective April 8, 2024.

FOR FURTHER INFORMATION CONTACT: Brian Shiker, telephone: (202) 693–8552, email: *shiker.brian@dol.gov,* Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (this is not a toll-free number).

Customer Service Information: Individuals interested in obtaining information from the Department concerning ERISA and employee benefit plans may call the Employee Benefits Security Administration's Toll-Free Hotline, at 1–866–444–EBSA (3272) or visit the Department's website (*www.dol.gov/ebsa*).

SUPPLEMENTARY INFORMATION:

Background

Part 4 of Title I of ERISA establishes an extensive framework of standards and rules that govern the conduct of ERISA plan fiduciaries; collectively, these rules are designed to safeguard the integrity of employee benefit plans. As part of this structure, ERISA section 406(a) generally prohibits a plan fiduciary from causing the plan to engage in a variety of transactions with certain related parties, unless a statutory or administrative exemption applies to the transaction. These related parties (which include plan fiduciaries, sponsoring employers, unions, service providers, and other persons who may be in a position to exercise improper influence over a plan) are defined as ''parties in interest'' in ERISA section 3(14). ERISA section 406(b) generally prohibits a plan fiduciary from (1) dealing with the assets of a plan in their own interest or for their account, (2) acting in any transaction involving the plan on behalf of a party whose interests are adverse to those of the plan or its participants and beneficiaries, or (3) receiving any consideration for their own personal account from a party dealing with the plan in connection with a transaction involving plan assets, unless an exemption specifically applies to such conduct. To supplement these provisions, ERISA sections 406(a)(1)(E) and 407(a) impose restrictions on the nature and extent of plan investments in assets such as ''employer securities'' (as defined in ERISA section 407(d)(1)) and ''employer real property'' (as defined in ERISA section 407(d)(2)). The transactions prohibited under ERISA sections 406 and 407 are referred to as ''prohibited transactions.''

Most of the transactions prohibited by ERISA section 406 are likewise prohibited by Code section 4975, which imposes an excise tax on those transactions to be paid by each ''disqualified person'' (defined in Code section 4975(e)(2) in virtually the same manner as the term ''party in interest'' is defined in ERISA section 3(14)) who engages in the prohibited transactions.

Prohibited Transaction Exemptions

Both ERISA and the Code contain various statutory exemptions from the prohibited transaction rules. These statutory exemptions were enacted by Congress to prevent the disruption of a number of customary business practices involving employee benefit plans, parties in interest, and fiduciaries. The statutory exemptions afford relief for transactions such as loans to participants and stock ownership plans, the provision of services necessary for the operation of a plan, certain investment advice transactions involving individual account plan participants and beneficiaries, and the investment of plan assets into deposits in certain financial institutions regulated by state or Federal agencies.

In addition to the statutory exemptions, ERISA section 408(a) authorizes the Secretary to grant administrative exemptions from the restrictions of ERISA sections 406 and 407(a) in instances where the Secretary makes a finding on the record that relief is (1) administratively feasible, (2) in the interests of the plan and its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan. Similarly, Code section 4975(c)(2) authorizes issuance of administrative exemptions from the prohibitions of Code section 4975(c)(1) subject to the same findings. Before an exemption is granted, notice of its pendency must be published in the **Federal Register** and interested persons must be given the opportunity to comment on the proposed exemption. If the exemption transaction involves potential fiduciary self-dealing or conflicts of interest, an opportunity for a public hearing must be provided.

ERISA section 408(a) authorizes the Secretary to grant administrative exemptions on either an individual or a class basis. Class exemptions provide general relief from the restrictions of ERISA, the Code, and FERSA to those parties in interest who engage in the categories of transactions described in the exemption and who also satisfy the conditions stipulated by the exemption. Persons who are in conformity with all the requirements of a class exemption do not ordinarily decide to seek an individual exemption for the same transaction from the Department. Individual exemptions, by contrast, involve case-by-case determinations as to whether the specific facts represented by an applicant concerning an exemption transaction as well as the conditions applicable to such a transaction support a finding by the Department that the requirements for relief from the prohibited transaction provisions of ERISA, the Code, and FERSA have been satisfied in a particular instance. While the vast majority of administrative exemptions issued by the Department are the product of requests for relief from individual applicants or the broader employee benefits community, ERISA section 408(a) also authorizes the Department to initiate administrative exemptions on its own motion.

In considering individual exemption requests from applicants, the Department exercises its authority under ERISA section 408(a) by carefully examining the decision-making process used by a plan's fiduciaries with respect to an exemption transaction, and the safeguards that are established against conflicts of interest. In general, the Department does not make determinations concerning the appropriateness or prudence of the investment proposals submitted by

exemption applicants. However, the Department ordinarily will not favorably consider an exemption request if the Department believes that the proposed transactions are inconsistent with the fiduciary responsibility provisions of ERISA sections 403 and 404. To protect plans and their participants, the Department requires an exemption transaction to be designed to minimize the potential for conflicts of interest and self-dealing. Also, exemptions generally preclude unilateral action by the applicant that could disadvantage the plan.

Prohibited Transaction Exemption Procedure

ERISA section 408(a) and Code section 4975(c)(2) direct the Secretary and the Secretary of the Treasury (the Secretaries), respectively, to establish procedures for granting administrative exemptions. In connection with this directive, ERISA section 3003(b) directs the Secretaries to consult and coordinate with each other with respect to the establishment of rules applicable to the granting of exemptions from the prohibited transaction restrictions of ERISA and the Code. Further, under ERISA section 3004, the Secretaries are authorized to develop rules on a joint basis that are appropriate for the efficient administration of ERISA.

Pursuant to these statutory provisions, the Secretaries jointly issued an exemption procedure on April 28, 1975 (ERISA Procedure 75–1, 40 FR 18471, also issued as Rev. Proc. 75–26, 1975–1 C.B. 722). Under this procedure, a person seeking an exemption under both ERISA section 408(a) and Code section 4975 was obliged to file an exemption application with both the Internal Revenue Service (IRS) and the Department. However, requiring applicants to seek exemptive relief for the same transaction from two separate Federal departments soon proved administratively cumbersome.

To resolve this problem, section 102 of Presidential Reorganization Plan No. 4 of 1978 (3 CFR, 1978 Comp., p. 332), reprinted in 5 U.S.C. app. at 672 (2006), and in 92 Stat. 3790 (1978)), effective on December 31, 1978, transferred to the Secretary the authority of the Secretary of the Treasury to issue exemptions under Code section 4975, with certain enumerated exceptions. As a result, Congress gave the Secretary authority under Code section 4975(c)(2) and ERISA section 408(a) to issue individual and class administrative exemptions from the prohibited transaction restrictions of ERISA and the Code. The Secretary has delegated this authority, along with most of the Secretary's other responsibilities under ERISA, to the Assistant Secretary of Labor for the Employee Benefits Security Administration.[1]

FERSA also contains prohibited transaction rules similar to those found in ERISA and the Code that are applicable to parties in interest with respect to the Federal Thrift Savings Fund established by FERSA. The Secretary is directed under FERSA to prescribe, by regulation, a procedure for granting administrative exemptions from certain of those prohibited transactions.[2] The Secretary also delegated this rulemaking authority under FERSA to the Assistant Secretary of Labor for the Employee Benefits Security Administration.[3]

Over time, the Department has issued additional guidance explaining its policies and practices relating to the consideration of exemption applications. In 1985, the Department published a statement of policy concerning the issuance of retroactive exemptions from the prohibited transaction provisions of ERISA section 406 and Code section 4975 (ERISA Technical Release 85–1, January 22, 1985). This statement noted that, in evaluating future applications for retroactive exemptions, the Department would ordinarily take into account a variety of objective factors in determining whether a plan fiduciary had exhibited good faith conduct in connection with the past prohibited transaction for which relief is sought (such as whether the fiduciary had utilized a contemporaneous independent appraisal or reference to an objective third-party source, *e.g.,* a stock exchange, in establishing the fair market value of the plan assets acquired or disposed of by the plan in connection with the transaction at issue). However, while noting that the satisfaction of such objective criteria might be indicative of a fiduciary's good faith conduct, the release cautioned that the Department would routinely examine the totality of facts and circumstances surrounding a past prohibited transaction before reaching a final determination on whether a retroactive exemption is warranted.

In 1990, the Department published a final regulation (29 CFR 2570.30 through 2570.52 (1991), reprinted in 55 FR 32847 (August 10, 1990)), setting forth a revised exemption procedure that superseded ERISA Procedure 75–1 (the Exemption Procedure Regulation). This regulation, which became effective on September 10, 1990, reflected the jurisdictional changes made by Presidential Reorganization Plan No. 4 and extended the scope of the exemption procedure to applications for relief from the FERSA prohibited transaction rules. In addition, the Exemption Procedure Regulation codified various informal exemption guidelines developed by the Department since the adoption of ERISA Procedure 75–1.

In 1995, the Department issued a publication entitled ''Exemption Procedures under Federal Pension Law'' (the 1995 Exemption Publication). In addition to providing a brief overview of the exemption process, the 1995 Exemption Publication included definitions of technical terms such as ''qualified independent fiduciary,'' ''qualified independent appraiser,'' and ''qualified appraisal report.'' These definitions, derived from conditions contained in previously granted exemptions, provide important guidance about the Department's standards concerning the independence, knowledge, and competence of third-party experts retained by a plan to review and oversee an exemption transaction, as well as the contents of the reports and representations the Department ordinarily requires from such experts.

The Department published an updated Exemption Procedure Regulation in 2011 (29 CFR 2570.30 through 2570.52 (2011)).[4] The updated Exemption Procedure Regulation revised the prohibited transaction exemption procedure to reflect changes in the Department's exemption practices since the previous exemption procedure was issued in 1990. Among other things, the Department consolidated elements of the exemption policies and guidance previously found in ERISA Technical Release 85–1 and the 1995 Exemption Publication within a single, comprehensive final regulation. The updated Exemption Procedure Regulation promoted the prompt and efficient consideration of all exemption applications by (1) clarifying the types of information and documentation generally required for a complete filing, (2) affording expanded opportunities for the electronic submission of information and comments relating to an exemption, and (3) providing plan participants and other interested persons with a more thorough understanding of the exemption under consideration.

[1] *See* Secretary of Labor's Order 6–2009, 74 FR 21524 (May 7, 2009).

[2] 5 U.S.C. 8477(c)(3).

[3] *See* Secretary of Labor's Order 6–2009, 74 FR 21524 (May 7, 2009).

[4] 76 FR 66637 (October 27, 2011).

Most recently, on March 15, 2022, the Department published a proposed amendment to the Exemption Procedure Regulation (the Proposed Rule) that would update its existing procedures governing the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of ERISA, the Code, and FERSA.[5] The Department received 29 comment letters on the Proposed Rule before the public comment period ended on May 29, 2022.

After consideration of the comments, including a written request for a public hearing, the Department held a virtual public hearing on September 15, 2022, which provided an opportunity for all interested parties to testify on material factual information regarding the Proposed Rule.[6] Eight organizations were represented at the hearing. The Department reopened the Proposed Rule's public comment period on the hearing date. Following the hearing, the Department posted the hearing transcript to EBSA's website on October 6, 2022, and announced that the reopened comment period that began on the hearing date would close on October 28, 2022.[7] Eight organizations submitted comments during the reopened comment period.

After careful consideration of the comments and testimony, the Department is finalizing the Proposed Rule (the Final Amendment). The Final Amendment makes a number of changes to the Proposed Rule in response to comments, which are discussed in detail in the section below titled ''Changes to the Exemption Procedure Proposed Rule.''

Changes to the Exemption Procedure Proposed Rule

The Department issued the Proposed Rule to promote a prompt, efficient, open, and transparent exemption application process. Accordingly, the Proposed Rule would make applicants explicitly aware of the information the Department requires and the specific steps it takes during the exemption application process to ensure that a thorough and complete record is created by which any impacted party, including plan participants and beneficiaries, can review and understand the decision-making process the Department engaged in when considering an exemption application. Specifically, in the Proposed Rule, the Department, among other things, proposed to (1) clarify the types of information and documentation required for a complete application, (2) revise the definitions of a ''qualified independent fiduciary'' and ''qualified independent appraiser'' to ensure their independence, (3) clarify the content of specific reports and documents applicants must submit to ensure that the Department receives sufficient information to make the requisite findings under ERISA section 408(a) to issue an exemption, (4) update various timing requirements to ensure clarity in the application review process, (5) clarify items that are included in the administrative record for an application and when the administrative record is available for public inspection, and (6) expand opportunities for applicants to submit information to the Department electronically.

General Comments on the Proposed Rule and the Need for Changes

Before discussing specific changes the Department made to the Proposed Rule in this Final Amendment, the Department notes that many commenters raised general, broad objections to the Proposed Rule.[8] Some commenters expressed concern that the Department had become more restrictive in its approach to exemptions and contended that the Proposed Rule would result in fewer exemptions. As evidence of this assertion, the commenters pointed to a decline in the number of exemptions the Department has issued over the last several years. The Department does not believe, however, that it has become unduly restrictive in its approach to exemptions. Instead, the number and frequency of granted exemptions reflects multiple factors, including market participants' increased ability to structure transactions in ways that avoid violating the prohibited transaction rules, the flexibility provided by many administrative class exemptions previously issued by the Department, the expansion of statutory exemptions, and market developments. The Department also notes that in the 2023 fiscal year, the Department granted 19 individual prohibited transaction exemptions, an increase in the number of exemptions from previous years.

One concern that the Department shares with many of the commenters is that the process was starting to become more drawn-out and longer than necessary. One reason the process is sometimes lengthy is that the Department frequently needs to follow-up with applicants to ensure that it has all of the information necessary to make the required statutory findings. This timeline was frustrating to everyone, and commenters noted it throughout their comments. While the commenters are correct that the Department intended to formalize many of its current exemption practices in this rulemaking process, its goal in doing so is to bring clarity and transparency to the exemption process, especially for plan participants and beneficiaries impacted by the exemption transaction, not to decrease the number of applications it receives or grants. The Department's reasoning is that by providing clearer expectations about what information should be included in exemption applications, some of the friction associated with the exemption process can be reduced because the Department will have less need to request additional information from applicants. This will make the entire process more accessible and efficient, especially for applicants that have less experience with the Department's exemption process. Contrary to the commenters' concerns, the Final Amendment is designed to help applicants navigate through the exemption process and not to dissuade them from applying for exemptions. The Final Amendment makes the exemption application process more efficient by reducing or eliminating delays caused when information is missing from exemption applications, and they are otherwise incomplete. It also tries to ensure that all entities have the same access to the exemption transaction process by making all steps of the process transparent.

In addition, commenters stated that the Proposed Rule is overly prescriptive, burdensome, and costly. The Department reiterates that one of the main reasons it is amending the Exemption Procedure Regulation is to clarify the specific items it expects applicants to include with their exemption applications and provide information regarding the process by which the Department evaluates exemption applications. The Department can achieve this goal only if the requirements of the Final Amendment are sufficiently prescriptive, because by adding more specificity, the Department will make the exemption application process less burdensome and costly and more streamlined and efficient.

The Department emphasizes that ERISA section 408(a) requires it to build an administrative record for the Department to make its required findings that an exemption transaction

[5] 87 FR 14722 (March 15, 2022).

[6] 87 FR 51299 (August 22, 2022).

[7] 87 FR 62751 (October 17, 2022).

[8] These commenters consisted of parties from the financial services industry and their attorney representatives, as well as independent fiduciaries and appraisers.

is (1) administratively feasible, (2) in the interest of the plan and its participants and beneficiaries, and (3) protective of its participants and beneficiaries. Under the current Exemption Procedure Regulation, the Department often engages in a drawn-out process where it makes several requests for additional information from the applicant after the submission of an application in the course of the Department's review. The information required under ERISA section 408(a) is, however, the same whether it is included with the initial submission of an application or obtained through this drawn-out process. Making the Department's expectations clearer through the Final Amendment should streamline and expedite the application process, which should redound to the benefit of both applicants and the Department. These changes will also enhance the administrative feasibility for exemptions.

Several commenters also urged the Department to withdraw the Proposed Rule and repropose it at a later date after receiving additional input from interested stakeholders. The Department disagrees with these commenters. The Department received comments from many different types of parties, representing financial institutions, fiduciaries, appraisers, plans, and participants and beneficiaries, among others during the initial comment period. The Department also notes that it provided interested stakeholders with multiple additional opportunities to provide their input on the Proposed Rule beyond their initial comments by (1) extending the initial public comment period, (2) holding a public hearing where the regulatory community expressed its views directly to the Department through written and oral testimony, and (3) reopening the comment period on the hearing date. Moreover, the Final Amendment improves the Department's exemption process and ultimately reduces applicants' burden; further delay would unnecessarily deprive the public of these benefits.

One commenter raised a concern that the Department may apply the Proposed Rule's provisions regarding independent fiduciaries and appraisers to other areas, such as the employee stock ownership plan valuation rules under ERISA. In response to this comment, the Department notes that the Final Amendment applies only to the Department's rules regarding the filing and processing of exemption applications. If the Department decides to issue future guidance regarding other areas of ERISA that contains similar rules for fiduciaries and appraisers to those contained in the Final Amendment, notice and an opportunity to comment on such guidance would be provided to the public, consistent with the Administrative Procedure Act.

Finally, several commenters objected to the Office of Management and Budget (OMB) and the Department's determination that the rule was not ''significant'' for purposes of Executive Order 12866. These commenters asserted that the Department should have included a regulatory impact analysis (RIA) with the Proposed Rule to assess its impact on plans, participants, and beneficiaries. In response to such comments, the Department has included an assessment of the potential costs and benefits of the Final Amendment, in accordance with section 6(a)(3)(B)(ii) of Executive Order 12866 (as amended by Executive Order 14094).[9]

Specific Rule Provisions

The current Exemption Procedure Regulation consists of 23 individual sections (§§ 2570.30 through 2570.52) that are arranged by topic, and that generally reflect the chronological order of steps the Department takes to process an exemption application. This Final Amendment retains the current section-by-section topical structure and most of the operative language of the current Exemption Procedure Regulation. While the Department made some non-substantive revisions to the current Exemption Procedure Regulation to improve its readability and provide clarity that are not discussed in this preamble, the Department addresses all substantive amendments to the current Exemption Procedure Regulation in the section-by-section discussion below.

Section 2570.30

Section 2570.30 sets forth the scope of the Exemption Procedure Regulation. It addresses the filing and processing of applications for both individual and class exemptions that the Department may propose and grant pursuant to ERISA section 408(a), Code section 4975(c)(2), FERSA, and on its own motion. Paragraph (b) broadly addresses the Department's power to issue exemptions. Similar to the Proposed Rule, the Department revises the regulatory text that is applicable to retroactive exemptions in the Final Amendment, to include a statement that the Department will review any retroactive exemption application to determine whether any plan participants or beneficiaries were harmed by the transaction for which retroactive relief is sought. This language reinforces the Department's existing policy that it, generally, will not support a request for a retroactive exemption involving a transaction that negatively impacted participants and beneficiaries. The Department notes that whether a transaction negatively impacts participants and beneficiaries will be determined based on the facts and circumstances, which will include a possible determination as to whether participants and beneficiaries were made whole for any harm. Further, the Department emphasizes in the Final Amendment that it will apply a high level of scrutiny to any retroactive exemption application using longstanding standards that have been previously set forth by the Department in the Exemption Procedure Regulation. As a result, the Department strongly suggests that a party that anticipates engaging in a transaction that would require retroactive exemptive relief contact the Department before engaging in the transaction.

Paragraph (d) of the Proposed Rule provides, generally, that the issuance of an administrative exemption does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from the obligation to comply with certain other provisions of ERISA, the Code, or FERSA. For clarity, the Final Amendment adds additional text to the proposed paragraph (d) to clarify the impact of an administrative exemption under the Code. Specifically, the Final Amendment states that the issuance of an exemption does not affect the requirements of Code section 401(a), including that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries, or the rules with respect to other Code provisions, including that an administrative exemption with respect to a contribution to a pension plan does not affect the deductibility of the contribution under Code section 404.

Paragraph (e) of the Final Amendment provides that the Department will not accept oral exemption applications or grant exemptions orally. Similar to the Proposed Rule, the Department has revised the regulatory text in the Final Amendment to clarify that the Department will provide feedback in response to oral inquiries, but it will not be bound by that feedback. The Department cannot give parties assurances that an exemption will be issued or whether a specific exemption condition will be required before it has

[9] The Department's RIA that is included in this Final Amendment was informed by comments that the Department received in response to its notice and comment solicitation in the Paperwork Reduction Act section of the Proposed Rule.

gone through the public exemption process, fully considered the record, and made a final determination. The Department also proposed to include language that any oral statements made by the party making the inquiry will become part of the administrative record. Commenters objected to this language on the basis that it would have a chilling effect on the regulated community's communications with the Department. As discussed in more detail below in § 2570.32(d), the creation of an accurate and complete administrative record outweighs commenters' concerns and necessitates the inclusion of oral communications in the administrative record. However, in order to be responsive to commenters' concerns while ensuring an accurate and complete administrative record, the Department has streamlined the Final Amendment to omit language in the proposed paragraph (e) regarding oral communications. Instead, all issues pertaining to the administrative record, many previously highlighted by the Proposed Rule, including the inclusion of pre-submission and oral communications, are addressed in § 2570.32(d).

Finally, the Department proposed to add a new paragraph (g), which would have provided that the Department issues administrative exemptions at its sole discretion based on the statutory criteria set forth in ERISA section 408(a) and Code section 4975(c)(2). Several commenters were concerned that the ''sole discretion'' language used here and in other sections of the Proposed Rule represented an attempt by the Department to leave stakeholders without a realistic opportunity to challenge its actions as arbitrary and capricious under the Administrative Procedure Act. For example, the commenters maintained that the Department could create a competitive imbalance by issuing two exemptions in identical circumstances with different conditions, or by refusing to give an exemption to one applicant that was given to a similarly situated applicant.

The Department disagrees. While the proposed text correctly reflects that the decision to grant or deny an exemption ultimately is within the Department's sole discretion, the regulation could not circumvent the Administrative Procedure Act requirements nor does (or could) it purport to give the Department authority to act arbitrarily. Therefore, the Department has retained the language as proposed in the Final Amendment.

In conjunction with this new paragraph (g), the Department proposed to add language stating that the existence of previously issued administrative exemptions is not determinative of whether the Department will propose future exemptions for applications with the same or similar facts, or whether a proposed exemption will contain the same conditions as a similar previously issued administrative exemption. The addition of this language reinforces the Department's existing policy that it has the sole discretionary authority to issue exemptions and is not bound by facts or conditions of prior exemptions in making determinations with respect to an exemption application. This policy allows the Department to retain sufficient flexibility to grant exemptions that are appropriate in an ever-changing business, legislative, and regulatory policy environment.

Commenters objected to proposed paragraph (g) and argued that the Department should be bound or, at a minimum, influenced by previously issued administrative exemptions. These commenters believe that prior exemptions should establish precedent that stakeholders can reasonably rely on to foster predictability, efficiency, and consistent treatment of different applicants.

It is reasonable for applicants to identify similar exemptions the Department previously has granted in certain situations as a starting point when submitting an exemption application to the Department. Applicants should be aware, however, that revisions and changes may be necessary based on the current facts and circumstances, whether they are driven by business, legislative, regulatory, or policy considerations. The Department endeavors to use the prohibited transaction class exemption process when the exemption transaction is reasonably understood to be a transaction that would benefit, and be protective of the interests of, participants and beneficiaries of numerous plans. When the Department is considering a prohibited transaction individual exemption, however, it is because the Department understands the transaction to be specific and unique to the party before it. Accordingly, parties that are facing similar, but not identical situations, are encouraged to seek their own exemption. Previously issued exemptions are instructive, and a useful starting point, but do not prevent the Department from considering each situation that comes before it in its entirety. As a result, the Department has modified the proposed paragraph (g) in the Final Amendment to provide that previously issued administrative exemptions may inform the Department's determination of whether to propose future exemptions based on the unique facts and circumstances of each application.

Lastly, with respect to proposed paragraph (g), commenters raised concerns regarding the interplay between the Department's stance that applicants cannot rely on exemptions as precedents and the existing expedited review process the Department established in Prohibited Transaction Exemption 96–62 (commonly referred to as EXPRO).[10] EXPRO permits the Department to perform an expedited review of an exemption application that is ''substantially similar'' to two other exemptions the Department has granted in the prior five years, as determined in the Department's sole discretion. The Department disagrees with the commenters' position that the Proposed Rule creates tension with EXPRO. Pursuant to proposed paragraph (g), the Department may use previously issued exemptions to inform its decisions regarding whether to grant individual exemptions. The EXPRO process merely uses prior exemptions to expeditiously inform the Department of whether an exemption would meet the requirements of ERISA section 408(a); it does not bind the Department to prior exemptions as precedent. Instead, before granting an exemption under EXPRO, the Department must determine, in its sole discretion, (1) whether a proposed transaction is ''substantially similar'' and (2) whether there is little, if any, risk of abuse or loss to plan participants and beneficiaries. Even if a transaction is substantially similar, the Department may deny an application under EXPRO if it finds that the particular transaction creates a risk of abuse or loss, or if it determines that the exemption transaction differs from the prior exemptions based on the Department's understanding of changes in present circumstances, whether business, legislative, regulatory, or policy.

Section 2570.31

Section 2570.31 sets forth definitions that are used throughout the Exemption Procedure Regulation. While the Department did not propose to revise most of the definitions (other than to improve readability), the Department proposed substantive revisions to several existing definitions and added new definitions. These changes address issues that the Department has often experienced in its review of exemption applications.

[10] 67 FR 44622 (July 3, 2002).

First, the Department proposed to revise the definition of ''affiliate'' set forth in paragraph (a) to include:

- any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual; any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)) of any such person; or
- any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, partner, or five percent or more owner.

In addition to rewording the text for clarity, the proposed revised definition would have included all employees and officers, rather than only those who are highly compensated (as defined in Code section 4975(e)(2)(H)) or have direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets involved in the subject exemption transaction to ensure that all parties that commonly serve as affiliates are captured, without a complicating reference to a Code citation.

Although commenters maintained that the revised definition may have been too broad because it is overly inclusive and might capture parties that are not related to the exemption transaction, the Department is finalizing this definition as proposed. The revision reflects the affiliate definition the Department currently uses in individual and class exemptions and has proved to be both appropriately protective and workable.[11]

The Department proposed to substantially revise the definition of the term ''qualified independent appraiser'' in paragraph (i) of the proposal. Commenters generally objected to the proposed changes because, according to them, such changes could result in a substantial reduction of the number of experienced appraisers available to represent the interests of plans in exemption transactions, and it would especially be harmful for smaller appraisers. They also indicated that the changes could result in further industry consolidation, which could lead to concentration of risks. After considering these comments, the Department has decided not to finalize the revised definition as proposed, and, except for the modifications discussed below, generally, has reverted to the qualified independent appraiser definition in the current Exemption Procedure Regulation.

The Department made a few revisions to the Exemption Procedure Regulation text in the Final Amendment regarding the qualified independent appraiser definition to clarify the underlying meaning of the existing language. The Department requested comments on these definitions, including whether the ''proposed changes are clear [and whether they] appropriately reflect the manner in which entities interact with ERISA-covered plans and plan participants and beneficiaries.'' [12] Based on this request for comment, the Department received input from the public that the proposed definition of qualified independent appraiser would better reflect the manner in which the appraiser interacted with plans if the definition were slightly changed. Specifically, the Final Amendment amends the qualified independent appraiser definition to provide that the Department generally will not conclude that an appraiser's independence is compromised solely based on the revenues it receives from parties in interest (and their affiliates) participating in the exemption transaction, as long as the appraiser neither receives nor is projected to receive more than two percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates). Although larger percentages merit more stringent scrutiny, an appraiser may be considered independent based upon other facts and circumstances provided that the appraiser neither receives nor is projected to receive more than five percent of its revenues within the current Federal income tax year from parties in interest (and their affiliates) participating in the exemption transaction.

While the amended definition returns to the two and five percent of revenue thresholds provided in the Exemption Procedure Regulation, the Department has modified the language in the Final Amendment to clarify that an appraiser whose revenue threshold is less than two percent is not automatically deemed independent. The Department may consider other facts and circumstances indicating that an appraiser is not independent regardless of its revenue threshold. For example, if an appraiser is likely to be retained by the applicant for additional appraisals due to its provision of an appraisal submitted with the exemption application, the Department may question whether the appraiser is truly independent. Further, the modified language emphasizes that appraisers with revenue thresholds that are between two and five percent could merit heightened scrutiny from the Department. The revised language in the Final Amendment strikes the appropriate balance of addressing commenters' concerns that the proposed changes could have negatively impacted the appraiser marketplace while giving appropriate weight to the participant-protective importance of an appraiser's independence based on all relevant facts and circumstances regardless of the appraiser's revenue percentage.

The Department also proposed to revise the qualified independent appraiser definition in the Proposed Rule to provide that an appraiser must be independent of and unrelated to the qualified independent fiduciary involved with the exemption transaction. Commenters objected to the revision by asserting that many independent fiduciaries retain affiliates to perform appraisals and eliminating this practice would unnecessarily drive up the cost of an exemption application. After considering these comments, the Department has not included the proposed language in the Final Amendment.

The Department also proposed to revise the definition of a ''qualified appraisal report'' in paragraph (h)(2)(i) to require the appraiser to provide an appraisal report ''on behalf of the plan.'' Commenters representing appraisers stated that longstanding ethical standards of the valuation profession require appraisers to perform appraisals independently and without bias in favor of any party. All appraisal reports are based on objective criteria and may not be ''on the behalf'' of any party. After considering this information, the Department did not include the proposed language in the Final Amendment.

The Department made similar amendments to the definition of ''qualified independent fiduciary'' in paragraph (j) of the proposed § 2570.31. As with the qualified independent appraiser definition, commenters expressed concern that the proposed changes to the qualified independent fiduciary definition would substantially reduce the number of experienced independent fiduciaries available to represent the interests of plans and participants and beneficiaries in exemption transactions, especially

[11] *See, e.g.,* PTE 2020–02 (85 FR 82798, December 18, 2020); PTE 2022–02 (87 FR 23245, April 19, 2022); PTE 2022–03 (87 FR 54264, September 2, 2022); and Proposed Exemption for Morgan Stanley & Co. LLC, and Current and Future Affiliates and Subsidiaries, Application No. D–11955 (86 FR 64695, November 18, 2021).

[12] 87 FR 14725 (Mar. 15, 2022).

smaller independent fiduciaries. After considering these concerns, the Department, generally, is not finalizing these provisions of the exemption as proposed and has mostly reverted to the language of the Exemption Procedure Regulation.

The Department proposed to revise the independent fiduciary definition to:

- require the fiduciary to be independent from any other party involved in the development of the exemption request; and
- state that the Department would consider whether a fiduciary has an interest in the exemption transaction or in future transactions of the same nature or type in determining whether a fiduciary is independent.

Beyond the broad objections described above regarding the changes to the definition, commenters stated these particular changes would result in the exclusion of experienced independent fiduciaries, leaving only inexperienced fiduciaries to represent the interests of plans and participants and beneficiaries. Commenters maintained that if a fiduciary develops expertise in a particular area, it would necessarily have an interest in future transactions, because future business drives a fiduciary to invest the resources necessary to develop expertise. While the Department is persuaded not to include the proposed change in the Final Amendment, it has revised the definition to provide that when the Department makes an independence determination based on all of the relevant facts and circumstances, that determination will include an evaluation of the extent to which the plan's counterparty in the exemption transaction participated or influenced the selection of the fiduciary. Using such explanatory language emphasizes the conflict of interest concerns, previously raised in the Proposed Rule, that the Department focuses on as part of its evaluation of fiduciary independence without unduly limiting those parties that may serve as independent fiduciaries.

Second, as with the definition of a qualified independent appraiser, the Department proposed to revise the revenue threshold used to determine independence in the Proposed Rule. Commenters made the same objections to this proposed change by asserting that it could have a detrimental impact on the independent fiduciary marketplace. After considering these comments, the Department, generally, has not included the proposed changes in the Final Amendment and has largely reverted to the original revenue thresholds set forth in the existing Exemption Procedure Regulation. However, as with the definition of a qualified independent appraiser, the Department has revised the language in the Exemption Procedure Regulation in the Final Amendment to clarify the underlying intent of the existing language.

Specifically, the Final Amendment states that the Department generally will not conclude that a fiduciary's independence is compromised solely based on the revenues it receives from parties in interest (and their affiliates) that are participating in the exemption transaction if the fiduciary neither receives nor is projected to receive more than two percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates). Although larger percentages merit more stringent scrutiny, a fiduciary may be considered independent based upon other facts and circumstances provided that the fiduciary neither receives nor is projected to receive more than five percent of its revenues within the current Federal income tax year from parties in interest (and their affiliates) participating in the exemption transaction.

As with the qualified independent appraiser definition, the amended independent fiduciary definition in the Final Amendment retains the two and five percent of revenue standards thresholds set forth in the existing Exemption Procedure Regulation, but modifies the language to clarify that a fiduciary with revenues less than the two percent revenue threshold is not automatically deemed independent: the Final Amendment provides that the Department may consider other facts and circumstance indicating whether a fiduciary is independent regardless of its revenue threshold. Further, the Department has revised the language in the Final Amendment to emphasize that fiduciaries whose revenue thresholds are between two and five percent merit heightened scrutiny from the Department. The revised language addresses the commenters' concerns that the proposed changes could have negatively impacted the independent fiduciary marketplace while giving proper weight to the participant-protective independence of the fiduciary, initially raised as a concern in the Proposed Rule, based on all relevant facts and circumstances.

Proposed paragraph (k) would have added a new definition of ''pre-submission applicant'' that defines a pre-submission applicant as a party that contacts the Department, either orally or in writing, to inquire whether a party with a particular fact pattern would need to submit an exemption application and, if so, what conditions and relief would be applicable. This definition would not include a party that contacts the Department to inquire broadly without reference to a specific fact pattern. The Department has included this definition in the Final Amendment to clearly distinguish parties that make inquiries with the Department that could potentially lead to an exemption application from those that simply seek non-fact specific guidance from the Department. As discussed below, this distinction impacts how the Department addresses the inquiries and whether an administrative record is created when pre-submission applicants contact the Department regarding an exemption transaction.

The Department also proposed to add a new definition of ''party involved in the exemption transaction'' that included the following:

(1) a party in interest (as defined in paragraph (f));

(2) any party (or its affiliate) that is engaged in the exemption transaction; and

(3) any party (or its affiliate) that provides services with respect to the exemption transaction to either the plan or a party described in (1) or (2).

The Department proposed to use this term to replace ''party in interest'' throughout the Exemption Procedure Regulation. After considering comments and reviewing whether the proposed switch to ''party involved in the exemption transaction'' facilitated the Department's goals of transparency and efficiency, the Department has determined not to include this definition in the Final Amendment and is reverting the reference in the applicable provisions to the term ''party in interest'' that is used in the current Exemption Procedure Regulation. Reverting to the term ''party in interest'' ensures that applicants can understand which parties are being addressed and can efficiently collect the information necessary to complete an application.

Section 2570.32

Section 2570.32 addresses who may apply for an exemption and when the administrative record for an exemption application is created. The Department proposed two revisions to § 2570.32. First, paragraph (a) would have been revised to describe persons who may apply for exemptions. The Department proposed to delete the language in paragraph (a) stating that ''the Department will initiate exemption proceedings upon the application of'' to

clarify that this paragraph addresses only those parties who are permitted to apply for an exemption. The Department has retained this revision in the Final Amendment as proposed because the revised language makes clear that paragraph (a) does not address whether the Department is required to initiate an exemption proceeding. The decision to initiate an exemption proceeding remains within the Department's sole discretion.

The Department also proposed to add a new paragraph (d) to address questions applicants have frequently asked the Department regarding the creation of the administrative record for an exemption application that is available for public inspection. To reflect the addition of this content, the Department proposed adding ''and the administrative record'' to the heading of § 2570.32. The Department has included these proposed revisions in the Final Amendment.

The Department proposed in paragraph (d)(1) of the Proposed Rule to open the administrative record for public inspection beginning on the date a pre-submission applicant provides information regarding an exemption transaction to the Department, and it proposed in paragraph (d)(2) that all pre-submission documents and communications between the Department and pre-submission applicants would immediately become part of the administrative record that is open for public inspection.

Commenters objected to this proposed change because, in their view, it would have a chilling effect on informal and anonymous communications between the Department and the regulated community. These commenters asserted that applicants would be less likely to start the exemption application process or otherwise approach the Department to discuss potential exemption transactions if every communication with the Department is included in the administrative record that is available to the public.

The Department's objective in proposing to add paragraph (d)(1) to the Exemption Procedure Regulation was to ensure a complete and accurate administrative record while still encouraging applicants to communicate freely with the Department. As discussed in more detail below, the Final Amendment still requires pre-submission information to be a part of the administrative record. However, the Department acknowledges commenters' concerns about making information submitted during the pre-submission process immediately available for public disclosure. Therefore, the Department has modified the proposed language in paragraph (d)(1) in the Final Amendment to provide that the administrative record for an exemption application becomes open for public inspection, pursuant to § 2570.51(a), on the date an applicant submits an exemption application to the Office of Exemption Determinations. This revision makes clear that the administrative record for an exemption transaction is not available for public inspection until an applicant formally submits a written exemption application to the Department. However, the Department also notes that paragraph (d)(1) is not meant to encourage extended negotiations between a potential applicant and the Department before it submits an exemption application, or to permit applicants to circumvent an open process by ''informally'' seeking an exemption from the Department, while maintaining that they have not yet formally applied. At its sole discretion, the Department may decline to engage in extended conversations without submission of a formal application that ensures an appropriately open and transparent process.

While the Department acknowledges commenters' concerns regarding the inclusion of pre-submission information in the administrative record, including oral communications, the Department's position is that building an accurate and transparent record takes precedence over those concerns. In making its required statutory findings under ERISA section 408(a), the Department is required to build an administrative record to support its findings under ERISA section 408(a). The administrative record is incomplete without all of the information that informed the Department's determinations with respect to the application, including notes of oral communications with the Department.

The Department emphasizes that the record is not developed solely for the benefit of the applicant; it is also available for review and consideration by all parties that may be affected by the exemption request, including participants and beneficiaries. The inclusion of pre-submission information in the public record ensures not only accuracy but transparency into the Department's exemption determination process. The record should contain all the information necessary to fully review the Department's ultimate decision. Not including all discussions between the applicant and the Department that inform the Department's decision may hinder, for example, a plan participant's ability to provide comments or additional facts that might be beneficial to the Department's review of the application or prevent a court from fully understanding the basis for the Department's exemption determination if an applicant or beneficiary legally challenges the Department's decision. The Department notes, too, that members of the public can continue to communicate anonymously with the Department pursuant to the requirements of § 2570.33(d).

Based on the Department's position that all pre-submission information, whether written or oral, must be included in the administrative record as of the date an applicant submits an exemption application, and building on the Proposed Rule's language, the Department has amended paragraph (d)(2) in the Final Amendment to provide that the administrative record includes, but is not limited to, the following: (1) the initial exemption application and any modifications or supplements thereto; (2) all correspondence with the applicant after the applicant submits the exemption application; and (3) any information submitted to the Department by the applicant in connection with the exemption application, whether such information is provided orally or in writing (as well as any comments and testimony received by the Department in connection with an application).

The Department clarified paragraph (d)(2) of the Final Amendment in turn, by adding a new paragraph (d)(3) which states that, although the administrative record is open and available to the public only after an applicant submits an exemption application, the record includes any material documents or supporting information that an applicant submitted to the Department in connection with the transaction that is the subject of the application, whether orally or in writing, before the applicant formally submits an exemption application to the Department. The administrative record does not include documents or records of communications with the Department that are unrelated to the exemption transaction that is the subject of the application or are associated with an exemption application an applicant submits subsequent to the unrelated communications.

Consistent with the goals outlined in the Proposed Rule, paragraphs (d)(2) and (3) of the Final Amendment clearly establish the documents and communications that the Department will include in the administrative record to add clarity and transparency to the Department's exemption

determination process. The new language expressly states that all information material to the Department's decision will be included, thereby ensuring the creation of an accurate and complete administrative record. The Department emphasizes, however, that pursuant to paragraph (d)(3), pre-submission information that is not material, such as inapplicable background information or information regarding other transactions that are not relevant to the exemption transaction, will not be included in the administrative record. Whether information is material for purposes of paragraph (d)(3) will be determined solely at the Department's discretion. Limiting pre-submission information in this manner should address the most significant concerns of the commenters while fully addressing the Department's obligation to build a transparent, accurate, and complete administrative record for its determinations regarding an exemption application.

In connection with commenters' concerns regarding the proposed inclusion of pre-submission documents and communications in the administrative record, several commenters requested the right to review and comment on or correct the Department's administrative record before the Department provides public access to it. The Department's position is that including such a right would be inconsistent with its goal of creating a record that accurately reflects the information the Department considered when making its determination. Allowing an applicant to edit the administrative record for its own exemption application would defeat the Department's goal of transparency for not only applicants, but all parties impacted by the transaction, as well as the general public. To the extent, however, that a party believes it is appropriate to correct any part of the public record, they are welcome to submit comments and clarifications which the Department also will include in the public record. The Department has determined that the need for an open, transparent, and fully developed process is best served by including all the information it received or reviewed when making an exemption determination in the administrative record at the time an exemption is proposed whether or not the Department relies on such information.

Finally, the Department proposed to update paragraph (d)(4) of the Exemption Procedure Regulation to reflect modern methods of communication. The paragraph provides that if documents are required to be provided in writing by either the applicant or the Department, the documents could be provided either by mail or electronically, unless otherwise required by the Department at its sole discretion. The Department has adopted this provision in the Final Amendment as proposed.

Section 2570.33

In § 2570.33, the Department proposed to address applications the Department will not consider. Specifically, the Department proposed to revise the text of the Exemption Procedure Regulation to clarify when it will not consider an exemption application. First, the Department proposed to revise paragraph (a)(1), under which the Department may exclude exemption applications that fail to include current information. The Department intended that the proposed revision would clarify that the Department would treat an applicant's failure to include current information the same as an applicant's failure to include information. The premise of this revision is that absent current information, the Department cannot develop an accurate understanding of the facts sufficient to enable a review of the underlying application. The Department has adopted this provision in the Final Amendment as proposed.

Second, the Department proposed to revise paragraph (a)(2), which generally excludes from consideration an application involving: (1) a transaction or transactions that are the subject of an investigation for possible violations of part 1 or 4 of subtitle B of Title I of ERISA or FERSA sections 8477 or 8478; or (2) a party in interest who is the subject of such an investigation or who is a defendant in an action by the Department or the IRS to enforce those provisions of ERISA or FERSA. The proposed revision would have expanded the existing exclusion to include any ERISA investigations (not only those pursuant to Title I of ERISA or FERSA sections 8477 and 8478), as well as investigations under any other Federal or state law. The proposal also would have expanded the limitation on applications from parties that are the subject of an investigation or a defendant in an action brought by the Department or the IRS to include any other regulatory agencies enforcing ERISA, the Code, FERSA, or any other Federal or state laws. Commenters argued that the new language was too expansive and would unnecessarily exclude potential applicants.

The Department has determined that the proposed revision to paragraph (a)(2) should not be included in the Final Amendment because parties should not be excluded automatically due to these additional investigations (except for a failure to include required information), thereby reverting closer to the current Exemption Procedure Regulation. The proposed regulation broadly expanded the existing exclusion to include any ERISA investigation (not only sections 8477 and 8478), as well as any other Federal or state law. In response to the comments, the Department decided that a more limited expansion was more appropriate. The best approach is to require applicants to disclose investigations or other court or enforcement actions, which is addressed in § 2570.34. Following this disclosure, the Department can make a fully informed decision regarding whether an exemption application should be accepted based on the facts and circumstances, rather than automatically rejecting an exemption application in this circumstance.

The Department acknowledges that some commenters were concerned that these additional disclosures, and their inclusion in the administrative record, could lead the public to presume malfeasance on the part of applicants. The Department declines to adopt any changes based on this comment, because a complete and accurate record is essential to a transparent exemption process. The Department notes that applicants who are concerned about potential reputational harm may include an explanation or description of mitigating facts along with their disclosure for inclusion in the administrative record. The Department also notes that some of the required disclosures may already be reflected in publicly available disciplinary actions by other regulators or may have been disclosed by the applicant in another context. For example, an applicant that is a publicly-traded company may have already disclosed certain investigations or disciplinary actions as part of its filing of a Form 10–K with the Securities and Exchange Commission.

The Department proposed to delete the language in the current paragraph (c) regarding the administrative record, because that topic is now addressed in revisions to § 2570.32 discussed above. The Department has made this revision in the Final Amendment as proposed.

The Department proposed to revise the part of paragraph (c) addressing the submission of confidential information. The current Exemption Procedure Regulation provides that if an applicant designates any information required by the rule or requested by the Department as confidential, the Department will determine whether the information is

material to the exemption determination. If it determines at its sole discretion that the information is material, the Department will not process the application unless the applicant withdraws the claim of confidentiality. The Department proposed to revise this language to clarify that it would not review an application that includes confidential information, with the exception of confidential designations by a Federal, State, or other governmental entity. This means that if an applicant submits any confidential information as part of an exemption application, the Department would not review the information nor process the exemption application. As a result, the Department would process the application only after the applicant withdraws its claim of confidentiality or revokes its submission of the confidential information. This change would support the Department's goal of increasing transparency while protecting confidential information and has adopted this provision in the Final Amendment as proposed.

One commenter objected to the proposed revisions to paragraph (c) on the grounds that requiring an applicant to remove a claim of confidentiality with respect to material information will discourage applicants from submitting applications. The Department maintains that the need for transparency in the exemption application process overrides the commenter's concerns. The Department's record must be complete and accurate and available for public inspection. If information that should be included in the administrative record is excluded based on a claim of confidentiality, a third party could not review the full administrative record, which would impede the Department's goal of establishing a full and transparent exemption determination process. The Department's obligation to make proper findings is undermined by the submission of confidential documents and information that are insulated from public comment and evaluation.

The revised language in the Final Amendment also states that by submitting an exemption application, an applicant consents to public disclosure of the entire administrative record pursuant to § 2570.51. This revision, consistent with the intent of the Proposed Rule, places applicants on notice that they are consenting to the public disclosure of all information in the administrative record when they submit an exemption application, which will lead to a fully transparent exemption process.

The Department proposed adding a new paragraph (d) that governs communications with pre-submission applicants as newly defined in § 2570.31(k). The proposed language provided that the Department would not communicate with a pre-submission applicant or its representative, whether through written correspondence or a conference, if the pre-submission applicant does not: (1) identify and fully describe the transaction for which exemptive relief is sought; (2) identify the applicant, the applicable plan(s), and the relevant parties to the exemption transaction; and (3) set forth the prohibited transaction provision(s) that the applicant believes are applicable.

Commenters objected to this language, arguing that it would have a chilling effect on informal and anonymous pre-submission discussions between the Department and the regulated community. The Department understands the commenters' concerns, but it also must be able to associate informal guidance it provides with specific applications that are submitted. While the Department welcomes pre-submission requests for guidance, it is imperative that parties approaching the Department for such guidance regarding a specific exemption transaction provide the Department with sufficient information to allow it to properly attribute the guidance to a specific transaction and the relevant prohibited transaction provisions that are applicable to the transaction.

Accordingly, the Final Amendment requires those seeking pre-submission guidance to identify the transaction for which exemptive relief is sought, as well as the applicable prohibited transaction provision(s). However, to address commenters' concerns, the Department has not included the proposed language in the Final Amendment that would have required pre-submission applicants to identify the applicant, the applicable plan(s), and the relevant parties to the exemption transaction before the Department will communicate with a pre-submission applicant. Eliminating specific identifying information should address commenters' concerns regarding anonymity while ensuring that the Department obtains the complete information it needs to provide relevant advice to an anonymous pre-submission applicant.

Section 2570.34

Section 2570.34 addresses information the Department requires applicants to include in an exemption application. While the Department proposed to expand the information the Department requires to be included in an application in some cases, the Department's intention in expanding the required information was to streamline the exemption process by ensuring that most of the information the Department needs to make an exemption determination is available to it when the application is submitted, which will expedite the exemption determination process.[13] The Department specifically requested comments on the changes to the information required to be submitted as part of the application, including comments on whether the Department should consider other types of information.[14]

Specifically, the Department proposed to revise paragraphs (a)(1) and (3) to require addresses, phone numbers, and email addresses for the applicants, representatives, and parties in interest. The Department proposed to require applicants to include this information in the initial exemption application to ensure that the Department can efficiently contact the proper parties.

In addition, the Department proposed to replace the original paragraph (a)(4) with new paragraphs (a)(4), (5), and (7) to facilitate the Department's understanding of the decision-making process the applicant undertook to determine that it was necessary to submit an exemption application. Accordingly, the Department proposed for paragraph (a)(4) to require the applicant to include in its application a description of: (1) the reason(s) for engaging in the exemption transaction; (2) any material benefit that a party in interest involved in the exemption transaction may receive as a result of the subject transaction (including the avoidance of any materially adverse outcome by the party in interest as a result of engaging in the exemption transaction); and (3) the costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible.

Commenters objected to this language on the grounds that requiring the disclosure is burdensome and unnecessary. However, the Department views this information as an essential component of an exemption application, because it will facilitate the Department's understanding of the underlying rationale for the exemption transaction, including the costs and benefits for both the party in interest and the plan and its participants and

[13] 87 FR 14727 (Mar. 15, 2022).

[14] *Id.*

beneficiaries. For example, when an applicant that is a plan sponsor provides not only a rationale for engaging in the exemption transaction, but also a statement of the benefits to the sponsor, as well as the costs and benefits to the plan, the Department can more accurately determine whether it has sufficient information to make its findings under ERISA section 408(a). The Department needs to understand the scope and severity of the conflicts of interest associated with the transaction, as well as the potential costs and benefits of the transaction, before it can make a properly informed decision about the merits of the application and how best to structure a participant-protective exemption. In addition, the requirement should not be too burdensome, because a fiduciary that is complying with its fiduciary obligations under ERISA section 404 should fully evaluate all the factors set forth in paragraph (a)(4) in the normal course of fulfilling its fiduciary responsibilities before deciding to seek an exemption or engage in the transaction at issue. Further, the Department notes that the required disclosures would likely be requested as part of the Department's normal review of an exemption application.

Based on the foregoing, the Department is including the proposed revisions in the Final Amendment as proposed. The Department notes that it is not requiring a full actuarial or technical economic accounting with respect to a proposed exemption transaction but, instead, is requesting applicants to disclose information they obtain by performing a full review of the transaction, which includes, at a minimum, reviewing the material benefits and cost of the transaction for the plan and its participants and beneficiaries. The Department also notes that this information is already typically requested when the Office of Exemption Determinations reviews exemption applications, such that this information would eventually have to be provided during the Department's review of the application, and the Department's primary objective in requiring this information to be submitted with the initial application is to streamline the exemption determination process.

The Department also proposed to add a new paragraph (a)(5) that would build on paragraph (a)(4) by proposing to require applicants to include with their exemption applications a detailed description of possible alternatives to the exemption transaction that would not involve a prohibited transaction and an explanation as to why the applicant did not pursue those alternatives. Commenters objected to this language by asserting that it would be burdensome, if not impossible, for an applicant to investigate and evaluate all potential approaches to a transaction. Further, commenters argued that ERISA does not require them to evaluate and exhaust all alternatives to an exemption transaction before submitting an exemption application.

The Department recognizes that ERISA does not require an applicant to evaluate every imaginable option with respect to an exemption transaction and that doing so may prove impractical, and it did not intend to suggest otherwise. In response to the comments, but still recognizing the concerns the Department raised in the Proposed Rule, the Department has modified the language in the Final Amendment to provide that an applicant must submit a description of the alternatives to the exemption transaction that it considered or evaluated before submitting the exemption application and explain why those alternatives were not pursued with its exemption application. Thus, the Department simply requires an applicant to explain to the Department the process by which the applicant arrived at its decision to propose an exemption application. If as part of that decision-making process the applicant evaluated alternatives, the applicant must disclose those alternatives to the Department, along with the rationales for not selecting such alternatives, to provide the Department with insight into the applicant's decision-making process. Although the Department is not retaining the proposed amendment to paragraph (a)(5) that would have required an exhaustive review of all alternatives to an exemption transaction, the Department notes that a failure to consider and address reasonable alternatives to engaging in a prohibited transaction may provide grounds for the Department to deny an exemption application. The prohibited transaction rules are the starting point for the Department's evaluation of an exemption application, and those rules are designed to prohibit transactions that involve significant conflicts of interest. Considering the harm conflicts of interest can inflict on plans and participants and beneficiaries, and the challenges the Department faces in determining the full scope and severity of these conflicts and their potential impact on the affected plan and its participants and beneficiaries, it is reasonable for the Department to require the applicant to explain why the most protective and appropriate approach is not avoiding entering into a prohibited transaction that requires an exemption from the Department to comply with ERISA. The Department encourages applicants to evaluate whether the exemption transaction could be structured in a manner that would not result in a prohibited transaction. In many cases, the best way to protect participants' interests is not to engage in a transaction subject to significant conflicts of interest, but rather to avoid the conflicts of interest in the first place and structure the transaction to avoid the need for an exemption from otherwise illegal conduct.

The Department proposed to insert a new paragraph (a)(7) that would replace the prior requirement that an applicant state why the transaction is customary to the industry with a requirement for the applicant to set forth a description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted. Commenters expressed concern that complying with the proposed revision may be difficult and burdensome. The Department, however, disagrees with these concerns and has included the new paragraph in the Final Amendment as proposed. The Department is making this change because the Exemption Procedure Regulation's prior ''customary to the industry'' language did not require applicants to sufficiently inform the Department of the conflicts of interest and instances of self-dealing involved in an exemption transaction or the costs and benefits to a plan and its participants and beneficiaries. The information required by the new language assists the Department in identifying the conflicts of interest and instances of self-dealing involved in an exemption transaction, and thereby facilitates the Department's analysis regarding whether the exemption transaction is structured to properly protect the interests of the plan and its participants and beneficiaries as required by ERISA section 408(a). As with information about applicants' decision-making processes, the Department notes it would need to request this information at some point during the application process to make its required statutory findings. By requesting this information upfront, as opposed to requesting it later in the application process, the Department is streamlining the exemption determination process and thereby reducing its associated burdens and costs.

Together, the Final Amendment's new paragraphs (a)(4), (5), and (7) will help the Department better understand applicants' proposed exemption transactions and their implications for

plans, participants, and beneficiaries. They also will help ensure that the Department has sufficient information to make its required findings under ERISA section 408(a) regarding whether a requested exemption would be (1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries when the applicant submits its application to the Department.

The final revisions to paragraph (a) are intended to provide consistency among exemption applications. The revised paragraph (a)(8) simply expands the disclosure requirement to include a statement regarding whether the transaction is the subject of investigation or enforcement actions by any regulatory authority. This change is consistent with the changes to § 2570.33 that are discussed above and ensures that the Department has the information it needs to make an informed decision regarding an exemption application.

The Department proposed to add a new paragraph (a)(10) that would require applicants that use the term ''affiliate'' in their exemption applications to include a statement that either (1) the definition of affiliate set forth in § 2570.31(a) is applicable or (2) explains why a different affiliate definition should be applied. The Department added this language to encourage the use of a single, consistent affiliate definition among all applications, which will prevent issues that could result from different definitions of the term being used in different exemptions. The Department has adopted this requirement in the Final Amendment as proposed.

Paragraph (b) addresses some of the Department's specific concerns with respect to exemption transactions. The most substantial change adds paragraph (b)(2), which requires applicants to include a statement in their applications that (A) the exemption transaction will be in the best interest of the plan and its participants and beneficiaries; (B) all compensation received, directly or indirectly, by a party involved in the exemption transaction will not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (C) all of the statements to the Department, the plan, or, if applicable, the qualified independent fiduciary or qualified independent appraiser about the exemption transaction and other relevant matters will not be materially misleading at the time the statements are made. If the applicant does not include such a statement in its exemption application, the applicant must explain why these exemption standards should not be applicable to the exemption transaction.

For purposes of paragraph (b), an exemption transaction is in the best interest of a plan if the plan fiduciary causing the plan to enter into the transaction determines, with the care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would, in the conduct of an enterprise of a like character and with like aims, enter into the exemption transaction based on the circumstances and needs of the plan. Such fiduciary shall not place the financial or other interests of itself, a party to the exemption transaction, or any affiliate ahead of the interests of the plan or subordinate the plan's interests to those of any party or affiliate.

In proposed paragraph (b)(2), the Department generally incorporated compliance with ''impartial conduct standards'' as formalized in Prohibited Transaction Exemption 2020–02 as a baseline condition for approved exemptions. Commenters, however, stated that the proposed new paragraph (b)(2) should not be included in the Final Amendment, because the impartial conduct standards are not applicable to all transactions. The Final Amendment, however, does not require the impartial conduct standards to be made applicable to all exemptions as a condition for the Department to grant them. The impartial conduct standards, however, are rooted in well-established fiduciary principles designed to address problems of agency and conflicts of interest, and as such, are often strong and flexible safeguards against abuse in transactions subject to the prohibited transaction rules. Accordingly, while the failure to propose adoption of such standards is not automatically disqualifying, the adoption of such standards as part of a proposed exemption can lend important support to a finding by the Department that the exemption transaction is in the interest of and protective of the plan and its participants and beneficiaries.

Rather than mandating adoption of such standards, paragraph (b)(2) of this regulation provides applicants with an opportunity to explain why the impartial conduct standards should not be applicable to their exemption transactions. The applicant's inclusion of an explanation as to why the standards are not applicable provides the Department with necessary insight into the applicant's process of evaluating the conflicts of interest that may or may not be inherent in the proposed exemption transaction. As discussed above with respect to paragraph (a), understanding and addressing conflicts of interest is a necessary part of the process the Department must undertake when evaluating exemption transactions to make its required statutory findings under ERISA section 408(a).

Commenters also objected to the inclusion of proposed paragraph (b)(2) on the grounds that the language runs counter to certain court decisions and Congressional intent. The Department disagrees with these assertions. As noted, the Final Amendment does not mandate the adoption of impartial conduct standards in every case, independently impose an enforceable obligation to comply with those standards, or purport to pre-decide the circumstances in which such conditions should be imposed. Instead, the Department is only requiring applicants to explain whether the standards would be met by the transaction at issue. This is clearly helpful information for the Department to have in reviewing exemptions for statutorily prohibited transactions, and for fiduciaries to consider before moving forward with transactions. The information allows the Department to address essential questions regarding whether a proposed exemption transaction is in the interests of and protective of the rights of the participants and beneficiaries. For example, knowing whether a transaction is in a plan's best interest can greatly inform the Department's statutorily mandated findings regarding whether the exemption transaction is in the interests of and protective of the rights of the participants and beneficiaries. Further, if the applicant informs the Department that the impartial conduct standards are not applicable, that knowledge will inform the Department's understanding of the transaction and its structure.

Proposed paragraph (b)(4) (previously paragraph (b)(3)) proposed to provide that if an advisory opinion has been requested by any party to the exemption transaction from the Department with respect to any issue relating to the exemption transaction, the exemption application must include (1) a copy of the letter concluding the Department's action on the advisory opinion request; or (2) if the Department has not yet concluded its action on the request, a copy of the request or the date on which it was submitted together with the Department's correspondence control number as indicated in the acknowledgment letter. The Department proposed to revise this provision for readability and to require an applicant

to include with its application any opinion or guidance issued by the Department and any other opinions or guidance issued by Federal, State, or regulatory bodies regarding the exemption transaction. The modification expands the prior text to ensure that all relevant information regarding the exemption transaction, including guidance issued in connection to the transaction by other Federal, State, or regulatory bodies is available to the Department when making its determination whether to grant an exemption. The Department is including this change in the Final Amendment as proposed.

The Department proposed to include a new paragraph (b)(7) that would require applicants that communicate with the Department either orally or in writing before submitting an exemption application to submit a statement setting forth the date(s) and with whom the applicant communicated before submitting the application. The Department added this language to work in tandem with the proposed revisions made to the Final Amendment in response to the requests made by multiple commenters that pre-submission applicants not be required to identify themselves. Since the Final Amendment permits certain anonymous discussions, paragraph (b)(7) now requires applicants that engaged in anonymous discussions to identify themselves to the Department so it can link prior anonymous discussions to the current applicant. Linking pre-submission communications to a current application ensures that the Department understands the entire context of an exemption application. The Department emphasizes, however, that this provision is only triggered when the applicant submits an exemption application.

The Final Amendment also includes substantial revisions to the proposed requirements set forth in proposed paragraphs (c) through (f) regarding statements and documents about qualified independent appraisers and qualified independent fiduciaries that are involved in an exemption transaction. Even though the final version of § 2570.31 generally reverts to the previous definitions of qualified independent appraiser and qualified independent fiduciary, the Department has revised, consistent with the intent of the Proposed Rule, paragraphs (c) through (f) of § 2570.34 to ensure that the appraiser and fiduciary are independent and that their valuations and oversight over the exemption transaction are accurate and reliable.

The proposed revision to paragraph (c) addressed statements and documents included in the application by the qualified independent appraiser. The Department proposed to extend the provisions of paragraph (c) to auditors and accountants. As a result, proposed paragraph (c) applied to all statements submitted by appraisers, auditors, and accountants to ensure that the Department can rely on any and all financial documents submitted by third parties.

More specifically, the Department proposed to revise several provisions that govern the information that must be included in any statements submitted by an appraiser, auditor, or accountant. First, the Department proposed to add a paragraph (c)(1) to require that statements include a signed and dated declaration under penalty of perjury that, to the best of the qualified independent appraiser's, auditor's, or accountant's knowledge and belief, all of the representations made in such statement are true and correct. Commenters objected to the proposed penalty of perjury requirement because, they argued, it would increase appraiser liability and discourage participation in the ERISA market. The Final Amendment does not require a declaration under penalty of perjury. Instead, it requires a certification that, to the best of the qualified independent appraiser's, auditor's, or accountant's knowledge and belief, all of the representations made in such statement are true and correct. The revised language in the Final Amendment balances the Department's need to ensure that an appraiser stands behind the accuracy of an appraisal report while reducing the potential chilling effect of a declaration under penalty of perjury.

Next, the Department proposed to expand paragraph (c)(2) to specifically address the contractual obligations of the appraiser, auditor, or accountant. The proposed provision required a copy of the qualified independent appraiser's, auditor's, or accountant's engagement letter and, if applicable, contract with the plan describing the specific duties the appraiser, auditor, or accountant shall undertake to be included with an application. The proposal would have provided that the appraiser, auditor, or accountant's letter or contract may not: (1) include any provision that provides for the direct or indirect indemnification or reimbursement of the independent appraiser, auditor, or accountant by the plan or another party for any failure to adhere to its contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work; or (2) waive any rights, claims or remedies of the plan or its participants and beneficiaries under ERISA, the Code, or other Federal and state laws against the independent appraiser, auditor, or accountant with respect to the exemption transaction.

Proposed paragraph (c)(2) would have prevented appraisers, auditors, and accountants from avoiding accountability to the plan and its participants by relying on indemnification or reimbursement provisions, whether direct or indirect, to avoid financial liability for their failure to comply with their contract or state or Federal law. When parties agree to relieve appraisers, auditors, and accountants from accountability through releases, waivers, and indemnification or reimbursement agreements, they undermine the protective conditions of the exemption, compromise the independence of their services, and cast doubt on the reliability of the service providers' work.

Commenters objected to proposed paragraph (c)(2)'s prohibition of contractual indemnification provisions. They argued that the proposed prohibition would dramatically increase the potential liability of large appraisers that often are engaged to appraise hard-to-value assets. According to the commenters, this would lead large appraisers to shift their resources to providing financial advisory services to non-employee benefit plan clients, leaving small appraisers to service the employee benefit plan market.

The Department is not persuaded by the commenters' concerns. The commenters did not provide any evidence that appraisers, accountants, or auditors would leave the marketplace if indemnification provisions were prohibited, and there is a large market of such professionals who will continue to serve plans, even if some of their colleagues choose not to render their services if they retain the liability assigned under state and Federal law for substandard work. In practice, the Department has issued numerous individual exemptions that prohibit such provisions without negative consequence.[15]

Further, the possibility that some market participants might decline to provide professional appraisal, accounting, or auditing services is

[15] *See, e.g.,* PTE 2022–04 granted to the Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees, 87 FR 71358 (Nov. 11, 2022) and PTE 2021–03 granted to the Electrical Insurance Trustees Insurance Fund (the EIT Fund) and the Electrical Joint Apprenticeship and Training Trust, 86 FR 34054 (June 28, 2021).

outweighed by the Department's need to ensure that they render unbiased and professional services that meet state and Federal standards. For example, the function of independent appraisers in prohibited transactions is to provide an unbiased and objective statement of value. That function is undermined when the appraisers are relieved from responsibility and accountability for the proper discharge of their important work. Similarly, accountants and auditors play a fundamental role in ensuring that participants' interests are protected, but that role is compromised when the parties relieve them of liability and accountability for adherence to applicable legal standards.

However, the Department understands that there are certain limited situations where a contractual indemnification provision may be appropriate such as when there are nuisance claims. As a result, the Department has revised proposed paragraph (c)(2) in the Final Amendment to provide that an appraiser, auditor or accountant's letter or contract may include a provision providing for reimbursement of legal expenses with respect to claims for any failure to adhere to the appraiser's, auditor's, or accountant's contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work, provided that: (A) the plan determines that the reimbursement is prudent following a good faith determination that the appraiser, auditor, or accountant likely did not fail to adhere to its contractual obligations or to Federal and state laws applicable to its work and will be able to repay the plan if it is found liable or enters into a settlement agreement based on an alleged breach; and (B) the letter or contract requires the appraiser, auditor, or accountant to repay all of the reimbursements in a timely fashion if the appraiser, auditor, or accountant enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal laws, or has been found liable for a breach of contract or violation of any Federal or state laws applicable to the appraiser's, auditor's, or accountant's work. The new language allows appraisers, auditors, and accountants and their clients to negotiate agreements regarding claims that are not likely to result in liability for the appraiser, auditor, or accountant.

The Department also revised proposed paragraph (c)(4) in the Final Amendment to state that submitted documents must contain a detailed description of any relationship that the qualified independent appraiser, auditor, or accountant has had or may have with the plan or any party in interest involved in the exemption transaction or its affiliates that may influence its judgment, including a description of any past engagements with the appraiser, auditor, or accountant. The language builds on the Department's insistence, as outlined in the Proposed Rule, that independent parties involved in the exemption transaction must truly be independent.

The Department notes that it proposed to include more expansive disclosure language; the proposal would have extended the disclosure requirement to apply to any parties involved in the exemption transaction and any parties involved in developing the proposed exemption request. Commenters objected to the proposal's language on the grounds that compliance was overly expansive and burdensome. They also disputed whether the language addressed any harm. To address these comments, the Department has revised the language in the Final Amendment to limit its application to parties in interest involved in the exemption transaction and their affiliates, and no longer extends the provision to include parties involved in developing the proposed exemption transaction. However, the Final Amendment retains the core requirement that relationships, past or present, with such parties in interest that may influence the appraiser, auditor, or accountant's judgment must be disclosed in the exemption application. This outcome settles at a middle ground between the Exemption Procedure Regulation and the Proposed Rule and balances the burden of disclosure with the Department's need to address instances in which a party has potentially conflicting relationships because it is dependent on or otherwise regularly involved with parties in interest or their affiliates.

The Department proposed to include language in paragraph (c)(5) that the appraisal report must be prepared solely in the interest of the plan. This language reflected proposed language in § 2570.31(h). As discussed above, commenters stated that all appraisal reports are based on objective criteria and may not be ''on the behalf'' of any party. The Department did not intend to suggest that appraisals should be slanted in favor of any particular party, and accordingly, the Department has revised paragraph (c)(5) of the Final Amendment to provide that a written appraisal report must be prepared by a qualified independent appraiser who determines, to the best of their ability and in accordance with professional appraisal standards, the fair market value of the subject asset(s) without bias towards the plan's counterparty in the transaction or other interested parties. The Department notes that the final provision, which addresses the same concerns raised by the Proposed Rule, includes anti-bias language to emphasize that the appraisal report must not favor one party over another. Specifically, the Department is concerned that appraisals of employer stock often may be influenced by the employer in employee stock ownership plan transactions or that an appraiser may rely on information provided by the applicant without verifying the veracity of the information.

The Department is deleting the statement in current paragraph (c)(4)(iii), now paragraph (c)(5)(iii), that requires an applicant to submit a new appraisal to the Department if an appraisal report is one year or more old. This deletion makes clear to applicants that they must submit a current appraisal report with their application when submitting it to the Department, and that the Department will not move forward with its analysis of an exemption transaction without receipt of a current appraisal report.

The Final Amendment also makes changes in paragraph (c)(8). The revisions are discreet changes that are consistent with the revised definition of a qualified independent appraiser in § 2570.31(i) and describe how the revenue limitations thereunder are calculated.

The Department proposed to add a new paragraph (d) that would have required an applicant to include detailed information regarding the appraiser selection process. The preamble to proposed paragraph (d) explained that the Department's goal in proposing the disclosure was ''to promote a prudent and loyal selection process to hire a qualified independent appraiser.'' [16] In response to this proposal, commenters objected on the grounds that the information submitted as part of the process can be confidential and the fact that a party would be documented as not being selected in the public record could discourage parties from participating in the selection process. Commenters also argued that the Department does not have the statutory authority to insert itself into the fiduciary selection process.

The Department has modified the proposed provision in response to commenters' concerns. Paragraph (d) of the Final Amendment now states that an

[16] 87 FR 14729 (Mar. 15, 2022).

applicant must include the following information with its exemption application: (1) a representation that the independent fiduciary prudently selected the appraiser after diligent review of the appraiser's technical training and proficiency with respect to the type of valuation at issue, the appraiser's independence from the plan's counterparties in the exemption transaction, and the absence of any material conflicts of interest with respect to the exemption transaction; (2) a representation that the appraiser is independent within the meaning of § 2571.31(i); and (3) a representation that the independent appraiser has appropriate technical training and proficiency with respect to the specific details of the exemption transaction. This new requirement achieves the goal the Department identified in its proposal to ensure that applicants follow a prudent and loyal selection process when they hire a qualified independent appraiser. The Department specifically requested comments on these proposed revisions, ''including whether the Department should consider other types of information.'' [17] Commenters pointed to other types of information the Department could request that would allow the Department to fulfill its stated objective and that would allay the commenters' concerns over the proposed requirements. Accordingly, the Final Amendment's requirement fulfills the Department's need to require applicants to follow a prudent and loyal selection process while addressing commenters' concerns.

The Department similarly revises the proposed new paragraph (e). Similar to proposed paragraph (d), proposed paragraph (e) would have required applicants to provide detailed information regarding the process by which an independent fiduciary was selected. Commenters raised similar concerns regarding this language. Therefore, as with paragraph (d), paragraph (e) of the Final Amendment has been revised to require applicants to include the following representations with their exemption applications: (1) a representation that an appropriate fiduciary without material conflicts of interest prudently selected the independent fiduciary after diligently reviewing the independent fiduciary's technical training and proficiency with respect to ERISA, the Code, and the specific details of the exemption transaction, and the sufficiency of the independent fiduciary's fiduciary liability insurance coverage; (2) a representation that the fiduciary retained to act as the independent fiduciary is independent within the meaning of § 2570.31(j); and (3) a representation that the independent fiduciary has appropriate technical training and proficiency with respect to ERISA and the Code and the specific details of the exemption transaction. As with paragraph (d), the new paragraph promotes a prudent and loyal selection process while addressing commenters' concerns.

In the Final Amendment, the Department revises paragraph (f), which specifies the information an applicant must include in the qualified independent fiduciary's statement required to be submitted with its application. As with the changes to the qualified independent appraiser's statement, these changes are designed to bolster independence and reliability.

First, paragraph (f)(1) of the proposal would have required the statement to include a signed and dated declaration under penalty of perjury that, to the best of the qualified independent fiduciary's knowledge and belief, all of the representations made in such statement are true and correct. As with the proposal's paragraph (c)(1), commenters objected to the penalty of perjury requirement because it would increase independent fiduciary liability and discourage them from participating in the employee benefit plan market. In response to those commenters, the Final Amendment does not require a declaration under penalty of perjury, and, instead, requires a certification that, to the best of the qualified independent fiduciary's knowledge and belief, all of the representations made in such statement are true and correct. The revised language appropriately ensures that an independent fiduciary stands behind its statements and actions while avoiding the potential chilling impact of a declaration under penalty of perjury. Next, paragraph (f)(2) aims to prevent fiduciaries from avoiding accountability to the plan and its participants and beneficiaries by relying on indemnification or reimbursement provisions, whether direct or indirect, to avoid financial liability for their failure to comply with their contract or state or Federal law. When parties agree to relieve fiduciaries from accountability through releases, waivers, and indemnification or reimbursement agreements, they undermine the protective conditions of an applicable exemption, compromise the independence of their services, and cast doubt on the reliability of the service providers' work.

As with the proposed paragraph (c)(2), commenters objected to the prohibition of contractual indemnification provisions in proposed paragraph (f)(2). They argued similarly that the prohibition on contractual indemnification provisions would dramatically increase the potential liability of independent fiduciaries that often are engaged to perform work with respect to exemption transactions. According to the commenters, this would lead large independent fiduciaries to shift their resources to providing fiduciary services to non-employee benefit plan clients, leaving small, inexperienced fiduciaries to service the employee benefit plan market.

The Department does not agree with the commenters' concerns. First, the Department notes that ERISA section 410 already places limitations on indemnification provisions for fiduciaries. Second, the commenters did not provide any evidence that fiduciaries would leave the employee benefit plan marketplace if an indemnification provision were prohibited, and many independent fiduciaries will continue to serve plans, even if some of their colleagues choose not to render their services if they retain the liability assigned under state and Federal law for substandard work. As with qualified independent appraisers, the Department has, in recent practice, already required qualified independent fiduciaries to adhere to stricter requirements in recent exemptions without a negative effect on the independent fiduciary market.[18] Furthermore, the possibility that some independent fiduciaries might decline to provide fiduciary services to the employee benefit plan market is outweighed by the Department's need to ensure that they render unbiased and professional services that meet state and Federal standards. Independent fiduciaries play a critical role in ensuring that participants' interests are protected, but that role is compromised when the parties relieve themselves of liability and accountability for adherence to applicable legal standards.

However, the Department does recognize that there are certain limited situations, such as nuisance claims,

[17] 87 FR 14727 (Mar. 15, 2022).

[18] *See, e.g.,* Section II(f) of PTE 2023–12 (88 FR 11699. February 23, 2023); Section II(p) of PTE 2022–02 (87 FR 23245, April 19, 2022); Section III(h) of PTE 2022–03 (87 FR 54264, September 2, 2022); Section I(h) of PTE 2021–03 (86 FR 34054, June 28, 2021); Section III(n) of the Notice of Proposed Exemption Involving J.P. Morgan Securities LLC, J.P. Morgan Investment Management Inc., J.P. Morgan Securities, and Chase Wealth Management (86 FR 57446, October 15, 2021).

where a contractual reimbursement provision may be appropriate. As a result, paragraph (f)(2) of the Final Amendment provides that the independent fiduciary's letter or contract may include a provision providing for reimbursement of legal expenses with respect to claims for any failure to adhere to the fiduciary's contractual obligations or to Federal and state laws applicable to the independent fiduciary's work, provided that (A) the plan determines that the reimbursement is prudent following a good faith determination that the independent fiduciary likely did not fail to adhere to its contractual obligations or to Federal and state laws applicable to the independent fiduciary's work and will be able to repay the plan if the fiduciary is found liable or enters into a settlement for the breach; and (B) the letter or contract requires the independent fiduciary to repay all of the reimbursements, in a timely fashion, in the event the independent fiduciary enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal laws, or has been found liable for a breach of contract or violation of any Federal or state laws applicable to the fiduciary's work. The new language allows independent fiduciaries and their clients to negotiate agreements to address claims that are not likely to result in liability for the fiduciary and is consistent with the underlying concerns previously laid out by the Proposed Rule. The Department requires the fiduciary selecting the independent fiduciary to make a good faith determination to fulfill its fiduciary obligations but does not require an exhaustive legal review. The Department also notes that despite the revised language, no language may be included in the letter or contract that runs afoul of ERISA section 410.

In order to ensure that qualified independent fiduciaries have sufficient resources to compensate plans for any losses for which they are liable, the Department originally proposed language that would require fiduciaries to maintain a sufficient amount of fiduciary liability insurance to indemnify the plan for damages resulting from a breach by the independent fiduciary of either: (1) ERISA, the Code, or any other Federal or state law; or (2) its contract or engagement letter under proposed paragraph (f)(3). The insurance could not contain an exclusion for actions brought by the Secretary or any other Federal, State, or regulatory body, the plan, or plan participants and beneficiaries. Commenters objected to this language on the grounds that obtaining insurance that could meet the requirements of the language would be difficult, if not impossible. They also argued that the cost of such insurance would drive many independent fiduciaries to exit the employee benefit plan marketplace.

The Department acknowledges the commenters' concerns but also wants to ensure that qualified independent fiduciaries have sufficient resources to compensate plans for any losses for which they are liable. Therefore, the Department has revised the proposed language in the Final Amendment to simply require applicants to include in their exemption applications a description of any fiduciary liability insurance policy maintained by the independent fiduciary that includes: (A) the amount of coverage available to indemnify the plan for damages resulting from a breach by the independent fiduciary of either ERISA, the Code, or any other Federal or state law or its contract or engagement letter; and (B) whether the insurance policy contains an exclusion for actions brought by the Secretary or any other Federal, State, or regulatory body, the plan, or plan participants or beneficiaries. Some entities that provide ERISA fiduciary services with respect to exemption transactions may not be either sufficiently liquid or sufficiently capitalized to address liability that might arise in connection with an exemption transaction. A prudent independent fiduciary must have sufficient insurance to address those issues. Therefore, the Department's position is that a prudent fiduciary should make a reasoned determination regarding the appropriate amount of insurance it should maintain to fulfill its fiduciary obligation to a plan and protect the plan's participants and beneficiaries. Revising paragraph (f)(2) in the Final Amendment to require a description of any fiduciary liability insurance policy maintained by the independent fiduciary allows the independent fiduciaries to make their own determinations regarding insurance, while also providing the Department with the information it needs to determine whether a proposed exemption is in the interest of and protective of the rights of participants and beneficiaries. Further, the information would assist the Department in determining whether it should request additional information regarding the independent fiduciary's assets, capital, or insurance in order to determine whether sufficient resources exist to cover a potential loss.

The Department notes that the Final Amendment's independent fiduciary insurance disclosure requirement is uniquely imposed on independent fiduciaries because of their important role as a unique bulwark against conflicts of interest. Under ERISA's statutory framework, fiduciaries have central responsibility—and accountability—for the protection of plan participants' interests. Consequently, the Department is especially concerned that they have the financial wherewithal to make good on violations that injure plan participants. Independent fiduciaries may ultimately bear the responsibility of (1) making final decisions regarding determinations (*e.g.,* approval of an appraisal) and (2) approving the overall exemption transaction. Independent fiduciaries also must make a determination as to whether a third-party service provider, such as an appraiser, has sufficient insurance, assets, and liquidity to address any liability that may arise from a failure to meet the service provider's contractually imposed obligations when determining whether to retain the service provider. Independent fiduciaries are critically important to ensuring that the exemptions are in the interest and protective of the plan and its participants and beneficiaries. Therefore, when they submit an exemption application, applicants should be positioned to carefully consider and disclose the independent fiduciary's ability to remedy any injuries caused by its fiduciary violations and make the plan whole for any losses caused by the independent fiduciary's failure to discharge its role properly.[19]

Due to the qualified independent fiduciary's essential role in many exemptions, the Department makes additional changes to paragraph (f) in the Final Amendment that are consistent with the stated goals of the Proposed Rule to further bolster the qualified independent fiduciary's independence. First, paragraph (f)(6) of the Final Amendment expands the existing acknowledgement provision to require an acknowledgement that the fiduciary understands its duties and

[19] The Department notes that the independent fiduciaries themselves are the parties best informed about their own ability to remedy any potential ERISA liability, and that the exemption process is not an adversarial proceeding in which the Department is in a position to adjudicate all the relevant facts. Accordingly, the Department's acceptance of these disclosures should not be viewed as a determination by the Department that an independent fiduciary has adequately addressed its ability to remedy any potential ERISA liability.

responsibilities under ERISA, is acting as a fiduciary of the plan with respect to the exemption transaction, has no material conflicts of interest with respect to the exemption transaction, and is not acting as an agent or representative of the plan sponsor. The Final Amendment expands the acknowledgment to capture more potential conflicts. Under the Final Amendment, the fiduciary can no longer simply acknowledge that it is an ERISA fiduciary, but it also has to acknowledge that it is acting with respect to the transaction solely in the interest of the plan, not acting on behalf of the plan sponsor, and not subject to conflicts of interest.

The Department also revises paragraph (f)(7) in the Final Amendment to provide that the qualified independent fiduciary must certify in writing that the exemption transaction complies with the impartial conduct standards set forth in paragraphs (b)(2)(i)(A) through (C). The Final Amendment revises paragraph (f)(9) to reflect the changes to the definition of a qualified independent fiduciary.

The Department added a new paragraph (f)(10) to the Final Amendment that requires the qualified independent fiduciary to state that it has no conflicts of interest with respect to the exemption transaction that could affect the exercise of its best judgment as a fiduciary. The requirement puts the fiduciary on the record that it has no conflicts that could impact its judgment and, thereby, promotes compliance with the exemption's terms.

In the proposal, the Department proposed to revise paragraph (f)(11) to require an applicant to address in its exemption application whether the qualified independent fiduciary has been under investigation or examination, or has been engaged in litigation or a continuing controversy. Specifically, the fiduciary would have been required to either (1) include a statement that within the last five years, the independent fiduciary has not been under investigation or examination by, and has not engaged in litigation or a continuing controversy with, the Department, the IRS, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other Federal or state entity involving compliance with provisions of ERISA, the Code, FERSA, or other Federal or state law; or (2) include a statement describing the applicable investigation, examination, litigation or controversy. Commenters objected to the breadth of the language, asserting that it would capture a wide universe of events that were not related to the interests of employee benefit plans.

In response to the concerns, the Department revised paragraph (f)(11) in the Final Amendment to limit disclosure to require the independent fiduciary to include a statement that it has not been under investigation or examination by, and has not engaged in litigation investigations or controversies involving: (A) compliance with provisions of ERISA or FERSA; (B) its representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law; (C) conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; (D) income tax evasion; or (E) or any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities.

In the final amendment, the Department now is requiring applicants only to disclose events that are directly applicable to the provision of fiduciary services to employee benefit plans. Specifically, the Department has limited the disclosure to cover a fiduciary's work experience that is relevant to determining whether the fiduciary can meet the high standard to which it is held under ERISA, whether that experience is in the employee benefits field or another industry in which a fiduciary's ability to uphold its heightened obligations is reflected. These disclosures are essential to informing the Department's determination of whether the proposed independent fiduciary will be able to meet the heightened standards to which a fiduciary is held under ERISA, and the important role they would serve in overseeing transactions that otherwise would be prohibited under ERISA. The Department notes, for clarity, that the term employee benefit plan also refers to governmental and church plans.

Paragraph (f)(12) connects with the Proposed Rule's paragraph (f)(11), which is slightly revised for clarity in the Final Amendment by requiring applicants to include in their exemption applications the qualified independent fiduciary's statement that within the last 13 years, it has not been:

(1) convicted or released from imprisonment, whichever is later, as a result of any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any crime identified in ERISA section 411, regardless of whether the conviction occurred in a U.S. or foreign jurisdiction; or

(2) convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime that is substantially equivalent to an offense described in paragraph (f)(12)(i)(A)(*1*); or

A statement describing a conviction or release from imprisonment described in paragraph (f)(12)(i)(A).

For purposes of paragraph (f), a person is deemed to have been ''convicted'' from the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. Federal or state trial court), regardless of whether that judgment remains under appeal and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal.

Commenters raised concerns that the required disclosure of foreign convictions is overly expansive, burdensome, and confusing. The Department disagrees with these concerns and maintains that the burden imposed by this disclosure is minimal and moreover that the burden is outweighed by the Department's need to have information relevant to the qualifications and independence of the fiduciary and to the prudence and loyalty of the applicant's selection of the independent fiduciary. Further, the Department does not believe the requirement is overly expansive or confusing, because it is limited to convictions that are specifically related to a fiduciary's duties that are relevant to the Department's determination.

Lastly, the Final Amendment narrows paragraph (g)(3) regarding other third-party experts. The paragraph now provides that the detailed description of any relationship is limited to parties in interest (or affiliates) involved in the exemption transaction. This revision is consistent with the changes made in the Final Amendment with respect to appraisers and fiduciaries.

Section 2570.35

Section 2570.35 addresses information that must be included in an individual exemption application. The Department proposed multiple changes to § 2570.35 for readability and consistency with changes made in other sections of the Exemption Procedure Regulation and included these changes in the Final Amendment. In addition, the Department included some minor changes in the Final Amendment that require applicants to provide the mail and email addresses of the plan and parties in interest to which the exemption application applies, as well as a reminder that applicants should not submit social security numbers with their applications.

Beyond those changes, the Department proposed to revise paragraph (a)(6) to address foreign convictions more clearly, which was further revised in the Final Amendment solely for clarity. While the Department's position is that the current Exemption Procedure Regulation language includes foreign convictions, the proposal amended the provision to clearly require applicants to disclose whether, within the last 13 years, they or any party involved in the exemption transaction had been convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in paragraph (a)(6)(i) and a description of the circumstances of any such conviction. For purposes of this section, a person is deemed to have been ''convicted'' from the date of the trial court's judgment (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. Federal or state trial court), regardless of whether that judgment remains under appeal and the foreign jurisdiction considers a trial court judgment final while under appeal.

Commenters objected to the inclusion of foreign convictions in the proposal because they asserted that their inclusion is not relevant to the exemption process and is inconsistent with guidance issued by the Department with respect to Prohibited Transaction Exemption 84–14.

The Department disagrees with the commenters' position, and it has adopted the proposed changes in the Final Amendment. The Department's position is that clarifying the treatment of foreign convictions removes uncertainty from the exemption application process, which ensures that the Department receives all relevant information it needs to make an exemption determination. Applicants' foreign convictions for crimes involving self-interested and conflicted transactions are relevant to the Department's statutory findings because such convictions may indicate risk to the plan and its participants and beneficiaries. This information also informs the Department about how to handle potential conflicts of interest and enhances its ability to design protective conditions by clarifying whether a party is likely to comply with the terms of the exemption. For example, if a party has a history of fiduciary violations in foreign jurisdictions, the Department may look closer or impose different conditions with respect to an exemption that allows a party to engage in a transaction with potential fiduciary conflicts of interest. The Department also notes that the language of the Final Amendment is applicable solely to the exemption application process and is not an interpretation of Prohibited Transaction Exemption 84–14.

The Department also proposed to revise paragraph (a)(7) to be consistent with the Department's approach to fiduciaries that have been the subject of investigation, examination, or litigation as set forth in § 2570.34(f)(11). Commenters objected to the breadth of the language by asserting that it captures a wide universe of events that are not related to employee benefit plans.

After considering these comments, consistent with § 2570.34(f)(11), the Department has limited the language in the proposed amendment to only require applicants to include information in their applications that is essential to the Department's evaluation of an independent fiduciary's ability to meet ERISA's fiduciary standards, which are the highest known to law.[20] As revised, the provision in the Final Amendment is limited to those investigations, examinations, or litigation involving: (i) compliance with provisions of ERISA or FERSA; (ii) representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law; (iii) conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; (iv) income tax evasion; or (v) or any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities. This change represents a subset of the investigations, examinations, and litigation matters that the Department proposed to include. This revision ensures that the Department has full knowledge of any potential issues or conflicts that may impact an independent fiduciary's duty to meet its ERISA obligations, while not requiring disclosures that are overly inclusive or burdensome.

The Department also proposed to revise paragraph (a)(12), which required the applicant to state the percentage of plan assets affected by the exemption transaction to provide that if the exemption transaction includes the acquisition of an asset by the plan, the fair market value of the asset to be acquired must be included in both the numerator and denominator of the applicable fraction. The new language simply clarifies the Department's understanding of how to calculate the fair market value percentage in an acquisition so that the percentage accurately reflects the impact of the exemption transaction on overall plan assets. This language has been adopted in the Final Amendment without change.

Paragraph (a)(18) requires applicants to provide information on which parties will bear the cost of the exemption application and notifying interested persons. The Proposed Rule would have explained that the disclosure is intended to capture all of the costs and fees associated with the exemption transaction, not just those immediately derived from the submission of the exemption application. This facilitates the Department's understanding of the true cost of a particular exemption transaction. This provision has thus been included in the Final Amendment without change.

In addition, paragraph (a)(18) of the proposal included language that stated that a plan may not bear the costs of the exemption application, commissions, fees, and notification of interested persons unless the Department determines, in its sole discretion, that a compelling circumstance exists that necessitates the payment of these expenses by the plan. Commenters argued that allowing a plan to bear these costs is acceptable because many applications are solely for the benefit of a plan, and that prohibiting the plan from incurring such expenses was arbitrary. After consideration, the Department has determined not to include this language in the Final Amendment.

Finally, the Department proposed to add a new paragraph (a)(20), which

[20] *See, Donovan* v. *Bierwirth,* 680 F.2d 263, 272 (2d Cir. 1982).

would have required the applicant to state in its exemption application whether any prior transactions have occurred between (1) the plan or plan sponsor and (2) a party in interest involved in the exemption transaction. Requiring this information allows the Department to determine where the exemption transaction fits in the relationship between the plan and the parties in interest involved in the exemption transaction, and to evaluate whether the exemption transaction is part of a larger set of transactions or a pattern of practice. Therefore, the Department included that provision in the Final Amendment as proposed.

The Department proposed a minor change to paragraph (b)(4). The current Exemption Procedure Regulation requires the application to contain a net worth statement with respect to any party in interest providing a personal guarantee with respect to the exemption transaction. The Department expanded this language to cover not just parties in interest, but any party providing such a guarantee. This change allows the Department to more accurately determine the value of any guarantee associated with the exemption transaction, and, therefore, has been included in the Final Amendment.

In accordance with its discussion of § 2570.30 regarding retroactive exemption requests, the Department proposed to make specific revisions to the requirements for retroactive exemptions in paragraph (d). For example, the Department proposed to amend current paragraph (d)(1) to state that the Department will consider exemption requests for retroactive relief only when (1) the safeguards necessary for the grant of a prospective exemption were in place at the time the parties entered into the exemption transaction, and (2) the plan and its participants and beneficiaries have not been harmed by the exemption transaction. An applicant for a retroactive exemption must demonstrate that the responsible plan fiduciaries acted in good faith by taking all appropriate steps necessary to protect the plan from abuse, loss, and risk at the time of the exemption transaction. An applicant should further explain and describe whether the exemption transaction could have been performed without engaging in a prohibited exemption transaction, and whether the goals of the exemption transaction could have been achieved through an alternative transaction that served the aims of the plan equally well.

The Department's proposed revisions were intended to emphasize that the applicant must demonstrate that the plan and its participants and beneficiaries were not harmed by the exemption transaction for which an applicant requests retroaction relief. The Department cannot readily make the findings required by ERISA section 408(a) that the transaction is in the interests of the plan and its participants and beneficiaries and protective of their rights if, in fact, the transaction were harmful to plan participants and beneficiaries. The Department's determination of whether a transaction was harmful will be based on the facts and circumstances of the transaction, including whether the participant and beneficiaries were made whole. Further, the applicant must: (1) demonstrate that the plan fiduciaries took all appropriate steps necessary to prevent abuse, loss, and risk when the transaction took place; and (2) fully explain and describe whether the exemption transaction could have been performed without engaging in a prohibited exemption transaction, and whether the goals of the transaction could have been achieved through an alternative transaction that served the plan's objectives equally well.

Including such information in the exemption application demonstrates to the Department that the fiduciaries were acting prudently to protect the plan and its participants and beneficiaries when the transaction took place. Therefore, the Department has finalized these revisions as proposed while making minor edits to the wording.

In order to assist applicants in demonstrating that they acted in good faith when entering into a previously consummated exemption transaction, proposed paragraph (d)(2) provided factors the Department would consider when reviewing a retroactive exemption application. As proposed, paragraph (d)(2)(i) was revised to state that one of the factors the Department would consider is the involvement of an independent fiduciary before an exemption transaction occurs who acts on behalf of the plan and is qualified to negotiate, approve, and monitor the exemption transaction; provided, however, the Department could consider, at its sole discretion, an independent fiduciary's appointment and retrospective review after completion of the exemption transaction due to exigent circumstances. The Department proposed making these revisions to the prior language to clarify that, in certain exigent circumstances, the Department may consider, at its sole discretion, the approval of an independent fiduciary after the fact. The Department recognizes that under certain rare and extreme circumstances, an independent fiduciary's retroactive approval of the transaction may assist the Department in determining whether an applicant acted in good faith.

The Department also proposed to revise paragraph (d)(2)(v) to assist with the good faith determination. The proposed revision required an applicant to submit evidence that the plan fiduciary did not engage in an act or transaction that the fiduciary should have known was prohibited under ERISA section 406 and/or Code section 4975. The proposed revision applied the more appropriate ERISA standard that a fiduciary is responsible not only for what it knows, but what it should have known. Setting forth this standard ensures that the plan fiduciary actively engaged and evaluated the exemption transaction. The Department is adopting this provision in the Final Amendment as proposed.

Finally, the Department proposed to revise the last paragraph on retroactive exemptions. Specifically, proposed paragraph (d)(3) addressed the Department's position that it will not consider retroactive exemption requests if the exemption transaction resulted in a loss for the plan. The proposed revision made clear that the Department's starting presumption is that it will simply not consider such requests. However, the Department also proposed to clarify that the determination as to loss is only applied at the time of the exemption application. Thus, if the facts later show that the exemption transaction resulted in a loss months or years after the completion of the exemption application, that information is not relevant to the exemption determination, which is made based on the facts available at the time. The Department has adopted this revision in the Final Amendment as proposed.

Section 2570.36

Section 2570.36 addresses where to file an exemption application. In the proposal, the Department proposed to modernize the submission process by no longer requiring a paper submission, and instead directing applicants to make their submissions to *e-oed@dol.gov.* The revision retains applicants' right to submit a paper application and provides current information on the correct delivery addresses while noting that the address published in the Exemption Procedure Regulation may change over time. The Department has finalized the revision as proposed, and notes that it will provide the current submission address on its website.

Section 2570.37

Section 2570.37 addresses an applicant's duty to supplement its exemption application. The Department proposed to revise paragraph (a) to state that applicants have a duty to promptly notify the Department of any material changes to facts or representations either during the Department's consideration of the application or following the Department's grant of an exemption. This duty only extends to the information that was provided at the time of the grant of the exemption. In paragraph (b), the Department includes the duty for applicants to disclose to the Department whether a party in interest participating in the exemption transaction is the subject of an investigation or enforcement action relating to an employee benefit plan by including investigative and enforcement actions by any Federal or state governmental entity, not just the Department, the IRS, the Justice Department, the Pension Benefit Guaranty Corporation, and the Federal Retirement Thrift Investment Board. The Department has included this provision in the Final Amendment as proposed, but it notes that solely for this purpose, SEC examinations are not included.

Section 2570.38

Section 2570.38 addresses the issuance of tentative denial letters before the Department issues a final denial letter to an applicant. Tentative denial letters, often referred to as TD letters, inform the applicant that the Department has tentatively decided not to move forward with proposing an exemption, and describe the applicant's rights to request a conference and submit additional information. The Department proposed to revise the text to clarify that it may extend the 20-day period during which an applicant normally would be required to request a hearing or notify the Department of its intent to submit additional information following the issuance of a tentative denial letter at its sole discretion. The Department proposed to make this change to inform applicants that the 20-day period provides a hard deadline for the applicant to reply unless the Department chooses to extend the period at its sole discretion based on the facts and circumstances. The Department has made this change to the Final Amendment as proposed.

Section 2570.39

Section 2570.39 addresses the applicant's ability to submit additional information. Consistent with other proposed revisions to the Exemption Procedure Regulation, the Department proposed a revision to update the manner by which the applicant may communicate with the Department. The Department also proposed to revise paragraph (b) to provide that, while the applicant is required to submit the additional information within 40 days after the date the Department issued a tentative denial letter, the Department may extend the time period at its sole discretion. The Department also proposed to make conforming changes throughout the section. As with § 2570.38, the Department proposed this change to inform the applicant that the time period is a hard deadline, unless the Department chooses to extend the period pursuant to its own discretion based on the facts and circumstances.

Finally, the Department proposed to delete paragraph (d). The paragraph provides that if an applicant could not submit all of the supplementary information within the 40-day time period (unless extended by the Department), it could withdraw the application and reinstate it at a later time. The Department proposed to delete this provision to be consistent with proposed changes to § 2570.44, which covers withdrawn applications. As described below, the Department is amending its approach regarding withdrawals and reapplications in that section.

The Department notes that the requirement in paragraph (b) that the certification accompanying the submission of additional information be made pursuant to a penalty of perjury is revised for consistency with § 2570.34(c) and (f) to require a certification that all information provided to the Department is true and correct. Otherwise, the Department is including all of the proposed revisions to § 2570.39 as proposed.

Section 2570.40

Section 2570.40 addresses conferences between the applicant, or its representative, and the Department. Current paragraph (b) provides that, generally, an applicant is entitled to only one conference under the Exemption Procedure Regulation. The Department proposed to retain this text, but the Department added additional language providing that the Department may request the applicant to participate in additional conferences at its sole discretion. The proposal provided that the Department would make such a request if it determines that additional conferences are appropriate based on the facts and circumstances of the exemption application.

The Department also proposed to revise paragraphs (d) through (h), which govern the timing of conferences and the submission of information. As with changes to §§ 2570.39 and 2570.40(b), the Department proposed to revise these sections to provide that the Department may, at its sole discretion, extend time periods. These changes were proposed to similarly inform the applicant that the time periods outlined in the section provide a hard deadline for the applicant, unless the Department, based on the facts and circumstances, chooses to extend the period pursuant to its own discretion.

The Department also proposed to add a new paragraph (i) providing that the Department, at its sole discretion, may hold a conference with any party, including the qualified independent fiduciary or the qualified independent appraiser, regarding any matter related to an exemption request without the presence of the applicant or other parties to the exemption transaction or their representatives. Under the proposal, any such conferences could occur in addition to the conference with the applicant described in § 2570.40(b). Commenters objected to this new paragraph, arguing that it is unnecessary and presumes malfeasance on the part of the applicant.

The Department disagrees. The Department proposed to add this language to clarify that it is entitled to hold conferences with whomever it deems necessary. The new paragraph acknowledges that, under certain circumstances, the Department may need to meet with a third party to accurately assess the exemption application. The language does not presume or connote an applicant's malfeasance; it only recognizes the fact that certain parties, such as independent fiduciaries or appraisers, may be less restrained when discussing issues solely with the Department. For example, the Department may determine that a discussion with a qualified independent fiduciary without the presence of the applicant or its representative may provide additional insight into the qualified independent fiduciary's work if the applicant is not present to influence the explanation of the fiduciary's work product or limit the topics which are discussed.

After considering the comments, the Department has included the revisions to § 2570.40 in the Final Amendment as proposed.

Section 2570.41

Section 2570.41 addresses final denial letters, which are the final action taken by the Department with respect to an

application if the Department has determined that an exemption will not be granted for an exemption transaction. The Department proposed to add a new paragraph (a), which provides that the Department would issue a final denial letter without issuing a tentative denial letter under § 2570.38, or conducting a hearing on the exemption under either § 2570.46 or § 2570.47, (in other words, a direct denial) if the Department determines in its sole discretion, that: (1) the applicant has failed to submit information requested by the Department in a timely manner; (2) the information provided by the applicant does not meet the requirements of §§ 2570.34 and 2570.35; or (3) a conference has been held between the Department and the applicant before the issuance of a tentative denial letter during which the Department and the applicant addressed the reasons for denial that otherwise would have been set forth in a tentative denial letter pursuant to § 2570.38. While the language of §§ 2570.38, 2570.46, and 2570.47 does not require a tentative denial letter to be sent or a hearing to occur under all circumstances, the current language does not clearly state that the Department may issue a final denial letter without taking those steps. To eliminate uncertainty, the Department proposed to add the new text to make clear that, based on the reasons outlined above, the Department may issue final denial letters without tentative denial letters or hearings.

Commenters objected to the new proposed paragraph (a) on the grounds that being issued a direct denial would deprive applicants of an opportunity to respond to concerns raised by the Department. In response, the Department clarifies that it would not issue a direct denial where there is active engagement between the applicant and the Department. The Department proposed to include this language solely to clarify that there are certain instances where, for administrative expediency, the Department can issue a final denial letter without issuing a tentative denial letter if the facts and circumstances preclude the Department from processing the application submitted by the applicant, or if an applicant fails to provide anything more than cursory information. For example, if an applicant submits an exemption application that is only one or two pages long and is unresponsive to the Department's request for additional information, under the proposed new paragraph, the Department may issue a final denial letter either immediately or following an initial short conference during which the applicant fails to provide any additional or requested information. Further, the Department proposed that it may issue a direct denial letter if an applicant submits a request for a retroactive exemption where the participants and beneficiaries were substantially harmed by the subject transaction.

The Department also notes that it has modified § 2570.45 to provide that applications denied under § 2570.41(a) can be resubmitted for reconsideration. Those changes are discussed further below.

The Department also proposed to add a new paragraph (e), which would provide that the Department will issue a final denial letter where the applicant either (1) asks to withdraw the exemption application, or (2) communicates to the Department that it is not interested in continuing the application process. This revision is consistent with the changes the Department is making in § 2570.44. The Department proposed to add this text to formally memorialize the ultimate disposition of the application by issuing a final denial letter if the applicant decides it is no longer interested in an exemption, whether communicated through either a withdrawal or a statement of disinterest. The proposed revision would allow the Department to track and manage exemption applications more clearly.

The Department has included all of the Proposed Rule's revisions to § 2570.41 in the Final Amendment.

Section 2570.42

When the Department makes an initial determination that the issuance of an exemption is warranted, § 2570.42 provides that the Department must give interested parties notice and opportunity to comment through the publication of a proposed exemption in the **Federal Register**. The Department proposed to revise a portion of paragraph (d). Previously, the paragraph provided that when the proposed exemption includes relief from ERISA section 406(b), Code section 4975(c)(1)(E), or FERSA section 8477(c)(2), the proposed exemption must inform interested persons who would be adversely affected by the transaction of their right to request a hearing under § 2570.46. The Department proposed to delete the reference to interested persons who would be adversely affected by the exemption transaction, thus making the text applicable to all interested persons who have been materially affected by the exemption. This revision was made to both reflect the difficulty in determining which parties are adversely affected and to ensure that all parties that might have relevant information to the Department's final determination are provided with an opportunity to communicate that information.

The Department has retained its proposed revisions to § 2570.42 in the Final Amendment.

Section 2570.43

Upon publication of a proposed exemption in the **Federal Register**, § 2570.43 provides that the applicant must provide notice to interested persons of the pendency of the exemption. The section outlines the process by which the notice is drafted and provided. The Department proposed to revise paragraph (a) to delete ''adversely'' and replace it with ''materially'' when applying the term to the interested parties' right to a hearing to remain consistent with the proposal's revision to § 2570.42 discussed above. The Department also proposed to make minor changes regarding how a commenter may submit their comment and added language to the existing text advising commenters not to disclose personal data or submit confidential or otherwise protected information.

The Department has included these proposed amendments to § 2570.43 in the Final Amendment.

Section 2570.44

Section 2570.44 addresses the withdrawal of an exemption application. The current Exemption Procedure Regulation is silent as to whether an applicant can withdraw its exemption application without the Department's issuance of a formal final denial letter. It has, however, been the Department's practice that applicants can withdraw their applications without the issuance of a final denial letter. In a revision to this practice, the Department proposed to revise paragraph (b) to provide explicitly that the Department will terminate all proceedings regarding the application upon receiving an applicant's withdrawal request and issue a final denial letter. The issuance of the final denial letter would formally close the application and allow the Department to better manage its inventory of exemption applications.

The Department proposed to revise paragraph (d) to provide that if an applicant chooses to reapply after withdrawing their application, the applicant must update all previously furnished information with respect to the prior application and the exemption transaction. Applicants currently can

reapply without providing additional information after withdrawing their applications unless the request occurs more than two years after withdrawal. Applicants should be required to completely update all information when they reapply for an exemption, regardless of the time that has elapsed after their withdrawal. Therefore, the Proposed Rule would treat the withdrawal as a formal denial, which would shift the burden to the applicant to present an updated application to the Department for its review.

Commenters raised concerns that the proposed denial and resubmission revisions would presume malfeasance or bias against resubmitted applications. The Department disagrees. The denial is an administrative action only, and it presents no bias against an application. Clearly shifting the resubmission burden to the applicant, without relying on an older submission that was withdrawn, is appropriate because the exemption application process starts from the premise that applicants must show how they meet the Exemption Procedure Regulation requirements. Additionally, requiring current information upon resubmission will benefit both the applicants and the Department by streamlining the review of resubmitted applications.

Finally, the Department proposed to add a new paragraph (f) which states that, following the withdrawal of an exemption application, the administrative record will remain subject to public inspection pursuant to § 2570.51. The Department proposed this change to clearly set forth its policy that the administrative record for an exemption will always be available for public inspection after it is created. The language was intended to clarify current practice and to make this section consistent with other revisions regarding the administrative record described above.

After considering the comments, the Department has retained the Proposed Rule's revisions to § 2570.44 in the Final Amendment.

Section 2570.45

Section 2570.45 addresses formal requests for reconsideration following the Department's issuance of a final denial letter. The Department proposed to add new language to paragraph (a), which provides that applicants whose applications were denied without a tentative denial under § 2570.41(a) may request reconsideration, and a new paragraph (g), which provides that a request for reinstatement of an exemption application following a withdrawal pursuant to § 2570.44(d) is not a request for reconsideration governed by § 2570.45. The Department proposed to add this text to draw a clear distinction between §§ 2570.44 and 2570.45, and it has retained the proposed revisions in the Final Amendment.

In addition, in response to commenters' concerns about final denials pursuant to § 2570.41(a), the Department has added a new paragraph (h). Commenters expressed concern about § 2570.41(a) foreclosing applicants' opportunities to respond to the Department. New paragraph (h) provides that the Department will reconsider applications that were previously denied under § 2570.41(a)(1) or (2) for failure to timely respond to the Department's request for information or provide sufficient information, as long as the applications are cured upon submission for reconsideration. For applications that are cured upon resubmission, the Department will undertake the steps in the exemption procedure that remained when the Department issued the final denial letter. If the Department concludes that an exemption is not warranted, it will either hold a conference or issue a tentative denial letter before issuing a final denial. This change clarifies that those applicants whose applications are denied under § 2570.41(a)(1) or (2) without a tentative denial letter or an equivalent conference will be afforded an opportunity to respond to the Department upon reconsideration.

Section 2570.46

Section 2570.46 covers the right to a hearing with respect to a proposed exemption that provides relief from ERISA section 406(b), Code section 4975(c)(1)(E) or (F), or FERSA section 8477(c)(2) for any interested person who may be adversely affected by the exemption. The Department proposed to expand the right to a hearing to any person who may be materially affected by an exemption that provides the relief described in this section. The determination of whether a person is materially affected would be at the sole discretion of the Department. The proposal would delete the reference to interested persons to allow any party materially affected by the exemption to provide material information. Similarly, the Department proposed to change the word ''adversely'' to ''materially'' to capture all relevant information with respect to the exemption transaction. Combined, these revisions would assist the Department in its review of the exemption transaction by ensuring that potentially helpful information is not excluded.

The Department also proposed to make a minor revision to paragraph (b) that would explicitly state that the Department will hold a hearing when it is necessary to explore material factual information with respect to the proposed exemption. Factual information is limited to the proposed exemption to ensure that the hearing is relevant to the Department's exemption determination; information that is not material to the exemption transaction would not be sufficient to meet this requirement.

The Department has adopted the Proposed Rule's revisions to § 2570.46 in the Final Amendment.

Section 2570.47

The Department did not propose any changes to section § 2570.47, and the Final Amendment does not make any material revisions to § 2570.47.

Section 2570.48

Section 2570.48 restates the Department's ERISA section 408(a) statutory finding requirements. The Department's only proposed material change to this section is to clarify that the Department must make a finding that the exemption is administratively feasible ''for the Department,'' rather than administratively feasible for the applicant.

The Department has retained the Proposed Rule's revisions to § 2570.48 in the Final Amendment.

Section 2570.49

Section 2570.49 addresses the various effects of and limits on the grant of an exemption. The Department proposed to revise paragraph (e) to clarify that the determination regarding whether a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation based on the totality of the facts and circumstances would be made by the Department in its sole discretion. The proposed addition of the ''sole discretion'' language clarifies that the Department retains sole discretion with respect to the determination.

The Department has retained this revision to § 2570.49 in the Final Amendment.

Section 2570.50

Section 2570.50 addresses the revocation and modification of existing exemptions. The Department proposed to substantially revise paragraph (a) to provide that, if material changes in facts, circumstances, or representations occur after an exemption takes effect, including if a qualified independent fiduciary resigns, is terminated, or is

convicted of a crime, the Department, at its sole discretion, may take steps to revoke or modify the exemption. If the qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the proposal required the applicant to notify the Department within 30 days of the resignation, termination, or conviction. The applicant's failure to provide such notice could result in a determination that the conditions of the exemption have not been met and lead to the exemption's revocation. Further, under the proposal, the Department would reserve the right to request the applicant to provide the Department with any of the information required pursuant to § 2570.34(e) and (f) at a time determined by the Department at its sole discretion.

The Department proposed to revise paragraph (a) beyond the material facts to address the qualified independent fiduciary. In many exemptions that employ qualified independent fiduciaries, the fiduciaries represent one of the exemption's core protective conditions. It is imperative that an applicant inform the Department if the independent fiduciary ceases to serve in that role because it resigns, is terminated, or is convicted of a crime. The Proposed Rule was written to ensure that the Department will be informed of the changed circumstances and require the applicant to take necessary actions to ensure the exemption continues to be in the interests of and protective of the rights of the plan and its participants and beneficiaries.

In connection with the qualified independent fiduciary issue, the proposal also would have reserved the Department's right to request that the applicant provide any of the information required pursuant to § 2570.34(e) and (f) at a time determined by the Department at its sole discretion. This change was proposed to assist the Department's ultimate disposition of the issue and ensure that the exemption remains protective.

Commenters objected to the cumulative changes in paragraph (a) on the grounds that disclosing information after the issuance of an exemption would be burdensome, and that such a requirement would transform the Office of Exemption Determinations into an enforcement arm of the Department. While the revised paragraph (a) imposes additional requirements on an applicant after the issuance of an exemption, the new language would ensure that granted exemptions remain protective of plans and their participants and beneficiaries. Ensuring that an exemption remains protective of plans and their participants and beneficiaries in the face of changed circumstances relates to the Department's ability to make its statutorily required findings. Without the revised language, material changes could undermine the basis or availability of an issued exemption, whether intentional or not, without the Department's knowledge. Further, the new provision will help prevent, or at least provide notice of, the swapping of an independent fiduciary that was specifically agreed upon with the Department as an exemption condition for a fiduciary the Department might not otherwise approve.

The Department proposed to amend paragraph (a) to provide a tool for the Department to evaluate exemptions on an ongoing basis, which would allow the Department to determine whether it can continue to make its statutory findings under ERISA section 408(a) with respect to an exemption it previously granted. While in some cases such submissions could result in the referral of potentially non-exempt prohibited transactions to EBSA's enforcement program, that is not the chief purpose of the submissions. Nevertheless, non-enforcement EBSA offices remain aware of potential ERISA violations and can, and do, appropriately refer parties to the Office of Enforcement or applicable regional offices when appropriate.

Lastly, the Proposed Rule would have revised paragraph (c), which currently permits the Department's to revoke or modify an exemption under certain circumstances, which possibly could give the modifications retroactive effect. The proposal deleted the reservation of the Department's right to make retroactive changes, and instead provided that changes may only be made prospectively. The revision reflects the Department's concern that the ability to make retroactive changes undermines the legitimate interests of applicants, plans, participants, and beneficiaries to rely on exemptions that have been granted pursuant to specific conditions. Commenters indicated that the proposed language may create uncertainty about whether the Department might choose to revoke an exemption. The Department disagrees. The current Exemption Procedure Regulation already permits revocation, and the new provision, in fact, provides more certainty by eliminating the retroactive revocation language. In addition, the Department emphasizes that, per new paragraph (b), a revocation cannot occur without notice and comment.

Accordingly, the Department has retained the Proposed Rule's revisions to § 2570.50 in the Final Amendment.

Section 2750.51

Section 2570.51 addresses public inspection and the provision of copies of the administrative record. The Department proposed to revise the current language in coordination with § 2570.32(d), which addresses the administrative record and the information included in the administrative record. In the proposal, the Department clarified that the administrative record is open for public inspection and available to copy from the date the administrative record is established, as determined by § 2570.32(d). In addition, the Department proposed to update paragraph (b) to allow copies of the administrative record to be furnished electronically.

The Department has retained the Proposed Rule's revisions to § 2570.51 in the Final Amendment.

Effective Date

This regulation is effective April 18, 2024.

Regulatory Impact Analysis

1.1. Background and Need for Regulation

As discussed above, the Department's Exemption Procedure Regulation sets forth the process by which the Department makes exemption determinations with respect to applications for administrative relief from the prohibited transaction provisions of ERISA and the Code. The Final Amendment revises the current Exemption Procedure Regulation to promote the Department's goal of promptly and efficiently making exemption determinations pursuant to a transparent process that is available for public inspection and subject to public scrutiny.

In order to accomplish this objective, the Final Amendment makes applicants aware of information the Department requires during the exemption application process based on recent practices the Department has used to process administrative exemption requests. The Final Amendment also revises the baseline Exemption Procedure Regulation to ensure creation of a thorough and complete administrative record. The revision will increase transparency and help any impacted party, including plan participants and beneficiaries, understand the information the Department considers when reviewing

exemption applications and the decisions the Department makes in making exemption determinations.

As discussed below, the Department has examined the effects of this Final Amendment as required by Executive Order 12866,[21] Executive Order 13563,[22] the Paperwork Reduction Act of 1995,[23] the Regulatory Flexibility Act,[24] section 202 of the Unfunded Mandates Reform Act of 1995,[25] Executive Order 13132,[26] and the Congressional Review Act.[27]

1.2. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866 (the Executive order), ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB).[28] As amended by Executive Order 14094,[29] entitled ''Modernizing Regulatory Review,'' Executive order section 3(f) defines a ''significant regulatory action'' as an action that is likely to result in a rule that may (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

Pursuant to the terms of Executive Order 12866, OMB has determined that this action is ''significant'' within the meaning of section 3(f) of the Executive order. Therefore, the Department has provided an assessment of the potential costs, benefits, and transfers associated with the Final Amendment, which is presented below and has been reviewed by OMB in accordance with the requirements of the Executive order.

1.3. Affected Entities

The Final Amendment affects individual retirement accounts, employee benefit plans, plan sponsors and fiduciaries, and participants and beneficiaries that are subject to the prohibited transaction rules set forth in ERISA, the Code, or FERSA. Based on recent exemption application activity, the Department estimates that it receives approximately 21 exemption applications annually.[30]

1.4. Benefits of Final Amendment

The Department expects that the Final Amendment will achieve the Department's goal of bringing enhanced efficiency, clarity, and transparency to the exemption determination process. The Department will achieve this objective by including provisions in the Final Amendment that, among other things, (1) clarify the types of information and documentation required for a complete application, (2) revise the definitions of a qualified independent fiduciary and qualified independent appraiser to ensure their independence, (3) clarify the content of specific reports and documents applicants must submit to ensure that the Department receives sufficient information to make the requisite findings under ERISA section 408(a) to issue an exemption, (4) update various timing requirements to ensure clarity in the application review process, (5) clarify items that are included in the administrative record for an application and when the administrative record is available for public inspection, and (6) expand opportunities for applicants to submit information to the Department electronically.

Also, the Department is requiring applicants to include more information upfront as part of their exemption applications, which will lead to an efficient determination process. Specifically, the Department is requiring applicants to include information relevant to the cost and benefits of the transaction, alternative transactions to the exemption transaction that were considered, the benefits derived by the parties involved, and explicit descriptions of all known conflicts involved with the transaction.

The baseline Exemption Procedure Regulation already requires applicants to submit most of this information to the Department. The Department, however, is amending the Exemption Procedure Regulation to align more closely with the information the Department frequently requests from applicants to make its statutorily mandated findings, and to require such information to be submitted sooner in the process rather than after the Department requests it. Having the information provided with the application clarifies expectations about required information. Also, time is saved as back-and-forth discussions about required information are reduced. In doing this, the Department will make the exemption determination process more efficient. Increased efficiency also will result from the amendment to § 2570.36 of the Exemption Procedure Regulation, which allows applicants to submit applications and supporting materials to the Department electronically.

The Final Amendment also enhances the transparency of the exemption determination process by clarifying that the administrative record for an exemption application becomes open for public inspection and available for copying when an applicant submits its exemption application to the Department. At that time, in addition to the application itself, any information the applicant provided to the Department *before* it submitted its application, as well as any pre-submission communications regarding the exemption transaction, will become part of the administrative record.

1.5. Costs Associated With the Final Amendment

As discussed above, the Final Amendment requires applicants to include information in their exemption applications that frequently was requested during review. For example, under the Final Amendment, applicants must include in their applications a description of: (1) the reason(s) for engaging in the exemption transaction; (2) any material benefit that a party in interest involved in the exemption transaction may receive as a result of the

[21] Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

[22] Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011).

[23] 44 U.S.C. 3506(c)(2)(A) (1995).

[24] 5 U.S.C. 601 *et seq.* (1980).

[25] 2 U.S.C. 1501 *et seq.* (1995).

[26] Federalism, 64 FR 153 (Aug. 4, 1999).

[27] 5 U.S.C. 804(2) (1996).

[28] Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

[29] Modernizing Regulatory Review, 88 FR 21879 (April 6, 2023).

[30] This estimate is the rounded five-year average of applications received.

subject transaction (including the avoidance of any materially adverse outcome by the party in interest as a result of engaging in the exemption transaction); (3) the costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible; (4) a description of the alternatives to the exemption transaction that it considered or evaluated before submitting the exemption application and an explanation of why those alternatives were not pursued; and (5) a description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted.

The Final Amendment also revises the baseline Exemption Procedure Regulation to expand the number of specialized parties from whom statements and documents must be included in exemption applications, such as auditors and accountants acting on the behalf of the plan (as well as independent fiduciaries and independent appraisers who already were covered). The required disclosures are expanded to cover any documents submitted by these parties in support of the application. These parties also are required to disclose, among other things, information regarding their contracts with the applicant, including, but not limited to, information on indemnification provisions, waivers, and relationships with other parties involved in the exemption transaction. In addition, the qualified independent fiduciaries and qualified independent appraisers are required to include specific information regarding conflicts of interest, fiduciary liability insurance, and whether the fiduciary has been under investigation or convicted of certain crimes.

While including this information in the application could impose additional costs on some applicants compared to the baseline requirements of the current Exemption Procedure Regulation, as discussed below, these increased costs are modest and justified by the Department's need for this critical information to make its findings under ERISA section 408(a) and to promote increased efficiency as explained previously. Such information also will facilitate the Department's understanding of the underlying rationale for the exemption transaction, including the costs and benefits for both the party in interest and the plan and its participants and beneficiaries.

The Final Amendment also requires information to be submitted by applicants with whom the Department engages on a pre-submission basis. Specifically, if an applicant communicated with the Department either orally or in writing before submitting an exemption application for the exemption transaction, the applicant or its representative must (1) identify and fully describe the exemption transaction; and (2) set forth the prohibited transactions that the applicant believes are applicable.

Applicants who communicated with the Department prior to submitting an application also must submit a statement setting forth the date(s) and with whom the applicant communicated before submission. Linking pre-submission communications to a current application ensures that the Department understands the entire context of an exemption application. The Department emphasizes, however, that this provision is only triggered when the applicant submits a formal exemption application.

Although the final amendment requires exemption applicants to submit information earlier than the baseline exemption procedure, as mentioned above, the Department expects that the final amendment will generate efficiency gains. Such gains will result because the open, transparent, and clear process implemented by final amendment will eliminate friction that is caused when the Department has back and forth discussion with applicants regarding information that is not included in an exemption application after the applicants submit their exemption application under the baseline Exemption Procedure Regulation. On balance, this final amendment will be cost neutral as a result of the efficiency gains that will be generated; however, the Department does not have sufficient data to quantify them. Based on the foregoing, the Department expects that this Final Amendment will result in modest increased labor costs to applicants compared to the baseline Exemption Procedure Regulation, which represent an upper bound because the efficiency gains that would offset such costs are not taken into account.

Specifically, the Department estimates a total estimated cost increase to prepare the application of approximately $29,000. This estimate does not include cost savings generated by efficiency gains. Each of the 21 affected applicants could experience an increase of six hours per application divided among various professionals. It does include the cost savings associated with increased electronic submission of applications and supporting materials that the Department had sufficient data to quantify. The cost of individual components of the Final Amendment are presented in Table 1 and explained below.

TABLE 1—LABOR HOURS AND EQUIVALENT COST CHANGES

	Additional hours (per plan)	Additional hours (total)	Additional costs (per plan)	Additional costs (total)
Prepare Application: In House Legal Professional	1	21	$159.34	$3,346
Prepare Application: Clerical	1	21	63.45	1,332
Prepare Application: Outside Legal Professional	1	21	535.85	11,253
Prepare Application: Outside Fiduciary/Experts	2	42	610.04	12,811
Pre-Submission Conference, Do Not Apply	1	5	159.34	797
Change to Submission Method (from mail to electronic)	0	0	−16.45	−345
Total	6	110	1,511.57	29,194

On average, an in-house attorney with a labor and overhead cost estimated at a rate of $159.34 per hour is expected to spend approximately one additional hour in preparing the application for a total cost of $159.34 per plan, or $3,346 total for the 21 plans estimated to apply each year.[31]

[31] Unless otherwise noted, all wage rates are based on internal Department calculations based on

An additional hour of an attorney's time required to organize and prepare information is estimated for plans that choose to have a pre-submission consultation and do not later apply. The Department assumes that five plans per year will conduct pre-submission consultations but not formally apply, at a per plan cost of $159.34 and $797 per year increase for this group of plans.

Outside professionals are hired by the plan to handle certain fiduciary and service provider duties associated with the transaction, the valuation(s), and the preparation of the application materials. The amendments are estimated to increase the net time an outside legal professional takes to prepare the application by one hour per plan at a billing rate of $535.85 per hour.[32] This results in a per plan cost of $535.85 and a total annual cost increase of $11,253 for the 21 plans assumed to apply. Both the outside fiduciary and appraiser or other service provider are assumed to require an additional hour to comply with the amended rules. The hourly rate for both is assumed to be $305.02, which results in an increase of $610.04 for each plan and a total of $12,811 for the 21 plans that are expected to apply annually.

The final labor component that is expected to change relates to clerical staff for whom the Department estimates labor and overhead cost of $63.45 per hour. The Department also estimates that an additional hour of clerical work will be associated with assisting outside professionals with preparation of the application, resulting in a cost increase of $63.45 per application, and a total of $1,332 for the 21 applications expected annually.

The changes to § 2570.36 of the baseline Exemption Procedure Regulation that allow for the application to be submitted electronically are expected to generate a cost savings of $16.45 per plan, for a total of $345 annually.

1.6. Uncertainty

The number of exemption applications the Department receives may vary over time due to the macroeconomic health of the economy, and they may vary over the business cycle. For example, prohibited transaction exemption applications may deal with the sale of illiquid assets for which there is a limited market. Because of this, these assets are more likely to be liquidated while the market is distressed. Therefore, exemption applications for this type of transaction may increase if the macroeconomic economy is unhealthy. This variation in the number of applications is supported by the Department's application data.

The Final Amendment itself may impact the number of applications the Department receives. For example, application volume could increase if potential applicants observe enhanced transparency in the exemption determination process and increased clarity about the information that is required to be included in an exemption application. As a result, the Department may receive more exemption applications because applicants may have increased confidence that their applications will be approved by the Department, since they are fully aware of the information the Department requires to be included in their applications and the Department's process for considering their applications.

Finally, as discussed above, the Department maintains that this Final Amendment will be cost neutral due to the efficiency gains it will generate relative to the baseline Exemption Procedure Regulation, but it is uncertain regarding the amount of cost savings that will result from the efficiency gains, as the Department does not have sufficient information to quantify them.

1.7. Alternatives

Although Executive order section 6(a)(3)(C) only requires the Department to assess the cost and benefits of feasible alternatives for rules that are significant under section 3(f)(1), the Department considered several alternatives to the provisions in the Final Amendment that are discussed in this section.

First, the Department considered retaining the status quo. However, the status quo was not a feasible alternative because the Department has found that the baseline Exemption Procedure Regulation has not been working with maximum efficiency since the Exemption Procedure Regulation was last amended in 2011. Under the current Exemption Procedure Regulation, the Department has had to adopt the practice of requiring applicants to submit additional information that was not specifically provided for in the baseline Exemption Procedure Regulation to ensure that it has sufficient information to make the statutorily mandated findings under ERISA section 408(a) that an exemption request is (1) administratively feasible, (2) in the interest of the plan that is requesting the exemption and its participants and beneficiaries, and (3) protective of the rights of the plan's participants and beneficiaries. The Department found that many exemption applications did not contain sufficient information for the Department to make these findings, and a lot of back-and-forth communication was taking place between applicants and the Department to make sure that adequate information was provided to the Department for it to make its findings. This led the Department to make a policy decision that the baseline Exemption Procedure Regulation needs to be amended to require the specific information the Department needs to process exemption applications. The Department expects the selected alternative of requiring more information submitted with the application will in many instances, but not all, either maintain or reduce the costs for applications that are granted relative to the status quo.

The Department also made a policy decision that an amendment to the Exemption Procedure Regulation is necessary to clarify when the administrative record opens for an exemption application and the items that are included in the administrative record. The creation of the administrative record for an exemption application is critically important because it commences the exemption determination process for an exemption application. The Department has received many questions from applicants over the years about when the administrative record opens and when the record is available for public review. Therefore, it is critical for the Department to clearly define when the administrative record is open in an amendment to the Exemption Procedure Regulation to ensure that the Department maintains an open and transparent exemption determination process.

The Department also considered finalizing the entire amendment as proposed but, instead, made major changes to the proposal in the Final Amendment based on the public input the Department received in comment letters and testimony that was provided at the public hearing. These changes were made, in part, to reduce the burdens imposed on applicants by the proposal. For example, the proposal added a new § 2570.34(a)(5) that would have required applicants to include with their exemption applications a detailed description of possible alternatives to the exemption transaction that would not involve a

2020 labor cost data. For a description of the Department's methodology for calculating wage rates, see *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[32] Outside legal billing rates are a blended rate based on the Laffey Matrix, which is available at *http://www.laffeymatrix.com/see.html.*

prohibited transaction, and why the applicant did not pursue those alternatives. Commenters objected, in part, to this language by asserting that it would be burdensome for an applicant to investigate and evaluate all potential approaches to a transaction before submitting an exemption application. The Department recognized this burden and modified the language in the Final Amendment to provide that an applicant must submit a description of the alternatives to the exemption transaction that it considered or evaluated before submitting the exemption application and explain why those alternatives were not pursued with its exemption application. The language no longer requires an exhaustive review; it only requires an applicant to explain to the Department the process by which the applicant arrived at its decision to propose an exemption application.

As another example, the Department proposed to add a new § 2570.34(d) that would have required an applicant to include detailed information regarding the appraiser selection process. In response to the proposal, commenters raised multiple objections. Therefore, paragraph (d) of the Final Amendment states that an applicant must include the following information with its exemption application: (1) a representation that the independent fiduciary prudently selected the appraiser after diligent review of the appraiser's technical training and proficiency with respect to the type of valuation at issue, the appraiser's independence from the plan's counterparties in the exemption transaction, and the absence of any material conflicts of interest with respect to the exemption transaction; (2) a representation that the appraiser is independent within the meaning of § 2570.31(i); and (3) a representation that the independent appraiser has appropriate technical training and proficiency with respect to the specific details of the exemption transaction. The Final Amendment's language has the effect of decreasing an applicant's burden by no longer requiring substantial disclosure and a specific delineated process. In addition to this burden reduction, the Department notes that it also made a similar change to § 2570.34(e), which had a similar burden-reducing effect.

The Department has determined that the totality of the expected benefits of the Final Amendment justify its costs. The Department's decision to publish the Final Amendment with modifications to the Proposed Rule will allow it to achieve its objective of making the exemption application process more efficient and transparent than the baseline process while minimizing the burden the Proposed Rule imposed on applicants. Accordingly, the Final Amendment is a necessary and beneficial regulation.

Paperwork Reduction Act Statement

In accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection request (ICR) included in the revision of the Exemption Procedure Regulation.[33] At the same time, the Department also submitted an ICR to the OMB under OMB Control Number 1210–0060, in accordance with 44 U.S.C. 3507(d). No comments were received that led to an adjustment in burden estimates.

In connection with the publication of the Final Amendment, the Department is submitting the ICR to OMB requesting a revision of the information collection under OMB control number 1210–0060 reflecting the changes made by the final rules. A copy of the ICR may be obtained by contacting the person listed in the PRA Addressee section below or at *www.RegInfo.gov.*

PRA Addressee: Address requests for copies of the ICR to James Butikofer, Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210 or by email at: *ebsa.opr@dol.gov.* A copy of the ICR also may be obtained at *https://www.RegInfo.gov.*

Background

Both ERISA and the Code contain various statutory exemptions from the prohibited transaction rules. In addition, ERISA section 408(a) authorizes the Secretary to grant administrative exemptions from the restrictions of ERISA sections 406 and 407(a), while Code section 4975(c)(2) authorizes the Secretary of the Treasury or their delegate to grant exemptions from the prohibitions of Code section 4975(c)(1). ERISA section 408(a) and Code section 4975(c)(2) also direct the Secretary and the Secretary of the Treasury, respectively, to establish procedures to carry out the purposes of these sections.

Under section 102 of Reorganization Plan No. 4 of 1978, the authority of the Secretary of the Treasury to issue exemptions under Code section 4975 was transferred, with certain enumerated exceptions not discussed herein, to the Secretary. Accordingly, the Secretary now possesses the authority under Code section 4975(c)(2), as well as under ERISA section 408(a), to issue individual and class exemptions from the prohibited transaction rules of ERISA and the Code.

Under the baseline Exemption Procedure Regulation, the Department requires certain information to be provided in a written application for an exemption. The written application is an ICR for purposes of the PRA. Sections 2570.34 and 2570.35 of the baseline Exemption Procedure Regulation describe the information that must be supplied by the applicant, such as, but not limited to: identifying information (name, type of plan, Employer Identification Number (EIN) number, etc.); an estimate of the number of plan participants; a detailed description of the exemption transaction and the parties for which an exemption is requested; a statement regarding which section of ERISA is thought to be violated and whether transaction(s) involved have already been entered into; a statement of whether the transaction is customary in the industry; a statement of the hardship or economic loss, if any, which would result if the exemption were denied; and a statement explaining why the proposed exemption would be administratively feasible and in the interests of the plan and protective of the rights of plan participants and beneficiaries. In addition, the applicant must certify that the information supplied is accurate and complete.

The Final Amendment expands the ICR contained in §§ 2570.34 and 2570.35 in several respects. First, the Final Amendment expands the information sought about the proposed exemption transaction, such as requiring a more detailed description of the exemption transaction, including the benefits derived by the parties and the costs and benefits to the plan; alternative transactions considered; and descriptions of all conflicts of interest and self-dealing. Second, the Final Amendment requires the inclusion of additional information in exemption applications, such as a statement regarding whether the exemption transaction is in the best interest of the plan and its participants and beneficiaries; expanded disclosures about any Advisory Opinions that the applicant requests with respect to any issue related to the exemption transaction; and expanded disclosures about relevant investigations by any Federal, State, or regulatory body.

[33] 87 FR 14722.

The Final Amendment also revises the ICR to expand the number of specialized parties from whom statements and documents must be included in exemption applications. The specialized parties covered by the existing requirements are expanded to include not just independent appraisers and fiduciaries, but also auditors and accountants acting on behalf of the plan, and the documents required to be disclosed are expanded to cover any documents submitted by those parties in support of the application. Specialized parties are required to disclose, among other things, additional information regarding their contracts with the applicant, including, but not limited to, information on indemnification provisions, waivers, and relationships with other parties involved in the exemption transaction. In addition, the qualified independent fiduciaries and qualified independent appraisers are required to include specific information regarding conflicts of interest, fiduciary liability insurance, and whether the fiduciary has been under investigation or convicted of certain crimes.

In addition to the requirements created by the application described in §§ 2570.33 and 2570.35, additional requirements are added by amending § 2570.33(d) with respect to applicants that communicate with the Department on a pre-submission basis. Specifically, if an applicant desires to engage in a pre-submission conference or correspondence, the applicant or its representative must (1) identify and fully describe the exemption transaction; and (2) set forth the prohibited transactions that the applicant believes are applicable.

Pre-submission applicants also must submit in their applications a statement setting forth the date(s) and with whom the applicant communicated before submitting the application. Linking pre-submission communications to a current application ensures that the Department understands the entire context of an exemption application. The Department emphasizes, however, that this provision is only triggered when the applicant submits a formal exemption application.

Finally, the Department is amending § 2570.36 to provide that the application and supporting documents may be submitted electronically. The Department expects that no longer requiring paper copies of documents to be submitted should reduce the burden associated with this ICR.

In order to assess the hour and cost burden of the revision to the baseline ICR associated with the Exemption Procedure Regulation, the Department updated its estimate of the number of exemption requests it expects to receive, and the hour and cost burden associated with providing information required to be submitted by applicants, including the new information required. The Department also adjusted its estimate of the labor rates for professional and clerical help and the size of plans filing exemption requests with the Department. In the revised estimate, the costs of hiring outside service providers (such as law firms specializing in ERISA, outside appraisers, and financial experts) are accounted for as a cost burden. Requirements related to these services are more explicitly specified in the final rule than they were in the previous procedure, and any paperwork costs associated with these requirements are built into the estimated fees for outside services.

The costs associated with the Final Amendment are dependent on pre-submission conference and application activity. Pre-submission activity is a potential initial contact with the Department to discuss a potential exemption application. These have traditionally been informal discussions which were not cataloged or tracked by the Department. For purposes of this Final Amendment, we assume that five plans conduct pre-submission conferences but do not ultimately apply for an exemption. Given the change in structure of the pre-submission conferences, these five plans would incur an additional cost, which is captured in the ''Pre-Submission Application'' line item below. Based on 2018–2022 application activity, the Department assumes that it will receive 21 applications annually. Based on 2019–2021 data, the Department assumes that five exemption applications reach the pendency stage which requires publication in the **Federal Register** and distribution of notices to participants. These five exemption applications could be approved following the public comment period.

The typical plan size is assumed to be 700 participants, which is based on a weighted average plan size. The rule also requires that, in cases where the facts associated with the application are complex, the plan, at the point of publication in the **Federal Register**, provide a summary of the proposed exemption (SPE) with the notice. The Department assumes this to occur in roughly half the cases, therefore three summaries will be required to be prepared.

The estimated hours burden and equivalent costs associated with this level of activity are presented in Table 2.

TABLE 2—HOUR AND EQUIVALENT COST BURDEN

	Number of requests (A)	Hours (B)	Hourly labor cost (C)	Hour burden A * B	Equivalent costs A * B * C
Prepare Request: In House Legal Professional	21	11	$159.34	231	$36,808
Prepare Request: Clerical	21	11	63.45	231	14,657
Prepare Request: Outside Legal Professional	21	51	535.85	1,071	573,895
Prepare Request: Outside Fiduciary/Experts	21	42	305.03	882	269,036
Prepare Request (SPE): In House Legal Professional	3	2	159.34	6	956
Distribute Notice: Clerical	5	5/60	63.45	292	18,506
Pre-Submission Application	5	1	159.34	5	797
Total				2,718	914,655

As discussed above, the Final Amendment allows applicants to submit their applications and supporting material electronically, which the Department assumes all applicants will choose as their default application method. This results in an estimated cost savings of $16.45 per applicant, for a total of $345. The distribution of the notices to plan participants is expected to be $144 and is summarized in Table 3 below. The majority (95.8%) of the notices to participants are expected to be delivered electronically.[34]

TABLE 3—COST BURDEN

	Number of notices (A)	Number of pages per notice (C)	Material and printing costs (D)	Mailing costs (E)	Cost burden A * B * (C * D + E)
Distribute Notice	203	1	$0.05	$0.63	$138
Distribute SPE	122	1	0.05	Included with Notice	6
Total					144

The paperwork burden estimates are summarized below:

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications.

OMB Control Number: 1210–0060.

Affected Public: Businesses or other for-profits.

Type of Review: Revision.

Estimated Number of Respondents: 21.

Estimated Number of Annual Responses: 3,592.

Frequency of Response: Annual or as needed.

Estimated Total Annual Burden Hours: 2,718 hours.

Estimated Total Annual Burden Cost: $144.

2. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), and which are likely to have a significant economic impact on a substantial number of small entities. Unless the head of an agency certifies that a final rule will not have a significant economic impact on a substantial number of small entities, RFA section 604 requires that the agency present a final regulatory flexibility analysis at the time of the publication of the notice of final rulemaking describing the impact of the rule on small entities and seeking public comment on such impact.

Under RFA section 605, the Department certified at the proposed rule stage that the rule would not have a significant economic impact on a substantial number of small entities. After considering comments that were submitted to the Department on the proposed rule and testimony from witnesses at the public hearing, as well as changes the Department made to the proposal in the Final Amendment in response to such comments and testimony, the Department is confident that the certification remains valid with respect to the Final Amendment. Therefore, the Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the Final Amendment will not have a significant economic impact on a substantial number of small entities. The Department presents its basis for making this determination below.

For purposes of the RFA, the Department continues to consider a small entity to be an employee benefit plan with fewer than 100 participants.[35] Further, while some large employers may have small plans, in general, small employers maintain most small plans. Thus, the Department maintains that assessing the impact of this Final Amendment on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from the definition of ''small business'' that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). The Department requested comment at the proposed rule stage on the appropriateness of the size standard used in evaluating the impact on small entities and received no comments.

Using this standard, most plans seeking an exemption are large plans. Even if the Department assumes that all the 21 estimated plans seeking exemptions each year are small, based on the approximately 652,934 ERISA-

[34] The Department estimates approximately 95.8% of participants receive disclosures electronically under the combined effects of the 2002 electronic disclosures safe harbor and the 2020 electronic safe harbor. The Department estimates that 58.3% of participants will receive electronic disclosures under the 2002 safe harbor. According to the National Telecommunications and Information Agency (NTIA), 37.4% of individuals aged 25 and over have access to the internet at work. According to a Greenwald & Associates survey, 84.0% of plan participants find it acceptable to make electronic delivery the default option, which is used as the proxy for the number of participants who will not opt-out of electronic disclosure that are automatically enrolled (for a total of 31.4% receiving electronic disclosure at work). Additionally, the NTIA reports that 44.1% of individuals aged 25 and over have access to the internet outside of work. According to a Pew Research Center survey, 61.0% of internet users use online banking, which is used as the proxy for the number of internet users who will affirmatively consent to receiving electronic disclosures (for a total of 26.9% receiving electronic disclosure outside of work). Combining the 31.4% who receive electronic disclosure at work with the 26.9% who receive electronic disclosure outside of work produces a total of 58.3%. The remaining 41.7% of participants are subject to the 2020 safe harbor. According to the 2021 American Community Survey, 90.3% of the population has an internet subscription. The Department estimates that 0.5% of electronic disclosures will bounce back and will need to be sent a paper disclosure. Accordingly, for the 41.7% of participants not affected by the 2002 safe harbor, 89.8%, or an additional 37.4% (41.7% x 89.8%), are estimated to receive electronic disclosures under the 2020 safe harbor. In total, the Department estimates that 95.8% (58.3% + 37.4%) would receive electronic disclosures.

[35] The basis for this definition is found in ERISA section 104(a)(2), which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Pursuant to the authority of ERISA section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46 and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and satisfying certain other requirements. The Department has consulted with the SBA Office of Advocacy concerning use of this participant count standard for RFA purposes and has a memorandum of understanding with the Office of Advocacy to use the standard. Memorandum received from the U.S. Small Business Administration, Office of Advocacy on July 10, 2020.

covered small pension plans, the 21 plans annually seeking an exemption make up a very small percentage of all plans (0.0031 percent of small plans). The Department does not consider this to constitute a substantial number of small entities that would be sufficient to invoke that application of the RFA.

3. Congressional Review Act

This Final Amendment is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review.

4. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), the Final Amendment does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or impose an annual burden exceeding $100 million or more, adjusted for inflation, on the private sector.

5. Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires Federal agencies to adhere to specific criteria in the process of their formulation and implementation of policies that have substantial direct effects on the States, or the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This Final Amendment does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. ERISA section 514 provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the Final Amendment do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the National Government and the States.

List of Subjects in 29 CFR Part 2570

Administrative practice and procedure, Employee benefit plans, Exemptions, Fiduciaries, Party in interest, Pensions, Prohibited transactions, Trusts and trustees.

For the reasons set forth in the preamble, the Department amends 29 CFR part 2570 as follows:

PART 2570—PROCEDURAL REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

■ 1. The authority citation for part 2570 continues to read as follows:

Authority: 5 U.S.C. 8477; 29 U.S.C. 1002(40), 1021, 1108, 1132, and 1135; sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App at 672 (2006); Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

Subpart I is also issued under 29 U.S.C. 1132(c)(8).

■ 2. Revise subpart B to read as follows:

Subpart B—Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

Sec.

§ 2570.30 Scope of this subpart.

(a) The rules of procedure set forth in this subpart apply to applications for prohibited transaction exemptions issued by the Department under the authority of:

(1) Section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA);

(2) Section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code); or

Note 1 to paragraph (a)(2). See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 310 (1974), and also section 102 of Presidential Reorganization Plan No. 4 of 1978 (3 CFR, 1978 Comp., p. 332, reprinted in 5 U.S.C. app. at 672 (2006), and in 92 Stat. 3790 (1978)), effective December 31, 1978, which generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Department.

(3) The Federal Employees' Retirement System Act of 1986 (FERSA) (5 U.S.C. 8477(c)(3)).

(b) Under the rules of procedure in this subpart, the Department may conditionally or unconditionally exempt any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by ERISA section 406 and the corresponding restrictions of the Code and FERSA. While administrative exemptions granted under the rules in this subpart are ordinarily prospective in nature, it is possible that an applicant may obtain retroactive relief for past prohibited transactions if, among other things, the Department determines that appropriate safeguards were in place at the time the exemption transaction was consummated, and no plan participants or beneficiaries were harmed by the exemption transaction.

(c) The rules in this subpart govern the filing and processing of applications for both individual and class exemptions that the Department may propose and grant pursuant to the authorities cited in paragraph (a) of this section. The Department may also propose and grant exemptions on its own motion, in which case the procedures relating to publication of notices, hearings, evaluation, and public inspection of the administrative record, and modification or revocation of previously granted exemptions will apply.

(d) The issuance of an administrative exemption by the Department under the procedural rules in this subpart does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from the obligation to comply with certain other provisions of ERISA, the Code, or FERSA, including any prohibited transaction provisions to which the exemption does not apply, and the general fiduciary responsibility provisions of ERISA, if applicable, which require, among other things, fiduciaries to discharge their duties respecting the plan solely in the

interests of the participants and beneficiaries of the plan and in a prudent fashion; nor does it affect the requirements of Code section 401(a), including that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries, or the rules with respect to other Code provisions, including that an administrative exemption with respect to a contribution to a pension plan does not affect the deductibility of the contribution under Code section 404.

(e) The Department will not propose or issue exemptions upon oral request alone, nor will the Department grant exemptions orally. An applicant for an administrative exemption may request and receive oral feedback from Department employees in preparing an exemption application, which will not be binding on the Department in its processing of an exemption application or in its examination or audit of a plan.

(f) The Department will generally treat any exemption application that is filed solely under ERISA section 408(a) or solely under Code section 4975(c)(2) as an exemption request filed under both ERISA section 408(a) and Code section 4975(c)(2) if it relates to a plan that is subject to both ERISA and the Code and the exemption transaction would be prohibited by both ERISA and the corresponding Code provisions.

(g) The Department issues an administrative exemption at its sole discretion based on the statutory criteria set forth in ERISA section 408(a) and Code section 4975(c)(2). The existence of previously issued administrative exemptions is not determinative of whether the Department will propose future exemptions for applications with the same or similar facts, or whether a proposed exemption will contain the same conditions as a previously issued administrative exemption. Previously issued administrative exemptions, however, may inform the Department's determination of whether to propose future exemptions based on the unique facts and circumstances of each application.

§ 2570.31 Definitions.

For purposes of the procedures in this subpart, the following definitions apply:

(a) An *affiliate of a person* means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph (a)(1), the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)) of any such person; or

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, partner, or five percent or more owner.

(b) A *class exemption* is an administrative exemption, granted under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3), which applies to any transaction and party in interest within the class of transactions and parties in interest specified in the exemption when the conditions of the exemption are satisfied.

(c) *Department* means the U.S. Department of Labor and includes the Secretary of Labor or their delegate exercising authority with respect to prohibited transaction exemptions to which this subpart applies.

(d) *Exemption transaction* means the transaction or transactions for which an exemption is requested.

(e) An *individual exemption* is an administrative exemption, granted under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3), which applies only to the specific parties in interest and exemption transactions named or otherwise defined in the exemption.

(f) A *party in interest* means a person described in ERISA section 3(14) or 5 U.S.C. 8477(a)(4) and includes a disqualified person, as defined in Code section 4975(e)(2).

(g) *Pooled fund* means an account or fund for the collective investment of the assets of two or more unrelated plans, including (but not limited to) a pooled separate account maintained by an insurance company and a common or collective trust fund maintained by a bank or similar financial institution.

(h) A *qualified appraisal report* is any appraisal report that:

(1) Is prepared by a qualified independent appraiser; and

(2) Satisfies all the requirements set forth in § 2570.34(c)(5).

(i) A *qualified independent appraiser* is any individual or entity with appropriate training, experience, and facilities to provide a qualified appraisal report regarding the particular asset or property appraised in the report, that is independent of and unrelated to any party in interest engaging in the exemption transaction (and their affiliates). In general, the Department determines an appraiser's independence based on all relevant facts and circumstances, such as the extent to which the plan's counterparty in the transaction participated in or influenced the selection of the appraiser. In making the independence determination, the Department will consider the amount of the appraiser's revenues and projected revenues for the current Federal income tax year (including amounts received for preparing the appraisal report) that will be derived from parties in interest (and their affiliates) relative to the appraiser's revenues from all sources for the appraiser's prior Federal income tax year. The Department generally will not conclude that an appraiser's independence is compromised solely based on the revenues it receives from the parties in interest (and their affiliates) that engaged in the exemption transaction, to the extent that the appraiser neither receives nor is projected to receive more than two (2) percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates). Although larger percentages merit more stringent scrutiny, an appraiser may be considered independent based upon other facts and circumstances provided that the appraiser neither receives nor is projected to receive more than five (5) percent of its revenues within the current Federal income tax year from parties in interest (and their affiliates) participating in the exemption transaction.

(j) A *qualified independent fiduciary* is any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, that is independent of and unrelated to any party in interest engaging in the exemption transaction (and its affiliates). In general, the Department will make the determination of whether a fiduciary is independent based on all relevant facts and circumstances, such as the extent to which the plan's counterparty in the transaction participated in or influenced the selection of the fiduciary. In making this determination, the Department will also take into account, among other things, the amount of both the fiduciary's revenues and projected revenues for the current Federal income tax year (including amounts received for preparing fiduciary reports) that will be derived from parties in interest engaging in the exemption transaction (and their affiliates) relative to the fiduciary's revenues from all sources for the prior Federal income tax year. The Department generally will not conclude that a fiduciary's independence is

compromised solely based on the revenues it receives from parties in interest (and their affiliates) that engaged in the exemption transaction, to the extent that the fiduciary neither receives nor is projected to receive more than two (2) percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates). Although larger percentages merit more stringent scrutiny, a fiduciary may be considered independent based upon other facts and circumstances provided that the fiduciary neither receives nor is projected to receive more than five (5) percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates) that engaged in the exemption transaction.

(k) A *pre-submission applicant* is a party that contacts the Department, either orally or in writing, to inquire whether a party with a particular fact pattern would need to submit an exemption application and, if so, what conditions and relief would be applicable. A party that contacts the Department to inquire broadly, without reference to a specific fact pattern, about prohibited transaction exemptions is not a pre-submission applicant.

§ 2570.32 Persons who may apply for exemptions and the administrative record.

(a) The following persons may apply for exemptions:

(1) Any party in interest to a plan who is or may be a party to the exemption transaction;

(2) Any plan which is a party to the exemption transaction; or

(3) In the case of an application for an exemption covering a class of parties in interest or a class of transactions, in addition to any person described in paragraphs (a)(1) and (2) of this section, an association or organization representing parties in interest who may be parties to the exemption transaction.

(b) An application by or for a person described in paragraph (a) of this section may be submitted by the applicant or by an authorized representative. An application submitted by an authorized representative of the applicant must include proof of authority in the form of:

(1) A power of attorney; or

(2) A written certification from the applicant that the representative is authorized to file the application.

(c) If the authorized representative of an applicant submits an exemption application to the Department together with proof of authority to file the application as required by paragraph (b) of this section, the Department will direct all correspondence and inquiries concerning the application to the representative unless requested to do otherwise by the applicant.

(d)(1) The administrative record is open for public inspection, pursuant to § 2570.51(a), from the date an applicant submits an application to the Office of Exemption Determinations.

(2) The administrative record includes, but is not limited to, the initial exemption application and any modifications or supplements thereto; all correspondence with the applicant after the applicant submits the exemption application; and any information provided by the applicant in connection with the exemption application, whether provided orally or in writing (as well as any comments and testimony received by the Department in connection with an application).

(3) Although the administrative record is open and available to the public only after an applicant submits an exemption application, the record includes any material documents or supporting information that was submitted to the Department in connection with the subject transaction of the application, whether orally or in writing, before formal submission of the application. The administrative record does not include records of communications with the Department which were either not with respect to the subject transaction of the application or not followed by the submission of an exemption application related to those communications.

(4) If documents are required to be provided in writing, by either the applicant or the Department, the documents may be provided either by mail or electronically, unless otherwise indicated by the Department at its sole discretion.

§ 2570.33 Applications the Department will not ordinarily consider.

(a) The Department ordinarily will not consider an application that fails to include all the information required by §§ 2570.34 and 2570.35 (or fails to include current information) or otherwise fails to conform to the requirements in this subpart.

(b) An application for an individual exemption relating to a specific exemption transaction or transactions ordinarily will not be considered if the Department has under consideration a class exemption relating to the same type of transaction or transactions. Notwithstanding the preceding sentence, the Department may consider such an application if the issuance of the final class exemption is not imminent, and the Department determines that time constraints necessitate consideration of the exemption transaction on an individual basis.

(c) If a party, excluding a Federal, state, or other governmental entity, designates any information submitted in connection with its exemption application as confidential, the Department will not process the application unless and until the applicant withdraws its claim of confidentiality. By submitting an exemption application, an applicant consents to public disclosure of the entire administrative record pursuant to § 2570.51.

(d) The Department will not engage a pre-submission applicant or its representative, whether through written correspondence or a conference, if the pre-submission applicant does not:

(1) Identify and fully describe the exemption transaction; and

(2) Set forth the prohibited transactions that the applicant believes are applicable.

§ 2570.34 Information to be included in every exemption application.

(a) All applications for exemptions must contain the following information:

(1) The name(s), address(es), phone number(s), and email address(es) of the applicant(s);

(2) A detailed description of the exemption transaction, including the identification of all the parties in interest involved, a description of any larger integrated transaction of which the exemption transaction is a part, and a chronology of the events leading up to the exemption transaction;

(3) The identity, address, phone number, and email address of any representatives for the affected plan(s) and parties in interest and what individuals or entities they represent;

(4) A description of:

(i) The reason(s) for engaging in the exemption transaction;

(ii) Any material benefit that may be received by a party in interest (or its affiliates) as a result of the exemption transaction (including the avoidance of any materially adverse outcome by a party in interest (or its affiliates) as a result of engaging in the exemption transaction); and

(iii) The costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible;

(5) A description of the alternatives to the exemption transaction that did not involve a prohibited transaction that were considered or evaluated by the

applicant before submitting its exemption application and the reason(s) why those alternatives were not pursued;

(6) The prohibited transaction provisions from which exemptive relief is requested and the reason(s) why the exemption transaction would violate each such provision;

(7) A description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted;

(8) Whether the exemption transaction is or has been the subject of an investigation or enforcement action by the Department, the Internal Revenue Service, or any other regulatory authority; and

(9) The hardship or economic loss, if any, which would result to the person or persons on behalf of whom the exemption is sought, to affected plans, and to their participants and beneficiaries from denial of the exemption.

(10) With respect to the exemption transaction's definition of affiliate, if applicable, either a statement that the definition of affiliate set forth in § 2570.31(a) is applicable or a statement setting forth why a different affiliate definition should be applied.

(b) All applications for exemption must also contain the following:

(1) A statement explaining why the requested exemption would meet the requirements of ERISA section 408(a) by being—

(i) Administratively feasible for the Department;

(ii) In the interests of affected plans and their participants and beneficiaries; and

(iii) Protective of the rights of participants and beneficiaries of affected plans.

(2) A statement that either:

(i)(A) The exemption transaction will be in the best interest of the plan and its participants and beneficiaries;

(B) That all compensation received, directly or indirectly, by a party in interest (and its affiliates) involved in the exemption transaction does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and

(C) That all statements to the Department, the plan, or, if applicable, the qualified independent fiduciary or qualified independent appraiser about the exemption transaction and other relevant matters are not materially misleading at the time the statements are made; or

(ii) Explains why the exemption standards in paragraphs (b)(2)(i)(A) through (C) of this section are not applicable to the exemption transaction.

(iii) For purposes of this paragraph (b)(2), an exemption transaction is in the best interest of a plan if the plan fiduciary causing the plan to enter into the exemption transaction determines, with the care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would, in the conduct of an enterprise of a like character and with like aims, enter into the exemption transaction based on the circumstances and needs of the plan. Such fiduciary shall not place the financial or other interests of itself, a party in interest, or any affiliate ahead of the interests of the plan or subordinate the plan's interests to itself, or any other party or affiliate.

(3) With respect to the notification of interested persons required by § 2570.43:

(i) A description of the interested persons to whom the applicant intends to provide notice;

(ii) The manner in which the applicant will provide such notice; and

(iii) An estimate of the time the applicant will need to furnish notice to all interested persons following publication of a notice of the proposed exemption in the **Federal Register**.

(4) If any party to the exemption transaction has requested either an advisory opinion from the Department or any similar opinion or guidance from another Federal, state, or regulatory body with respect to any issue relating to the exemption transaction—

(i) A copy of the opinion, letter, or similar document concluding the Department's or other entity's action on the request; or

(ii) If the Department or other entity has not yet concluded its action on the request:

(A) A copy of the request or the date on which it was submitted and, solely with respect to an advisory opinion request to the Department, the Department's correspondence control number as indicated in the acknowledgment letter; and

(B) An explanation of the effect the issuance of an advisory opinion by the Department or similar opinion or guidance from another Federal, state, or regulatory body would have upon the exemption transaction.

(5) If the application is to be signed by anyone other than the party in interest seeking exemptive relief on their own behalf, a statement which—

(i) Identifies the individual signing the application and their position or title; and

(ii) Briefly explains the basis of their familiarity with the matters discussed in the application.

(6)(i) A declaration in the following form:

I certify that I am familiar with the matters discussed in this application and, to the best of my knowledge and belief, the representations made in this application are true and correct.

(ii) This certification must be dated and signed by:

(A) The applicant, in its individual capacity, in the case of an individual party in interest seeking exemptive relief on their own behalf;

(B) A corporate officer or partner if the applicant is a corporation or partnership;

(C) A designated officer or official if the applicant is an association, organization, or other unincorporated enterprise; or

(D) The plan fiduciary that has the authority, responsibility, and control with respect to the exemption transaction if the applicant is a plan.

(7) If an applicant communicated with the Department either orally or in writing before submitting an exemption application for the exemption transaction, a statement setting forth the date(s) and with whom the applicant communicated before submitting the application.

(c) Statements and documents from a qualified independent appraiser, auditor, or accountant, such as appraisal reports, analyses of market conditions, audits, or financial documents submitted to support an application for exemption must be accompanied by a statement of consent from such appraiser, auditor, or accountant acknowledging that the statement is being submitted to the Department as part of an exemption application. The statements by the qualified independent appraiser, auditor, or accountant must also contain the following written information:

(1) A signed and dated certification stating that, to the best of the qualified independent appraiser's, auditor's, or accountant's knowledge and belief, the representations made in such statement are true and correct;

(2) A copy of the qualified independent appraiser's, auditor's, or accountant's engagement letter and, if applicable, contract with the plan describing the specific duties the appraiser, auditor, or accountant shall undertake. The letter or contract may not:

(i) Include any provision that provides for the direct or indirect indemnification or reimbursement of the independent appraiser, auditor, or

accountant by the plan or another party for any failure to adhere to its contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work. However, the letter or contract may include a provision providing for reimbursement of legal expenses with respect to claims for any failure to adhere to the appraiser's, auditor's, or accountant's contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work, provided that:

(A) The plan determines that the reimbursement is prudent following a good faith determination that the appraiser, auditor, or accountant likely did not fail to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work and will be able to repay the plan; and

(B) The letter or contract requires the appraiser, auditor, or accountant to repay all of the reimbursements, in a timely fashion, in the event the appraiser, auditor, or accountant enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal laws, or has been found liable for breach of contract or violation of any Federal or state laws applicable to the appraiser's, auditor's, or accountant's work; or

(ii) Waive any rights, claims, or remedies of the plan or its participants and beneficiaries under ERISA, the Code, or other Federal and state laws against the independent appraiser, auditor, or accountant with respect to the exemption transaction;

(3) A summary of the qualified independent appraiser's, auditor's, or accountant's qualifications to serve in such capacity;

(4) A detailed description of any relationship that the qualified independent appraiser, auditor, or accountant has had or may have with the plan or any party in interest involved in the exemption transaction or its affiliates that may influence the appraiser, auditor, or accountant, including a description of any past engagements with the appraiser, auditor, or accountant;

(5) A written appraisal report prepared by the qualified independent appraiser, which determines, to the best of the qualified independent appraiser's ability and in accordance with professional appraisal standards, the fair market value of the subject asset(s), without bias towards the plan's counterparty in the transaction or other interested parties:

(i) The report must describe the method(s) used in determining the fair market value of the subject asset(s) and an explanation of why such method best reflects the fair market value of the asset(s);

(ii) The report must consider any special benefit that a party in interest involved in the exemption transaction may derive from control of the asset(s), such as from owning an adjacent parcel of real property or gaining voting control over a company; and

(iii) The report must be current and not more than one year old from the date of the exemption transaction, and a written update must be prepared by the qualified independent appraiser affirming the accuracy of the appraisal as of the date of the exemption transaction;

(6) If the subject of the appraisal report is real property, the qualified independent appraiser shall submit a written representation that they are a member of a professional organization of appraisers that can sanction its members for misconduct;

(7) If the subject of the appraisal report is an asset other than real property, the qualified independent appraiser shall submit a written representation describing the appraiser's prior experience in valuing assets of the same type; and

(8) The qualified independent appraiser shall submit a written representation disclosing the percentage of its current revenue that is derived from any party in interest (or its affiliates) involved in the exemption transaction; in general, such percentage shall be computed with respect to the two separate disclosures by comparing, in fractional form:

(i) The amount of the appraiser's projected revenues from the current Federal income tax year (including amounts received from preparing the appraisal report) that will be derived from any party in interest (or its affiliates) involved in the exemption transaction (expressed as a numerator); and

(ii) The appraiser's revenues from all sources for the prior Federal income tax year (expressed as a denominator).

(d) For those exemption transactions requiring the retention of a qualified independent appraiser, the applicant must include:

(1) A representation that the independent fiduciary prudently selected the appraiser after diligent review of the appraiser's technical training and proficiency with respect to the type of valuation at issue, the appraiser's independence from the plan's counterparties in the exemption transaction, and the absence of any material conflicts of interest with respect to the exemption transaction;

(2) A representation that the appraiser is independent within the meaning of § 2571.31(i); and

(3) A representation that the independent appraiser has appropriate technical training and proficiency with respect to the specific details of the exemption transaction.

(e) For those exemption transactions requiring the retention of a qualified independent fiduciary to represent the interests of the plan, the applicant must include:

(1) A representation that an appropriate fiduciary, without material conflicts of interest, prudently selected the independent fiduciary after diligent review of the independent fiduciary's technical training and proficiency with respect to ERISA, the Code, and the specific details of the exemption transaction, as well as the sufficiency of the independent fiduciary's fiduciary liability insurance;

(2) A representation that the fiduciary retained to act as the independent fiduciary is independent within the meaning of § 2570.31(j);

(3) A representation that the independent fiduciary has appropriate technical training and proficiency with respect to:

(i) ERISA and the Code; and

(ii) The specific details of the exemption transaction.

(f) For exemption transactions requiring the retention of a qualified independent fiduciary to represent the interests of the plan, a statement must be submitted by such independent fiduciary that contains the following written information:

(1) A signed and dated certification that, to the best of the qualified independent fiduciary's knowledge and belief, all the representations made in such statement are true and correct;

(2) A copy of the qualified independent fiduciary's engagement letter and, if applicable, contract with the plan describing the fiduciary's specific duties. The letter or contract may not:

(i) Contain any provisions that violate ERISA section 410;

(ii) Include any provision that provides for the direct or indirect indemnification or reimbursement of the independent fiduciary by the plan or other party for any failure to adhere to its contractual obligations or to state or Federal laws applicable to the independent fiduciary's work, except that the letter or contract may include a provision providing for reimbursement of legal expenses with

respect to claims for any failure to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the independent fiduciary's work, provided that:

(A) The plan determines that the provision is prudent following a good faith determination that the independent fiduciary likely did not fail to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the independent fiduciary's work and will be able to repay the plan; and

(B) The letter or contract requires the independent fiduciary to repay all of the reimbursements, in a timely fashion, if the independent fiduciary enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal law, or has been found liable for breach of contract or violation of any Federal or state laws applicable to the independent fiduciary's work; or

(iii) Waive any rights, claims, or remedies of the plan under ERISA, state, or Federal law against the independent fiduciary with respect to the exemption transaction;

(3)(i) A description of any fiduciary liability insurance policy maintained by the independent fiduciary that includes:

(A) The amount of coverage available to indemnify the plan for damages resulting from a breach by the independent fiduciary of either ERISA, the Code, or any other Federal or state law or its contract or engagement letter; and

(B) Whether the insurance policy contains an exclusion for actions brought by the Secretary or any other Federal, state, or regulatory body; the plan; or plan participants or beneficiaries;

(4) An explanation of the bases for the conclusion that the fiduciary is a qualified independent fiduciary, which also must include a summary of that person's or entity's qualifications to serve in such capacity and a description of any prior experience by that person or entity or other demonstrated characteristics of the fiduciary (such as special areas of expertise) that render that person or entity suitable to perform its duties as a qualified independent fiduciary on behalf of the plan with respect to the exemption transaction;

(5) A detailed description of any relationship that the qualified independent fiduciary has had or may have with the plan and any party in interest involved in the exemption transaction (or its affiliates);

(6) An acknowledgement by the qualified independent fiduciary that it understands its duties and responsibilities under ERISA; is acting as a fiduciary of the plan with respect to the exemption transaction; has no material conflicts of interest with respect to the exemption transaction; and is not acting as an agent or representative of the plan sponsor;

(7) The qualified independent fiduciary's opinion on whether the exemption transaction would be in the interests of the plan and its participants and beneficiaries, protective of the rights of participants and beneficiaries of the plan, and in compliance with the standards set forth in paragraphs (b)(2)(i)(A) through (C) of this section, if applicable, along with a statement of the reasons on which the opinion is based;

(8) If the exemption transaction is continuing in nature, a declaration by the qualified independent fiduciary that it is authorized to take all appropriate actions to safeguard the interests of the plan, and will, during the pendency of the exemption transaction:

(i) Monitor the exemption transaction on behalf of the plan and its participants and beneficiaries on a continuing basis;

(ii) Ensure that the exemption transaction remains in the interests of the plan and its participants and beneficiaries and, if not, take any appropriate actions available under the particular circumstances; and

(iii) Enforce compliance with all conditions and obligations imposed on any party dealing with the plan with respect to the exemption transaction;

(9) The qualified independent fiduciary shall submit a written representation disclosing the percentage of its current revenue that is derived from any party in interest involved in the exemption transaction (or its affiliates) with respect to both the prior Federal income tax year and current Federal income tax year; in general, such percentage shall be computed with respect to the two disclosures by comparing in fractional form:

(i) The amount of the independent fiduciary's projected revenues from the current Federal income tax year that will be derived from parties in interest involved in the exemption transaction and their affiliates (expressed as a numerator); and

(ii) The independent fiduciary's revenues from all sources (excluding fixed, non-discretionary retirement income) for the prior Federal income tax year (expressed as a denominator);

(10) A statement that the independent fiduciary has no conflicts of interest with respect to the exemption transaction that could affect the exercise of its best judgment as a fiduciary;

(11) Either:

(i) A statement that, within the last five years, the independent fiduciary has not been under investigation or examination by, and has not engaged in litigation, or a continuing controversy with the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other Federal or state entity involving:

(A) Compliance with provisions of ERISA or FERSA;

(B) Its representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(C) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(D) Income tax evasion; or

(E) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(ii) A statement describing the applicable investigation, examination, litigation, or controversy; and

(12)(i)(A) Either a statement that, within the last 13 years, the independent fiduciary has not been:

(*1*) Convicted or released from imprisonment, whichever is later, as a result of any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any crime identified in ERISA section 411, regardless of whether the conviction occurred in a U.S. or foreign jurisdiction; or

(*2*) Convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime that is substantially equivalent to an offense described in paragraph (f)(12)(i)(A)(*1*) of this section; or

(B) A statement describing a conviction or release from imprisonment described in paragraph (f)(12)(i)(A) of this section.

(ii) For purposes of this paragraph (f), a person shall be deemed to have been ''convicted'' from the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. Federal or state trial court), regardless of whether that judgment remains under appeal, and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal.

(g) Statements, as applicable, from other third-party experts, including but not limited to economists or market specialists, submitted on behalf of the plan to support an exemption application must be accompanied by a statement of consent from such expert acknowledging that the statement prepared on behalf of the plan is being submitted to the Department as part of an exemption application. Such statements must also contain the following written information:

(1) A copy of the expert's engagement letter and, if applicable, contract with the plan describing the specific duties the expert will undertake;

(2) A summary of the expert's qualifications to serve in such capacity; and

(3) A detailed description of any relationship that the expert has had or may have with any party in interest (or its affiliates) involved in the exemption transaction that may influence the actions of the expert.

(h) An application for exemption may also include a draft of the requested exemption which describes the exemption transaction and parties in interest for which exemptive relief is sought and the specific conditions under which the exemption would apply.

§ 2570.35 Information to be included in applications for individual exemptions only.

(a) Except as provided in paragraph (c) of this section, every application for an individual exemption must include, in addition to the information specified in § 2570.34, the following information:

(1) The name, address, email address, telephone number, and type of plan or plans to which the requested exemption applies;

(2) The Employer Identification Number (EIN) and the plan number (PN) used by such plan or plans in all reporting and disclosure required by the Department (individuals should not submit Social Security numbers);

(3) Whether any plan or trust affected by the requested exemption is currently under investigation for violation of, or has ever been found by the Department, the Internal Revenue Service, or by a court to have violated, the exclusive benefit rule of Code section 401(a), Code section 4975(c)(1), ERISA sections 406 or 407(a), or 5 U.S.C. 8477(c)(3), including a description of the circumstances surrounding such violation;

(4) Whether any relief under ERISA section 408(a), Code section 4975(c)(2), or 5 U.S.C. 8477(c)(3) has been requested by, or provided to, the applicant or any parties in interest (or their affiliates) involved in the exemption transaction and, if so, the exemption application number or the prohibited transaction exemption number;

(5) Whether the applicant or any party in interest (or its affiliates) involved in the exemption transaction is currently, or has been within the last five years, a defendant in any lawsuits or criminal actions concerning its conduct as a fiduciary or party in interest with respect to any plan (other than lawsuits with respect to a routine claim for benefits), and a description of the circumstances of the lawsuits or criminal actions;

(6)(i) Whether the applicant (including any person described in § 2570.34(b)(6)(ii)) or any of the parties in interest involved in the exemption transaction has, within the last 13 years, been:

(A) Convicted or released from imprisonment, whichever is later, as a result of any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any crime identified in ERISA section 411, regardless of whether the conviction occurred in a U.S. or foreign jurisdiction; or

(B) Convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in paragraph (a)(6)(i)(A) of this section and a description of the circumstances of any such conviction in paragraph (a)(6)(i)(A) or this paragraph (a)(6)(i)(B); and

(ii) For purposes of this paragraph (a), a person shall be deemed to have been ''convicted'' from the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. Federal or state trial court), regardless of whether that judgment remains under appeal and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal;

(7) Whether, within the last five years, any plan affected by the exemption transaction, the applicant, or any party in interest (or its affiliates) involved in the exemption transaction, has been under investigation or examination by, or has been engaged in litigation or a continuing controversy with, the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other regulatory body involving compliance with provisions of ERISA, FERSA, the Code, or any other Federal or state law involving:

(i) Compliance with provisions of ERISA or FERSA;

(ii) Representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(iii) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(iv) Income tax evasion; or

(v) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities. If so, the applicant must provide a brief statement describing the investigation, examination, litigation, or controversy. The Department reserves the right to require the production of additional information or documentation concerning any of the matters in this paragraph (a)(7). In this regard, a denial of the exemption application may result from an applicant's failure to provide additional information requested by the Department;

(8) Whether any plan affected by the requested exemption has experienced a reportable event under ERISA section 4043, and, if so, a description of the circumstances of any such reportable event;

(9) Whether a notice of intent to terminate has been filed under ERISA section 4041 with respect to any plan affected by the requested exemption, and, if so, a description of the

circumstances for the issuance of the notice;

(10) Names, addresses, phone numbers, and email addresses of all parties in interest (or their affiliates) involved in the exemption transaction;

(11) The estimated number of participants and beneficiaries in each plan affected by the requested exemption as of the date of the application;

(12) The percentage of the fair market value of the total assets of each affected plan that is involved in the exemption transaction. If the exemption transaction includes the acquisition of an asset by the plan, the fair market value of the asset to be acquired must be included in both the numerator and denominator of the fraction;

(13) Whether the exemption transaction has been consummated or will be consummated only if the exemption is granted;

(14) If the exemption transaction has already been consummated:

(i) The circumstances which resulted in plan fiduciaries causing the plan(s) to engage in the exemption transaction before obtaining an exemption from the Department;

(ii) Whether the exemption transaction has been terminated;

(iii) Whether the exemption transaction has been corrected as defined in Code section 4975(f)(5);

(iv) Whether Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, has been filed with the Internal Revenue Service with respect to the exemption transaction; and

(v) Whether any excise taxes due under Code section 4975(a) and (b), or any civil penalties due under ERISA section 502(i) or (l) by reason of the exemption transaction have been paid. If so, the applicant should submit documentation (*e.g.,* a canceled check) demonstrating that the excise taxes or civil penalties were paid;

(15) The name of every person who has authority or investment discretion over any plan assets involved in the exemption transaction and the relationship of each such person to the parties in interest involved in the exemption transaction and the affiliates of such parties in interest;

(16) Whether the assets of the affected plan(s) are invested, directly or indirectly, in:

(i) loans to any party in interest (or its affiliates) involved in the exemption transaction;

(ii) Property leased to any party in interest (or its affiliates) involved in the exemption transaction; or

(iii) Securities issued by any party in interest (or its affiliates) involved in the exemption transaction, and, if such investments exist, a statement for each of these three types of investments which indicates:

(A) The type of investment to which the statement pertains;

(B) The aggregate fair market value of all investments of this type as reflected in the plan's most recent annual report;

(C) The approximate percentage of the fair market value of the plan's total assets as shown in such annual report that is represented by all investments of this type; and

(D) The statutory or administrative exemption covering these investments, if any;

(17) The approximate aggregate fair market value of the total assets of each affected plan;

(18) The person(s) or entity who will bear the costs of:

(i) The exemption application;

(ii) Any commissions, fees, or costs associated with the exemption transaction, and any related transaction; and

(iii) Notifying interested persons;

(19) Whether an independent fiduciary is or will be involved in the exemption transaction and, if so, the names of the persons who will bear the cost of the fee payable to such fiduciary; and

(20) Any prior transaction between:

(i) The plan or plan sponsor; and

(ii) Any party in interest (or its affiliates) involved in the exemption transaction.

(b) Each application for an individual exemption must also include:

(1) True copies of all contracts, deeds, agreements, and instruments, as well as relevant portions of plan documents, trust agreements, and any other documents bearing on the exemption transaction;

(2) A discussion of the facts relevant to the exemption transaction that are reflected in the documents listed in paragraph (b)(1) of this section and an analysis of their bearing on the requested exemption;

(3) A copy of the most recent financial statements of each plan affected by the requested exemption; and

(4) A net worth statement with respect to any party that is providing a personal guarantee with respect to the exemption transaction.

(c) Special rules for applications for individual exemption involving pooled funds are as follows:

(1) The information required by paragraphs (a)(8) through (12) of this section is not required to be furnished in an application for individual exemption involving one or more pooled funds.

(2) The information required by paragraphs (a)(1) through (7) and (13) through (19) of this section and by paragraphs (b)(1) through (3) of this section must be furnished in reference to the pooled fund, rather than to the plans participating therein. (For purposes of this paragraph (c)(2), the information required by paragraph (a)(16) of this section relates solely to other pooled fund transactions with, and investments in, parties in interest involved in the exemption transaction which are also sponsors of plans which invest in the pooled fund.)

(3) The following information must also be furnished—

(i) The estimated number of plans that are participating (or will participate) in the pooled fund; and

(ii) The minimum and maximum limits imposed by the pooled fund (if any) on the portion of the total assets of each plan that may be invested in the pooled fund.

(4) Additional requirements for applications for individual exemptions involving pooled funds in which certain plans participate are as follows:

(i) This paragraph (c)(4) applies to any application for an individual exemption involving one or more pooled funds in which any plan participating therein—

(A) Invests an amount which exceeds 20 percent of the total assets of the pooled fund; or

(B) Covers employees of:

(*1*) The party sponsoring or maintaining the pooled fund, or any affiliate of such party; or

(*2*) Any fiduciary with investment discretion over the pooled fund's assets, or any affiliate of such fiduciary.

(ii) The exemption application must include, with respect to each plan described in paragraph (c)(4)(i) of this section, the information required by paragraphs (a)(1) through (3), (5) through (7), (10), (12) through (16), (18), and (19) of this section. The information required by this paragraph (c)(4)(ii) must be furnished in reference to the plan's investment in the pooled fund (*e.g.,* the names, addresses, phone numbers, and email addresses of all fiduciaries responsible for the plan's investment in the pooled fund (paragraph (a)(10) of this section), the percentage of the assets of the plan invested in the pooled fund (paragraph (a)(12) of this section), whether the plan's investment in the pooled fund has been consummated or will be consummated only if the exemption is granted (paragraph (a)(13) of this section, etc.)).

(iii) The information required by this paragraph (c)(4) is in addition to the information required by paragraphs

(c)(2) and (3) of this section relating to information furnished by reference to the pooled fund.

(5) The special rule and the additional requirements described in paragraphs (c)(1) through (4) of this section do not apply to an individual exemption request solely for the investment by a plan in a pooled fund. Such an application must provide the information required by paragraphs (a) and (b) of this section.

(d)(1) Generally, the Department will consider exemption requests for retroactive relief only when:

(i) The safeguards necessary for the grant of a prospective exemption were in place at the time the parties entered into the exemption transaction; and

(ii) The plan and its participants and beneficiaries have not been harmed by the exemption transaction. An applicant for a retroactive exemption must demonstrate that the responsible plan fiduciaries acted in good faith by taking all appropriate steps necessary to protect the plan from abuse, loss, and risk at the time of the exemption transaction. An applicant should further explain and describe whether the exemption transaction could have been performed without engaging in a prohibited exemption transaction, and whether the goals of the transaction could have been achieved through an alternative transaction that served the aims of the plan equally well.

(2) Among the factors that the Department will consider in making a finding that an applicant acted in good faith include the following:

(i) The involvement of an independent fiduciary before an exemption transaction occurs who acts on behalf of the plan and is qualified to negotiate, approve, and monitor the exemption transaction; provided, however, the Department may consider, at its sole discretion, an independent fiduciary's appointment and retrospective review after completion of the exemption transaction due to exigent circumstances;

(ii) The existence of a contemporaneous appraisal by a qualified independent appraiser or reference to an objective third party source, such as a stock or bond index;

(iii) The existence of a bidding process or evidence of comparable fair market transactions with unrelated third parties;

(iv) That the applicant has submitted an accurate and complete exemption application that contains documentation of all necessary and relevant facts and representations upon which the applicant relied. In this regard, the Department will accord appropriate weight to facts and representations which are prepared and certified by a source independent of the applicant;

(v) That the applicant has submitted evidence that the plan fiduciary did not engage in an act or transaction with respect to which the fiduciary should have known, consistent with its ERISA fiduciary duties and responsibilities, was prohibited under ERISA section 406 and/or Code section 4975. In this regard, the Department will accord appropriate weight to the submission of a contemporaneous, reasoned legal opinion of counsel, upon which the plan fiduciary relied in good faith before engaging in the act or transaction;

(vi) That the applicant has submitted a statement of the circumstances which prompted the submission of the application for exemption and the steps taken by the applicant about the exemption transaction upon discovery of the violation;

(vii) That the applicant has submitted a statement, prepared and certified by an independent person familiar with the types of transactions for which relief is requested, demonstrating that the terms and conditions of the exemption transaction (including, in the case of an investment, the return in fact realized by the plan) were at least as favorable to the plan as that obtainable in a similar transaction with an unrelated party; and

(viii) Such other undertakings and assurances with respect to the plan and its participants that may be offered by the applicant which are relevant to the criteria under ERISA section 408(a) and Code section 4975(c)(2).

(3) The Department, as a general matter, will not consider requests for retroactive exemptions if transactions or conduct with respect to which an exemption is requested resulted in a loss to the plan, as determined pursuant to the facts existing at the time of the exemption application. In addition, the Department will not consider requests for exemptions if the transactions are inconsistent with the general fiduciary responsibility provisions of ERISA sections 403 or 404 or the exclusive benefit requirements of Code section 401(a).

§ 2570.36 Where to file an application.

The Department's prohibited transaction exemption program is administered by the Employee Benefits Security Administration (EBSA). Any exemption application governed by this subpart may be emailed to the Department at *e-OED@dol.gov.* The applicant is not required to submit a paper copy if an electronic copy is submitted. An applicant may submit a paper copy of the application by mailing it via first-class mail to: Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor, 200 Constitution Avenue NW, Suite 400 Washington, DC 20210 or via private carrier service to Employee Benefit Security Administration, U.S. Department of Labor, Office of Exemption Determinations, 122 C Street NW, Suite 400, Washington, DC 20001–2109. The mail or private carrier service addresses, however, are subject to change, and the applicant should confirm the address with the Office of Exemption Determinations before submitting a paper copy of an application.

§ 2570.37 Duty to amend and supplement exemption applications.

(a) During the Department's consideration of an exemption application and following any grant by the Department of an exemption request, an applicant must promptly notify the Department in writing if they discover that any material fact or representation contained in the application or in any documents or testimony provided in support of the application was inaccurate at the time it was provided to the Department in support of the application. If any material fact or representation changes during this period, or if anything occurs that may affect the continuing accuracy of any such fact or representation, the applicant must promptly notify the Department in writing of the change. In addition, an applicant must promptly notify the Department in writing if it learns that a material fact or representation has been omitted from the exemption application.

(b) If, at any time during the pendency of an exemption application, the applicant or any other party in interest who would participate in the exemption transaction becomes the subject of an investigation or enforcement action by the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other Federal or state governmental entity involving:

(1) Compliance with provisions of ERISA or FERSA;

(2) Representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(3) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(4) Income tax evasion; or

(5) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities, the applicant must promptly notify the Department.

(c) The Department may require an applicant to provide any documentation it considers necessary to verify any statements contained in the application or in supporting materials or documents.

§ 2570.38 Tentative denial letters.

(a) If, after reviewing an exemption file, the Department tentatively concludes that it will not propose or grant the exemption, it will notify the applicant in writing. At the same time the Department provides the notification, the Department will also provide a brief statement of the reasons for its tentative denial.

Note 1 to paragraph (a). As referenced in § 2570.33(a)(1), the Department will not hold a conference with, or issue a tentative denial letter to, an applicant who does not submit a complete application, or an applicant who does not provide current information.

(b) An applicant will have 20 days from the date of a tentative denial letter, unless the Department extends the time period at its sole discretion, to request a conference under § 2570.40 and/or to notify the Department of its intent to submit additional information under § 2570.39. If the Department does not receive a request for a conference or a notification of intent to submit additional information within that time, it will issue a final denial letter pursuant to § 2570.41.

§ 2570.39 Opportunities to submit additional information.

(a) An applicant may notify the Department of its intent to submit additional information supporting an exemption application by telephone, by letter sent to the address furnished in the applicant's tentative denial letter, or electronically to the email address provided in the applicant's tentative denial letter. At the same time, the applicant should indicate generally the type of information that will be submitted.

(b) The additional information an applicant intends to provide in support of the application must be in writing and received by the Department within 40 days from the date the Department issues the tentative denial letter unless the Department extends the time period at its sole discretion. All such information must be accompanied by a certification that all information provided to the Department is true and correct, and the certification must be dated and signed by a person qualified under § 2570.34(b)(6) to sign such a declaration. The information may be submitted either electronically or by mail to the address specified in the letter.

(c) If, for reasons beyond its control, an applicant is unable to submit all the additional information they intend to provide in support of their application within the period described in paragraph (b) of this section, they may request an extension of time to furnish the information. Such requests must be made before the expiration of the time period described in paragraph (b), and the request will be granted, in the Department's sole discretion, only in unusual circumstances and for a limited period as determined by the Department. The request may be made by telephone, mail, or electronically.

(d) The Department will issue, without further notice, either by mail or electronically, a final denial letter denying the requested exemption pursuant to § 2570.41 if—

(1) The Department has not received the additional information that the applicant stated their intention to submit within the period described in paragraph (b) of this section, or within any additional period granted pursuant to paragraph (c) of this section; and

(2) The applicant did not request a conference pursuant to § 2570.38(b).

§ 2570.40 Conferences.

(a) Any conference between the Department and an applicant pertaining to a requested exemption will be held in Washington, DC, except that a telephone or electronic conference will be held at the applicant's request.

(b) An applicant is entitled to only one conference with respect to any exemption application. The Department may hold additional conferences at its sole discretion if it determines additional conference(s) are appropriate. An applicant will not be entitled to a conference, however, if the Department has held a hearing on the exemption under either § 2570.46 or § 2570.47.

(c) Insofar as possible, conferences will be scheduled as joint conferences with all applicants present if:

(1) More than one applicant has requested an exemption with respect to the same or similar types of transactions;

(2) The Department is considering the applications together as a request for a class exemption;

(3) The Department contemplates not granting the exemption; and

(4) More than one applicant has requested a conference.

(d) In instances where the applicant has requested a conference pursuant to § 2570.38(b) and also has submitted additional information pursuant to § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 20 days after the date on which the Department has provided either oral or written notification to the applicant that, after reviewing the additional information, it still is not prepared to propose the requested exemption or a later date determined at the Department's sole discretion. If, for reasons beyond its control, the applicant cannot attend a conference within the time limit described in this paragraph (d), the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(e) In instances where the applicant has requested a conference pursuant to § 2570.38(b) but has not expressed an intent to submit additional information in support of the exemption application as provided in § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 40 days after the date of the issuance of the tentative denial letter described in § 2570.38(a) or a later date determined at the sole discretion of the Department. If, for reasons beyond its control, the applicant cannot attend a conference within the time limit described in this paragraph (e), the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(f) In instances where the applicant has requested a conference pursuant to § 2570.38(b), notified the Department of its intent to submit additional information pursuant to § 2570.39, and failed to furnish such information within 40 days after the date of issuance of the tentative denial letter, the Department will schedule a conference under this section for a date and time that occurs within 60 days after the date of the issuance of the tentative denial letter described in § 2570.38(a) or a later date as determined at the sole discretion of the Department. If, for reasons

beyond its control, the applicant cannot attend a conference within the time limit described in this paragraph (f), the applicant may request an extension of time to schedule a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(g) If the applicant fails to either timely schedule or appear for a conference agreed to by the Department pursuant to this section, the applicant will be deemed to have waived its right to a conference.

(h) Within 20 days after the date of any conference held under this section, or a later date determined at the sole discretion of the Department, the applicant may submit to the Department (electronically or in paper form) any additional written data, arguments, or legal authorities discussed at the conference but not previously or adequately presented in writing. If, for reasons beyond its control, the applicant is unable to submit the additional information within this time limit, the applicant may request an extension of time to furnish the information, provided that such request is made before the expiration of the time limit described in this paragraph (h). The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(i) The Department, at its sole discretion, may hold a conference with any party, including the qualified independent fiduciary or the qualified independent appraiser, regarding any matter related to an exemption request without the presence of the applicant or other parties involved in the exemption transaction, or their representatives. Any such conferences may occur in addition to the conference with the applicant described in paragraph (b) of this section.

§ 2570.41 Final denial letters.

The Department will issue a final denial letter denying a requested exemption, either by mail or electronically, if:

(a) Before issuing a tentative denial letter under § 2570.38 or conducting a hearing on the exemption under either § 2570.46 or § 2570.47, the Department determines at its sole discretion that:

(1) The applicant has failed to submit information requested by the Department in a timely manner;

(2) The information provided by the applicant does not meet the requirements of §§ 2570.34 and 2570.35; or

(3) A conference was held between the Department and the applicant before the Department issued a tentative denial letter during which the Department and the applicant addressed the reasons for denial that otherwise would have been set forth in a tentative denial letter pursuant to § 2570.38;

(b) The conditions for issuing a final denial letter specified in § 2570.38(b) or § 2570.39(d) are satisfied;

(c) After issuing a tentative denial letter under § 2570.38 and considering the entire record in the case, including all written information submitted pursuant to §§ 2570.39 and 2570.40, the Department decides not to propose an exemption or to withdraw an exemption it already proposed;

(d) After proposing an exemption and conducting a hearing on the exemption under either § 2570.46 or § 2570.47 and after considering the entire record in the case, including the record of the hearing and any public comments, the Department decides to withdraw the proposed exemption; or

(e) The applicant either:

(1) Requests for the Department to withdraw the exemption application; or

(2) Communicates to the Department that it is not interested in continuing the application process.

§ 2570.42 Notice of proposed exemption.

If the Department tentatively decides that an administrative exemption is warranted, it will publish a notice of a proposed exemption in the **Federal Register**. In addition to providing notice of the pendency of the exemption before the Department, the notice will:

(a) Explain the exemption transaction and summarize the information and reasons in support of proposing the exemption;

(b) Describe the scope of relief and any conditions of the proposed exemption;

(c) Inform interested persons of their right to submit comments to the Department (either electronically or in writing) relating to the proposed exemption and establish a deadline for receipt of such comments; and

(d) If the proposed exemption includes relief from the prohibitions of ERISA section 406(b), Code section 4975(c)(1)(E) or (F), or FERSA section 8477(c)(2), inform interested persons who are materially affected by the grant of the exemption of their right to request a hearing under § 2570.46 and establish a deadline for hearing requests to be submitted.

§ 2570.43 Notification of interested persons by applicant.

(a) If a notice of proposed exemption is published in the **Federal Register** in accordance with § 2570.42, the applicant must notify interested persons of the pendency of the exemption in the manner and within the time period specified in the application. If the Department determines that this notification would be inadequate, the applicant must obtain the Department's consent as to the manner and time period of providing the notice to interested persons. Any such notification must include:

(1) A copy of the notice of proposed exemption as published in the **Federal Register**; and

(2) A supplemental statement in the following form:

You are hereby notified that the United States Department of Labor is considering granting an exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, the Internal Revenue Code of 1986, or the Federal Employees' Retirement System Act of 1986. The exemption under consideration is summarized in the enclosed [Summary of Proposed Exemption and described in greater detail in the accompanying] [1] Notice of Proposed Exemption. As a person who may be affected by this exemption, you have the right to comment on the proposed exemption by [date].[2] [If you may be materially affected by the grant of the exemption, you also have the right to request a hearing on the exemption by [date].] [3]

All comments and/or requests for a hearing should be addressed to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5461,[4] U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, ATTENTION: Application No.____.[5] Comments and hearing requests may also be transmitted to the Department electronically at *e-OED@dol.gov* or at *https://www.regulations.gov* (follow instructions for submission), and should prominently reference the application

[1] To be added in instances where the Department requires the applicant to furnish a Summary of Proposed Exemption to interested persons as described in paragraph (d) of this section.

[2] The applicant will write in this space the date of the last day of the time period specified in the notice of proposed exemption.

[3] To be added in the case of an exemption that provides relief from ERISA section 406(b) or corresponding sections of the Code or FERSA.

[4] The applicant will fill in the room number of the Office of Exemptions Determinations. As of January 24, 2024, the room number of the Office of Exemption Determinations is N–5461.

[5] The applicant will fill in the exemption application number, which is stated in the notice of proposed exemption, as well as in all correspondence from the Department to the applicant regarding the application.

number listed above. Individuals submitting comments or requests for a hearing on this matter are advised not to disclose sensitive personal data, such as social security numbers or information that they consider confidential or otherwise protected.

The Department will make no final decision on the proposed exemption until it reviews the comments received in response to the enclosed notice. If the Department decides to hold a hearing on the exemption request before making its final decision, you will be notified of the time and place of the hearing.

(b) The method used by an applicant to furnish notice to interested persons must be reasonably calculated to ensure that interested persons actually receive the notice. In all cases, personal delivery and delivery by first-class mail will be considered reasonable methods of furnishing notice. If the applicant elects to furnish notice electronically, they must provide satisfactory proof that the entire class of interested persons will be able to receive the notice.

(c) After furnishing the notification described in paragraph (a) of this section, an applicant must provide the Department with a written statement confirming that notice was furnished in accordance with the requirements in paragraph (b) of this section. This statement must be accompanied by a certification that the information provided in the statement and signed by a person qualified under § 2570.34(b)(6) to sign such a declaration is true and correct. No exemption will be granted until the applicant furnishes such a certification to the Department.

(d) In addition to the provision of notification required by paragraph (a) of this section, the Department, in its sole discretion, may also require an applicant to furnish interested persons with a brief summary of the proposed exemption (Summary of Proposed Exemption), written in a manner calculated to be understood by the average recipient, which objectively describes:

(1) The exemption transaction and the parties in interest thereto;

(2) Why the exemption transaction would violate the prohibited transaction provisions of ERISA, the Code, and/or FERSA from which relief is sought;

(3) The reasons why the plan seeks to engage in the exemption transaction; and

(4) The conditions and safeguards proposed to protect the plan and its participants and beneficiaries from potential abuse or unnecessary risk of loss in the event the Department grants the exemption.

(e) Applicants who are required to provide interested persons with the Summary of Proposed Exemption described in paragraph (d) of this section shall furnish the Department with a copy of such summary for review and approval before its distribution to interested persons. Such applicants shall also provide confirmation to the Department that the Summary of Proposed Exemption was furnished to interested persons as part of the written statement and declaration required of exemption applicants by paragraph (c) of this section.

§ 2570.44 Withdrawal of exemption applications.

(a) An applicant may withdraw an application for an exemption at any time by oral or written (including electronic) notice to the Department. A withdrawn application generally shall not prejudice any subsequent applications for the same exemption transaction submitted by an applicant.

(b) Upon receiving an applicant's notice of withdrawal regarding an application for an individual exemption, the Department will issue a final denial letter in accordance with § 2570.41(e) and will terminate all proceedings relating to the application. If a notice of proposed exemption has been published in the **Federal Register**, the Department will publish a notice in the **Federal Register** withdrawing the proposed exemption.

(c) Upon receiving an applicant's notice of withdrawal regarding an application for a class exemption or an individual exemption that is being considered with other applications as a request for a class exemption, the Department will inform any other applicants for the exemption of the withdrawal. The Department will continue to process other applications for the same exemption. If all applicants for a particular class exemption withdraw their applications, the Department may either terminate all proceedings relating to the exemption or propose the exemption on its own motion.

(d) If, following the withdrawal of an exemption application, an applicant decides to reapply for the same exemption, they may contact the Department in writing (including electronically) to request the Department to reinstate the application. The applicant should refer to the application number assigned to the original application. If, at the time the original application was withdrawn, any additional information required to be submitted to the Department under § 2570.39 was outstanding, that information must accompany the request for reinstatement of the application. The applicant must also update all previously furnished information to the Department in connection with a withdrawn application.

(e) Any request for reinstatement of a withdrawn application submitted in accordance with paragraph (d) of this section will be granted by the Department, and the Department will take whatever steps remained to process the application when the applicant withdrew the application.

(f) Following the withdrawal of an exemption application, the administrative record will remain subject to public inspection and copy pursuant to § 2570.51.

§ 2570.45 Requests for reconsideration.

(a) The Department will entertain one request for reconsideration of an exemption application that the Department has denied pursuant to § 2570.41 if the applicant either:

(1) Presents significant new facts or arguments in support of the application, which, for good reason, could not have been submitted for the Department's consideration during its initial review of the exemption application; or

(2) The applicant received a final denial letter pursuant to § 2570.41(a) before the Department issued a tentative denial letter under § 2570.38 or conducted a hearing on the exemption under either § 2570.46 or § 2570.47.

(b) An applicant must submit a request for reconsideration of a previously denied application within 180 days after the issuance of the final denial letter and include with the request a copy of the Department's final denial letter and a statement setting forth the new information and/or arguments that provide the basis for reconsideration.

(c) A request for reconsideration must also be accompanied by a certification that the new information provided to the Department is true and correct, which is signed by a person qualified under § 2570.34(b)(6) to sign the certification.

(d) If, after reviewing a request for reconsideration, the Department decides that the facts and arguments presented do not warrant reversal of its original decision to deny the exemption, it will send a letter to the applicant reaffirming that decision.

(e) If, after reviewing a request for reconsideration, the Department decides to reconsider its final denial letter based on the new facts and arguments submitted by the applicant, it will notify the applicant of its intent to reconsider

the application in light of the new information presented. The Department will then take whatever steps remained to be completed to process the exemption application when it issued its final denial letter.

(f) If, at any point during its subsequent processing of the application, the Department decides again that the exemption is unwarranted, it will issue a letter to the applicant affirming its final denial.

(g) The Department does not consider a request for reinstatement of an exemption application pursuant to § 2570.44(d) as a request for reconsideration governed by this section.

(h) If an applicant whose application was finally denied pursuant to § 2570.41(a)(1) or (2) cures the application by providing all required and requested information upon submission for reconsideration, the Department will reconsider the application under paragraph (e) of this section. If, upon reconsideration, the Department concludes that an exemption is not warranted, the Department will either hold a conference with the applicant under § 2570.40 or issue a tentative denial pursuant to the procedures in § 2570.38.

§ 2570.46 Hearings in opposition to exemptions from restrictions on fiduciary self-dealing and conflicts of interest.

(a) Any person who may be materially affected by an exemption which the Department proposes to grant from the restrictions of ERISA section 406(b), Code section 4975(c)(1)(E) or (F), or FERSA section 8477(c)(2) may request a hearing before the Department within the time period specified in the **Federal Register** notice of the proposed exemption. Any such request must state:

(1) The name, address, telephone number, and email address of the person making the request;

(2) The nature of the person's interest in the exemption and how the person would be materially affected by the exemption; and

(3) A statement of the issues to be addressed and a general description of the evidence to be presented at the hearing.

(b) The Department will grant a request for a hearing made in accordance with paragraph (a) of this section if a hearing is necessary to fully explore material factual issues with respect to the proposed exemption identified by the person requesting the hearing. The Department will publish a notice of such hearing in the **Federal Register**. The Department may decline to hold a hearing if:

(1) The request for the hearing is not timely, or otherwise fails to include the information required by paragraph (a) of this section;

(2) The only issues identified for exploration at the hearing are matters of law; or

(3) The factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

(c) An applicant for an exemption must notify interested persons if the Department schedules a hearing on the exemption. Such notification must be provided in the form, time, and manner prescribed by the Department. Ordinarily, however, adequate notification can be given by providing to interested persons a copy of the notice of hearing published by the Department in the **Federal Register** within 10 days after its publication, using any of the methods approved in § 2570.43(b).

(d) After furnishing the notice required by paragraph (c) of this section, an applicant must submit a statement confirming that notice was given in the form, manner, and time prescribed. This statement must be accompanied by a certification that the information provided in the statement is true and correct, which is signed by a person qualified under § 2570.34(b)(6) to sign a certification.

§ 2570.47 Other hearings.

(a) In its sole discretion, the Department may schedule a hearing on its own motion if it determines that issues relevant to the exemption can be most fully or expeditiously explored at a hearing. The Department shall publish a notice of such hearing in the **Federal Register**.

(b) An applicant for an exemption must notify interested persons of any hearing on an exemption scheduled by the Department in the manner described in § 2570.46(c). In addition, the applicant must submit a certification subscribed as true and correct like that required in § 2570.46(d).

§ 2570.48 Decision to grant exemptions.

(a) The Department may not grant an exemption under ERISA section 408(a), Code section 4975(c)(2), or 5 U.S.C. 8477(c)(3)(C) unless, following evaluation of the facts and representations comprising the administrative record of the proposed exemption (including any comments received in response to a notice of proposed exemption and the record of any hearing held in connection with the proposed exemption), it finds that the exemption meets the statutory requirements by being:

(1) Administratively feasible for the Department;

(2) In the interests of the plan (or the Thrift Savings Fund in the case of FERSA) and of its participants and beneficiaries; and

(3) Protective of the rights of participants and beneficiaries of such plan (or the Thrift Savings Fund in the case of FERSA).

(b) In each instance where the Department determines to grant an exemption, it shall publish a notice in the **Federal Register** which summarizes the transaction or transactions for which exemptive relief has been granted and specifies the conditions under which such exemptive relief is available.

§ 2570.49 Limits on the effect of exemptions.

(a) An exemption does not take effect with respect to the exemption transaction unless the material facts and representations contained in the application and in any materials and documents submitted in support of the application were true and complete at the time of the submission of such material.

(b) An exemption is effective only for the period of time specified and only under the conditions set forth in the exemption.

(c) Only the specific parties to whom an exemption grants relief may rely on the exemption. If the notice granting an exemption does not limit exemptive relief to specific parties, all parties to the exemption transaction may rely on the exemption.

(d) For exemption transactions that are continuing in nature, an exemption ceases to be effective if, during the continuation of the exemption transaction, there are material changes to the original facts and representations underlying such exemption or if one or more of the exemption's conditions cease to be met.

(e) The determination as to whether, under the totality of the facts and circumstances, a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation is made by the Department in its sole discretion.

§ 2570.50 Revocation or modification of exemptions.

(a) If, after an exemption takes effect, material changes in facts, circumstances, or representations occur, including whether a qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the Department, at its sole discretion, may take steps to revoke or modify the exemption. If the qualified independent

fiduciary resigns, is terminated, or is convicted of a crime, the applicant must notify the Department within 30 days of the resignation, termination, or conviction, and the Department reserves the right to request the applicant to provide the Department with any of the information required pursuant to § 2570.34(e) and (f) pursuant to a time determined by the Department at its sole discretion.

(b) Before revoking or modifying an exemption, the Department will publish a notice of its proposed action in the **Federal Register** and provide interested persons with an opportunity to comment on the proposed revocation or modification. Before the Department publishes such notice, it will notify the applicant of the Department's proposed action and the reasons therefore. After the publication of the notice, the applicant will have the opportunity to comment on the proposed revocation or modification.

(c) The revocation or modification of an exemption will have prospective effect only.

§ 2570.51 Public inspection and copies.

(a) From the date the administrative record of each exemption is established pursuant to § 2570.32(d), the administrative record of each exemption will be open for public inspection and copying at the EBSA Public Disclosure Room, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

(b) Upon request, the staff of the Public Disclosure Room will furnish photocopies of an administrative record, or any specified portion of that record, for a specified charge per page; or, at the discretion of the Department, provide the administrative record electronically for a specified charge.

§ 2570.52 Effective date.

This subpart is effective with respect to all exemptions filed with or initiated by the Department under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3) at any time on or after April 8, 2024. Applications for exemptions under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3) filed on or after December 27, 2011, but before April 8, 2024, are governed by 29 CFR part 2570 (revised effective December 27, 2011).

Signed at Washington, DC, this 9th day of January 2024.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2024–00586 Filed 1–23–24; 8:45 am]

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Part III

Commodity Futures Trading Commission

17 CFR Parts 1 and 23

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

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1 and 23

RIN 3038–AF23

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

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is proposing to require that futures commission merchants, swap dealers, and major swap participants establish, document, implement, and maintain an Operational Resilience Framework reasonably designed to identify, monitor, manage, and assess risks relating to information and technology security, third-party relationships, and emergencies or other significant disruptions to normal business operations. The framework would include three components—an information and technology security program, a third-party relationship program, and a business continuity and disaster recovery plan—supported by broad requirements relating to governance, training, testing, and recordkeeping. The proposed rule would also require certain notifications to the Commission and customers or counterparties. The Commission is further proposing guidance relating to the management of risks stemming from third-party relationships.

DATES: Comments must be received on or before March 2, 2024.

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

- *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.
- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

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

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in Commission regulation 145.9.[1]

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

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

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

In 2012 and 2013, the Commission adopted rules requiring that futures commission merchants (FCMs),[2] swap dealers (SDs) [3] and major swap

[1] 17 CFR 145.9. The Commission's regulations are found at 17 CFR chapter I (2022).

[2] *See* 7 U.S.C. 1a(28), 17 CFR 1.3 (defining ''futures commission merchant'').

[3] *See* 7 U.S.C. 1a(49), 17 CFR 1.3 (defining ''swap dealer'').

participants (MSPs)[4] establish risk management programs (RMPs).[5] The rules require that SDs and MSPs (together, swap entities) and FCMs design their RMPs to monitor and manage the risks associated with their activities as swap entities or FCMs.[6] Such risks include, but are not limited to, market, credit, liquidity, segregation, settlement, capital, and operational risk.[7] Taken together, the RMP rules support a unified Commission objective: to require FCMs and swap entities (collectively, covered entities) to establish comprehensive risk management practices to mitigate systemic risk and promote customer protection.[8] Recognizing that covered entities vary in size and complexity, the RMP rules identify certain elements that must, at a minimum, be included as part of the RMP, and require that certain risks must be taken into account; but the rules otherwise allow covered entities flexibility to design RMPs tailored to their circumstances and organizational structures.[9]

In the decade since the RMP rules were adopted, covered entities have encountered a wide variety of challenging conditions, including Brexit, the LIBOR transition, the COVID–19 pandemic stress period, the invasion of Ukraine, and general interest rate increases to tame inflation. Throughout this period, the Commission has, through its various oversight activities, observed that adherence to its RMP rules has supported covered entities' ability to withstand and recover from market challenges. The Commission therefore believes the RMP rules have helped establish a solid foundation of risk management among covered entities across various risk types, promoting a solid baseline standard of risk management that reduces overall systemic risk and enhances the Commission's customer protections.

Nevertheless, the Commission believes it has identified opportunities to adapt its regulations to further promote sound risk management practices, reduce risk to the U.S. financial system, and protect commodity interest customers and counterparties.[10] Specifically, as it relates to this proposal, the Commission believes that recent events, noted below, have highlighted the need for more particularized risk management requirements for covered entities designed to promote operational resilience. An outcome of the effective management of operational risk, ''operational resilience'' can be broadly defined as the ability of a firm to detect, resist, adapt to, respond to, and recover from operational disruptions.[11] As the use of technology and associated third-party service providers have expanded within the financial sector, so too have the sources of operational risk facing covered entities, notably the potential for technological failures and cyberattacks.[12] The Commission preliminarily believes that requirements for covered entities directed at promoting sound practices for managing these risks, as well as the risk of other potential physical disruptions to operations (*e.g.,* power outages, natural disasters, pandemics), and for mitigating their potential impact would not only strengthen individual covered entity operational resilience but would reduce risk to the U.S. financial system as a whole and help protect derivatives customers and counterparties.[13]

The importance of operational resilience in the financial industry has come into stark relief in the past few years, particularly following the COVID–19 pandemic. At the start of the pandemic, Commission staff initiated near daily in-depth discussions with covered entities as those registrants navigated the myriad challenges presented during that time. Through a combination of sustained intensive effort on the part of the covered entities, and targeted no-action positions and exemptive relief provided by Commission staff, covered entities generally continued to operate without material disruption to their CFTC-regulated activities. As a result of this unprecedented experience, the Commission considered whether there were additional opportunities for it to act to gain ongoing transparency into, and to provide further regulatory support to, covered entities' operational resilience practices outside of an unfolding crisis. Commission staff then began the work of assessing the current operational resilience landscape for covered entities and determining how the Commission could act to further the holistic consideration and adoption of operational resilience practices amongst covered entities to ensure that certain

[4] *See* 7 U.S.C. 1a(33), 17 CFR 1.3 (defining ''major swap participant'').''

[5] *See* 17 CFR 1.11; 17 CFR 23.600; Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 FR 68506 (Nov. 14, 2013) (Final FCM RMP Rule); Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128 (Apr. 3, 2012) (Final Swap Entities RMP Rule).

[6] *See* 17 CFR 1.11(c); 17 CFR 23.600(b). The RMP rule for FCMs does not apply to FCMs that do not accept or hold customer assets. *See* 17 CFR 1.11(a).

[7] *See* 17 CFR 1.11(e); 17 CFR 23.600(c).

[8] *See* Final Swap Entities RMP Rule, 77 FR at 20128; Final FCM RMP Rule, 78 FR 68506.

[9] *See, e.g.,* Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants, 75 FR 71397, 71399 (Nov. 23, 2010) (Proposed Swap Entities RMP Rule) (''The Commission's rule has been designed such that the specific elements of a risk management program will vary depending on the size and complexity of a [swap entity's] business operations.'').

[10] The Commission recently solicited public comment on an advanced notice of proposed rulemaking regarding potential amendments to the RMP requirements. *See* Risk Management Program Regulations for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 88 FR 45826 (Jul. 18, 2023) (RMP ANPRM). The comment file is available at *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7412.*

[11] *See* Proposed Swap Entities RMP Rule, 75 FR 71399, n.12 (defining ''operational risk'' as including ''the risk of loss due to deficiencies in information systems, internal processes and staffing, or disruptions from external events that result in the reduction, deterioration, or breakdown in services or controls within the firm.''). Several sources have produced definitions of ''operational resilience'' relevant to the financial sector. *See e.g.,* Board of Governors of the Federal Reserve System (FRB), the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC) (together, the prudential regulators), *Sound Practices to Strengthen Operational Resilience* at 2 (Oct. 30, 2020) (Prudential Operational Resilience Paper) (defining ''operational resilience'' as the ''ability to deliver operations, including critical operations and core business lines, through a disruption from any hazard.''); Basel Committee on Banking Supervision (BCBS), *Principles for Operational Resilience* at 2, 3 (Mar. 31, 2021) (BCBS Operational Resilience Principles) (''ability of a bank to deliver critical operations through disruption''); National Institute of Standards and Technology (NIST), *Developing Cyber-Resilient Systems: A Systems Security Engineering Approach,* SP 800–160, Vol. 2, Rev. 1 at 76 (Dec. 2021) (''ability of systems to resist, absorb, and recover from or adapt to an adverse occurrence during operation that may cause harm, destruction, or loss of ability to perform mission-related functions.''). Core to each of these definitions is the notion of being able to continue to operate or perform despite a disruption.

[12] *See* Jason Harrell, Depository Trust & Clearing Corporation (DTCC) Managing Director, Head of External Engagements, ''Operational and Technology Risk, Evolving Cybersecurity Risks in a Digitalized Era'' (Sept. 20, 2023) (''While partnerships with third parties offer rapid solutions for institutions to access the latest technologies and capabilities, they also increase the surface area for potential threat actors to gain access to an institution, causing cyber incidents that can impact the institution's operations and potentially create additional sector impacts.'').

[13] Responding to the RMP ANPRM, several commenters suggested the Commission consider addressing cybersecurity risk independently. *See* Americans for Financial Reform Education Fund (AFREF) and Public Citizen Letter at 6 (Sept. 18, 2023) (AFREF&PC Letter); Better Markets Letter Re: Risk Management Program Regulations for Swap Dealers, Major Swap Participants, and Futures Commission Merchants (RIN 3038–AE59) at 6–9 (Sept. 18, 2023) (Better Markets Letter); R.J. O'Brien & Associates LLC Letter at 5–6 (Sept. 18, 2023) (R.J. O'Brien Letter). AFRF and Public Citizen also recommended that the Commission consider extending its risk management regulations to encompass third-party service providers for information technology services. *See* AFREF&PC Letter at 2.

operational risks impacting their CFTC-regulated activities were being addressed on an ongoing basis.

In particular, one area of increased focus is cyber risk. In 2022, cyber intelligence firms reported that the financial sector was among the most impacted by malicious emails, and was ultimately the most breached over the course of the year, with more than 566 successful attacks resulting in 254 million leaked records by early December 2022.[14] For the past two years, financial institutions responding to a DTCC risk survey have identified cyber risk as one of the top five risks to global financial markets, highlighting the increased sophistication of cyber criminals and the industry's growing digital footprint as key drivers.[15] Given that remote access and cloud computing may become permanent features of the financial markets, the need for financial institutions to strengthen, adapt, and prioritize their information and technology risk practices would seem critical to preserving the continued integrity and stability of U.S. financial markets.[16]

Covered entities have experienced firsthand how breaches of information and technology security can reduce their ability to protect customers. In 2016, for instance, a hacker was able to access customer records held on an FCM's backup storage device after a default configuration of that device left it open to infiltration via the internet.[17] In 2018, a successful phishing attack on an FCM compromised customer information and resulted in the FCM's acceptance of a fraudulent wire request that took $1 million in funds from a customer's account.[18] Other regulators have also taken action against banks registered as swap entities where failed controls and third-party service providers intersected to result in the significant exposure of customer information.[19] Even more recently, a ransomware attack on a U.S. broker-dealer in November 2023 was so significant, news reports indicate that the brokerage required a capital injection from a parent entity to settle $9 billion in trades, an amount many times larger than its net capital.[20]

Against the backdrop of that work, a recent and well-documented incident serves as an important cautionary tale about the potential systemic impact of an operational event at a third-party service provider. On January 30, 2023, a ransomware attack on ION Markets, a division of UK-based third-party service provider ION Group LLC (ION), resulted in a two-week disruption in mid-office activities at several FCMs. ION provides order management, execution, trading, and trade processing services for several FCMs, including about 20 percent of clearing members at the Chicago Mercantile Exchange (CME), but also provides software services to many other financial institutions, notably many systemically important banks.[21] FCMs affected by the attack had to process trades manually, leading to delays in the timely and accurate reporting of trade data to the CFTC, and consequently a temporary lag in production of the Commission's weekly Commitments of Traders report.[22] The incident was initially so concerning that Japan cut off all connectivity with ION.[23] Within a couple days of the attack, however, regulators, including the CFTC, coordinated efforts to determine that the attack was limited to a small number of software applications relied on within the cleared derivatives space by about forty-two (42) institutions, with no significant impact to systemically important banks.[24]

During a March 8, 2023, meeting of the CFTC's Market Risk Advisory Committee (MRAC), panelists discussed how the collaborative work of the CFTC, industry, and self-regulatory organizations (including CME, the National Futures Association (NFA), and the Financial Industry Regulatory Authority (FINRA)) helped mitigate the impact of the ION incident, allowing affected firms to return to business as usual within a couple weeks.[25] Nevertheless, panelists agreed that the incident highlighted the interconnectedness of the derivatives markets and the need for firms to continue to adapt safeguards to address the ever-evolving threat landscape.[26] As the ION incident demonstrates, a

[14] *See* Trellix, *The Threat Report Fall 2022* at 11 (Nov. 2022) (noting that the financial services sector was the most targeted by malicious emails in Q3 of 2022); Flashpoint, *Flashpoint Year In Review: 2022 Financial Threat Landscape* (Dec. 20, 2022) (citing finance and insurance as the most-breached sector in 2022).

[15] *See* DTCC, Systemic Risk Barometer Survey: 2023 Risk Forecast (Dec. 7, 2022); DTCC, Systemic Risk Barometer Survey: 2022 Risk Forecast (Dec. 13, 2021) (naming cyber risk as the top risk to the economy). *See also* Bank for International Settlements (BIS), Financial Stability Institute (FSI), FSI Insights on policy implementation No. 50, Banks' cyber security—a second generation of regulatory approaches (June 12, 2023) (FSI Cybersecurity Paper) (citing a 2023 report that most chief risk officers consider cyber risk the top threat to the banking industry and the most likely to result in a crisis or major operational disruption); Federal Bureau of Investigation, internet Crime Complaint Center Releases 2022 Statistics (Mar. 22, 2023) (''Cyber-enabled crime has been around for many years, but methods used by perpetrators continue to increase in scope and sophistication emanating from around the world.'').

[16] *See* FRB, *Cybersecurity and Financial System Resilience Report* at 15 (Aug. 2023) (''The rising number of advanced persistent threats increases the potential for malicious cyber activity within the financial sector. Combined with the increased internet-based interconnectedness between financial institutions and the increasing dependence on third-party service providers, these threats may result in incidents that affect one or more participants in the financial services sector simultaneously and have potentially systemic consequences.'').

[17] *See In re AMP Global Clearing LLC*, CFTC Docket No. 18–10 (Feb. 12, 2018).

[18] *See In re Phillip Capital Inc.,* CFTC Docket No. 19–22 (Sept. 12, 2019).

[19] *See, e.g., In re Capital One, N.A. and Capital One Bank (USA), N.A.,* AA–EC–20–49 (Aug. 5, 2020) (OCC finding that failed risk management practices resulted in exposure of 100 million individual credit card applications, including approximately 140,000 social security numbers, by a former cloud servicer employee); *In re Morgan Stanley Smith Barney LLC,* File No. 3–17280 (Jun. 8, 2016) (Securities and Exchange Commission (SEC) finding that failed risk management controls allowed an employee to impermissibly access and transfer data regarding 730,000 accounts to a personal server, which was ultimately hacked by third parties).

[20] *See* Paritosh Bansal, Reuters, ''Inside Wall Street's scramble after ICBC hack'' (Nov. 13, 2023) (reporting that the firm asked clients to temporarily suspend business with them and clear trades elsewhere).

[21] *See* Luke Clancy, Risk.net, ''One-fifth of CME clearing members hit by Ion hack'' (Mar. 9, 2023); *see also* Statement of Todd Conklin, Deputy Assistant Secretary, Department of the Treasury (Treasury), Office of Cybersecurity and Critical Infrastructure Protection (OCCIP), *The Cyber Threat Landscape for Financial Markets: Lessons Learned from ION Markets, Cloud Use in Financial Services, and Beyond,* CFTC Technology Advisory Committee Meeting Transcript at 160–166 (Mar. 22, 2023) (Conklin TAC Presentation) (describing the potential ''sprawling impact zone'' had the ION incident not been limited to its derivatives software services), *available at https://www.cftc.gov/sites/default/files/2023/07/1688400024/tac_032223_transcript.pdf.*

[22] CFTC, Statement on ION and the Impact to the Derivatives Markets (Feb. 2, 2023), *available at https://www.cftc.gov/PressRoom/Speeches Testimony/cftcstatement020223.* The Commitment of Traders report is widely relied on by market participants for insight into positions held on exchange-traded futures and options.

[23] *See* Conklin TAC Presentation (Mar. 22, 2023).

[24] *Id.*

[25] *See* CFTC, The Market Risk Advisory Committee to Meet on March 8 (Mar. 8, 2023) (MRAC Meeting), *available at https://www.cftc.gov/PressRoom/Events/opaeventmrac030823; see also* Conklin TAC Presentation (discussing how Treasury implemented its cyber incident response playbook in the days following the ION incident to mitigate the potential for panic after news reports began circulating information that the incident was more significant than regulators had initially determined it was).

[26] *See* Statement of Walt Lukken, President and Chief Executive Officer, Futures Industry Association (FIA), MRAC Meeting Transcript at 41 (''While the number of clearing firms that use ION's suite of clearing products is limited, the interconnectedness of our markets made the outage impactful throughout the entirety of our marketplace.''); *see also* Statement of Tom W. Sexton, III, President and Chief Executive Officer, NFA, MRAC Meeting Transcript at 46 (''[O]ur member firms have adopted robust safeguards already that need to be adapted in light of today's and tomorrow's ongoing challenges and threats.'').

disruptive cyber event can reach beyond particular financial institutions directly experiencing events to other institutions in the financial markets or to others doing business with an impacted financial institution, and could potentially impact financial stability.[27]

In light of these and other events, the Commission believes that customer protection and the broader stability of the derivatives markets at large warrant more targeted CFTC requirements relating to the management of operational risk designed to promote operational resilience.[28] Specifically, the Commission believes that the absence of CFTC-specific requirements for covered entities that explicitly address information and technology security, as well as third-party risk, could impede the Commission's ability to fulfill its regulatory oversight obligations with respect to covered entities and ultimately weaken its ability to address systemic risk, protect customer assets, and promote responsible innovation.[29] The Commission further believes that enhanced CFTC oversight of covered entities with respect to operational resilience would help improve outcomes following operational disruptions by giving the Commission the ability to ensure that covered entities have actionable plans in place to address key operational risks.

II. Proposal

Section 4s(j)(2) of the Commodity Exchange Act (CEA or Act) expressly requires swap entities to establish robust and professional risk management systems adequate for managing their day-to-day business.[30] Section 4s(j)(7) further directs the Commission to prescribe rules governing the duties of swap entities, including the duty to establish risk management systems, which would include the management of operational risk.[31] The Commission is authorized to promulgate operational risk management requirements for FCMs pursuant to section 8a(5) of the CEA, which authorizes the Commission to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions of, or to accomplish any of the purposes of, the CEA.[32] This general rulemaking authority may be used to prevent problems before they arise in the agency's blind spots,[33] and may be exercised to regulate circumstances or parties beyond those explicated in a statute.[34] Accordingly, the Commission has broad authority to promulgate regulations provided that such regulations are supported by a sufficient nexus to the CFTC's delegated authority. Specifically, Congress expressly empowered the Commission to prescribe certain requirements with respect to FCMs, namely, to require FCMs to register (sections 8a(1), 4d(a)(1), and 4f(a)(1) of the CEA [35]); to segregate customer funds (section 4d of the CEA [36]); to establish safeguards to minimize conflicts of interest (section 4d of the CEA [37]); to meet minimum financial requirements (section 4f of the CEA [38]); to manage and maintain records and reporting on the financial and operational risks of affiliates (section 4f of the CEA [39]); and to establish administrative, technical, and physical safeguards to protect the security and confidentiality of certain nonpublic personal information (section 5g of the CEA [40]), among other requirements.

The Commission believes that more particularized operational risk management requirements are reasonably necessary to help effectuate these statutory requirements for FCMs and to accomplish the purposes of the CEA. FCMs play an important role in the derivatives markets, serving as both the primary point of access to the cleared commodity interest markets for customers and the custodian of the funds used to maintain their positions. Given their position at the center of the derivatives market ecosystem, FCMs' operational resilience is essential to well-functioning derivatives markets and to ensuring that customers receive the protections provided by the CEA. However, as discussed above, operational risks, notably cyber and third-party risks, have become an increasing threat to financial institutions, including FCMs. These risks can cause major disruptions to FCMs' operations, and consequently impact the ability of FCMs to fulfill their obligations as Commission registrants. In particular, information security threats and operational disruptions can place an FCM's financial resources at risk; disrupt an FCM's ability to segregate and protect customer funds; impede accurate recordkeeping, including records related to customer funds; and cause a host of other issues for FCMs, which ultimately inure to the detriment of their customers and the derivatives markets. Accordingly, the Commission believes a comprehensive operational resilience regime is reasonably necessary to ensure that an FCM adequately addresses and mitigates risks that could adversely impact its ability to operate and fulfill its statutory obligations and duties as an FCM.

As discussed in detail in subsequent sections of this release, the Commission is proposing to require that FCMs and swap entities establish an Operational Resilience Framework (ORF) that is reasonably designed to identify, monitor, manage, and assess risks relating to information and technology security, third-party relationships, and emergencies or other significant disruptions to normal business operations. At its core, the ORF would have three key components: an

[27] *See* FIA, FIA Taskforce on Cyber Risk, *After Action Report and Findings* at 3 (Sept. 2023) (FIA Taskforce Report) (''The [ION incident] demonstrated that an outage at a single service provider can have damaging effects across a wide range of firms and threaten the orderly functioning of markets. The attack also demonstrated in vivid detail the complexities of restoring normal service.'').

[28] Existing CFTC requirements for covered entities relating to operational risk or information security are more general in nature or limited in application. *See, e.g.,* 17 CFR 1.11(e)(3)(ii) (providing, with respect to operational risk, that FCMs have automated financial risk management controls reasonably designed to prevent the placing of erroneous orders); Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 77 FR 67866, 67906 (Nov. 14, 2012) (describing Commission regulation 1.11(e)(3)(ii) as requiring an FCM's RMP to include automated financial risk management controls in order to reduce operational risk that could result from ''fat finger'' errors when submitting trades, or from technological ''glitches'' using automated trading); 17 CFR 23.600(c)(4)(vi) (requiring swap entities to take into account, among other things, secure and reliable operating and information systems with adequate, scalable capacity, and independence from the business trading unit; safeguards to detect, identify, and promptly correct deficiencies in operating and information systems; and reconciliation of all data and information in operating and information systems); 17 CFR 162.21 and 17 CFR 160.30 (requiring covered entities to adopt written policies and procedures addressing administrative, technical, and physical safeguards with respect to the information of consumers).

[29] *See* 7 U.S.C. 5 (establishing among the purposes of the Commodity Exchange Act to deter disruptions to market integrity, to ensure the financial integrity of covered transactions and the avoidance of systemic risk, and to promote responsible innovation and fair competition among market participants).

[30] *See* 7 U.S.C. 6s(j)(2).

[31] *See* 7 U.S.C. 6s(j)(7).

[32] 7 U.S.C. 12a(5).

[33] *Inv. Co. Inst.* v. *CFTC,* 891 F. Supp. 2d 162, 193 (D.D.C. 2012), *as amended* (Jan. 2, 2013) (citing *Stilwell* v. *Office of Thrift Supervision,* 569 F.3d 514, 519 (D.C. Cir. 2009)).

[34] Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 366 (D.C. Cir. 2014), overruled on other grounds by Am. Meat Inst. v. U.S. Dept. of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc).

[35] 7 U.S.C. 12a(1); 7 U.S.C. 6d(a)(1); 7 U.S.C. 6f(a)(1).

[36] 7 U.S.C. 6d.

[37] *Id.*

[38] 7 U.S.C. 6f.

[39] *Id.*

[40] *See* 7 U.S.C. 7b–2; 15 U.S.C. 6801.

information and technology security program, a third-party relationship program, and a business continuity and disaster recovery plan. The proposed ORF rule reflects a principles-based approach buttressed by certain minimum requirements specific to each of the component programs or plans, such as requiring an annual risk assessment and controls relating to information and technology security, and due diligence and monitoring requirements for third-party service providers. Proposed requirements relating to governance, training, testing, and recordkeeping would apply broadly and support the ORF as a whole. The proposed rule would further require covered entities to notify the Commission (and, in certain instances, customers or counterparties) of certain ORF-related events. Detailed guidance intended to assist covered entities in designing and implementing their third-party relationship program would be included in appendices to the rule.

In developing the proposed rule, the Commission endeavored to incorporate general directives to federal agencies articulated in the White House's March 2023 National Cybersecurity Strategy: Leverage existing standards and guidance, harmonize where sensible and appropriate to achieve better outcomes, and demonstrate an approach that is sufficiently nimble to meet the challenges of the ever-evolving technological threat landscape and fit the unique business and risk profile of each covered entity.[41] To that end, the proposal builds on the Commission's experience establishing system safeguard requirements for registered entities, as well as the approaches adopted by self-regulatory organizations and other regulatory authorities.[42] Notably, the proposal draws on approaches adopted by NFA, whose rules and interpretative notices relating to information systems security, third-party risk, and business continuity and disaster recovery planning apply to covered entities by virtue of being NFA members, and prudential regulators, who also regulate many covered entities, and have recently issued interagency positions on operational resilience and third-party relationship management.[43]

The Commission also surveyed the work of international standard-setting bodies, notably the BCBS *Principles for Operational Resilience*.[44] The Commission also conferred with, and reviewed the standards published by the National Institute of Standards and Technology (NIST), a part of the U.S. Department of Commerce charged by Executive Order 13636 in 2013 with developing a framework to reduce cyber risks to critical infrastructure that incorporates voluntary consensus standards and industry best practices.[45] Standards developed in response to this charge and reviewed by the Commission include the *Framework for Improving Critical Infrastructure Cybersecurity* and the *Security and Privacy Controls for Information Systems and Organizations,* among others.[46] The Commission and other financial regulators have previously adapted NIST's standards in regulation and guidance related to operational resilience. The Commission's system safeguards requirements treat NIST's CSF as a source for well-established best practices for cybersecurity.[47] In Appendix A of the Interagency Sound Resilience Paper, the prudential regulators presented ''a collection of sound practices for cyber risk management, aligned to NIST and augmented to emphasize governance and third-party risk management.'' [48] The Commission also considered standards published by equivalent standard setting bodies like the International Standards Organization (ISO).[49]

Finally, in putting together the proposal, Commission staff engaged with staff at NFA and various federal agencies, including prudential regulators, and the SEC.[50] Based on these efforts, the Commission preliminarily believes that, if adopted, the proposed rule would strike an

[41] The White House, National Cybersecurity Strategy at 8–9 (Mar. 2023) (National Cyber Strategy) (''Our strategic environment requires modern and nimble regulatory frameworks for cybersecurity tailored for each sector's risk profile, harmonized to reduce duplication, complementary to public-private collaboration, and cognizant of the cost of implementation.''). *See also* FIA Taskforce Report, *supra* note 27, at 9 (''[T]he Taskforce encourages regulators and legislators to take a principles-based approach to cyber risk and operational resilience. That approach may not be sufficient in all areas, but such a flexible approach is well suited to a threat landscape that is likely to continue evolving at a rapid rate.'').

[42] *See* 17 CFR 37.1400 and 17 CFR 37.1401 (system safeguard requirements for swap execution facilities (SEFs)); 17 CFR 38.1050 and 17 CFR 38.1051 (designated contract markets (DCMs)); 17 CFR 39.18 (derivatives clearing organizations (DCOs)); 17 CFR 49.24 (swap data repositories (SDRs)). *See also* 17 CFR 1.3 (defining ''registered entity'' to include DCMs, DCOs, SEFs, and SDRs). For a summary of international regulatory efforts related to operational resilience, *see* FIA Taskforce Report, *supra* note 27, at 7–8.

[43] *See* NFA Interpretive Notice 9070, NFA Compliance Rules 2–9, 2–36 and 2–49: Information Systems Security (rev. Sept. 30, 2019) (NFA ISSP Notice); NFA Interpretive Notice 9079, NFA Compliance Rules 2–9 and 2–36: Members' Use of Third-Party Service Providers (NFA Third-Party Notice) (effective Sept. 30, 2021); NFA Rule 2–38: Business Continuity and Disaster Recovery Plan (rev. July 1, 2019); NFA Interpretive Notice 9052, NFA Compliance Rule 2–38: Business Continuity and Disaster Recovery Plan (NFA BCDR Notice) (April 7, 2003); Prudential Operational Resilience Paper, *supra* note 11; Interagency Guidance on Third-Party Relationships: Risk Management, 88 FR 37920 (Jun. 9, 2023) (Prudential Third-Party Guidance). *See also* Computer-Security Incident Notification Requirements for Banking Organizations and their Bank Service Providers, 86 FR 66424 (Nov. 23, 2021); 12 CFR part 30, app. A (Interagency Guidelines Establishing Standards for Safety and Soundness), 12 CFR part 30, app. B (Interagency Guidelines Establishing Information Security Standards).

[44] *See* BCBS Operational Resilience Principles, *supra* note 11. *See also* International Organization of Securities Commissions (IOSCO), *Cyber Task Force: Final Report* (2019) (identifying different but comparable core standards or frameworks, including both NIST and ISO standards); Financial Stability Board (FSB), *Final report on Enhancing Third-Party Risk Management and Oversight—a toolkit for financial institutions and financial authorities* (Dec. 4, 2023) (FSB Third-Party Report). Materials related to the FSB's work on cyber resilience are available at *https://www.fsb.org/work-of-the-fsb/financial-innovation-and-structural-change/cyber-resilience/.*

[45] *See* The White House, Office of the Press Secretary, *Executive Order—Improving Critical Infrastructure Cybersecurity,* E.O. 13636 (Feb. 12, 2013).

[46] *See* NIST, Framework for Improving Critical Infrastructure Cybersecurity (Version 1.1) at 2 (Apr. 16, 2018) (NIST CSF); NIST, SP 800–53, Security and Privacy Controls for Information Systems and Organizations (Sept. 2020, rev. Dec. 10, 2020) (NIST SP 800–53). *See also* Cybersecurity & Infrastructure Security Agency (CISA), Financial Services Sector-Specific Plan—2015 at 16 (rev. Dec. 17, 2020) (''While the [NIST cybersecurity framework] is designed to manage cybersecurity risks, its core functions of Identify, Protect, Detect, Respond, and Recover provide a model for considering physical risks as well. This methodology is increasingly central to the sector's thinking on security and resilience, and the concept aligns with existing [Federal Financial Institutions Examination Council (FFIEC)] guidance.'').

[47] System Safeguards Testing Requirements for Derivatives Clearing Organizations, 81 FR 64322, 64329 (Sept. 19, 2016).

[48] Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, Sound Practices to Strengthen Operational Resilience (Nov. 2, 2020), *available at https://www.federalreserve.gov/supervisionreg/srletters/SR2024.html.*

[49] *See, e.g.,* ISO/IEC 27001:2022, Information security, cybersecurity and privacy protection: Information security controls (Oct. 2022) (ISO/IEC 27001:2022).

[50] In accordance with section 712(a) of the Dodd-Frank Act (15 U.S.C. 8302), the Commission has consulted and coordinated, to the extent possible, with the SEC and the prudential regulators, including with the FRB, the OCC, and the FDIC, for purposes of assuring regulatory consistency and comparability. The Securities Exchange Act of 1934 and existing and proposed SEC regulations include requirements relating to risk management including cybersecurity, including requirements for SEC-regulated broker-dealers and security-based swap dealers. *See, e.g.* 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, 88 FR 20212, sections IV.C.1.b.i and IV.C.1.b.iii (Apr. 5, 2023).

appropriate balance between supporting technological and market innovation and fair competition, ensuring covered entities devote the necessary thought, planning, and resources to their operational resilience so as to support the resilience of the U.S. derivatives markets and the financial sector as a whole.[51]

The Commission is proposing to codify the ORF rule for swap entities in existing Commission regulation 23.603, which currently contains the Commission's business continuity and disaster recovery requirements for swap entities.[52] As discussed in greater detail below, the Commission is proposing to retain the substance of the existing business continuity and disaster recovery requirements in current Commission regulation 23.603 as part of the ORF rule for swap entities, with certain modifications. Similar requirements would also be imposed on FCMs. The proposed ORF rule for FCMs would be codified in new Commission regulation 1.13. The proposed guidance on third-party relationships would be included in the appendices to parts 1 and 23 for FCMs and swap entities, respectively.

As proposed, the regulatory text of the ORF rule for swap entities is nearly identical in structure and substance to the ORF rule for FCMs. Accordingly, to promote readability, when referencing sections of the regulatory text, this notice generally refers to the relevant paragraph of the proposed regulations (*i.e.,* ''proposed paragraph (b)'' would refer to paragraph (b) of both proposed Commission regulations 1.13 and proposed Commission regulation 23.603).

The Commission invites comment on all aspects of the proposed rule, as further detailed below.

A. Generally—Proposed Paragraph (b)[53]

1. Purpose and Scope; Components—*Proposed Paragraphs (b)(1) and (b)(2)*

As previously mentioned, the proposed rule would require covered entities to establish, document, implement, and maintain an Operational Resilience Framework, or ORF.[54] The ORF would need to be reasonably designed to identify, monitor, manage, and assess risks relating to three key risk areas that challenge operational resilience: (i) information and technology security, as defined in the proposed rule and discussed further below; (ii) third-party relationships; and (iii) emergencies or other significant disruptions to the continuity of normal business operations as a covered entity.[55] Although these risk areas are often viewed distinctly, as the introduction to this notice illustrates, they are significantly interrelated, as the relative strength of information and technology security and third-party risk management can directly affect recovery activities and improve outcomes following an emergency or other significant disruption.[56] Together, the Commission believes they represent important sources of potential operational risk, the effective management of which is key to operational resilience.

The proposed rule would require covered entities to establish three written component programs or plans, each dedicated to addressing one of the three enumerated risks within the ORF. The three component programs or plans would be: (i) an information and technology security program, (ii) a third-party relationship program, and (iii) a business continuity and disaster recovery plan.[57] Each component program or plan would need to be supported by written policies and procedures and meet the requirements set forth in the rule, as discussed in subsequent sections of this notice.[58] The definitions and specific requirements for the information and technology security program, the third-party relationship program, and the business continuity and disaster recovery plan are discussed in detail in subsequent sections of this notice specifically dedicated to discussing each of the three components.[59]

Although they may go by different names, the Commission understands that written programs or plans of these types are generally recognized as common ways to address these risks and are even currently required of covered entities. NFA, for instance, currently requires members to adopt a written information systems security program (ISSP), a written supervisory framework to address outsourcing to third-party service providers, and a written business continuity and disaster recovery plan.[60] The Commission itself requires swap entities to have a written business continuity and disaster recovery plan.[61] Accordingly, to the extent that covered entities have existing programs or plans and policies and procedures that address the requirements of the ORF rule, by virtue of other regulatory requirements or otherwise, the Commission would not expect such covered entities to adopt entirely new component programs or plans. The Commission would only expect that covered entities review their existing programs and plans to ensure they meet the minimum requirements of the ORF rule and make any necessary amendments.

The Commission appreciates that covered entities may assign responsibility for the establishment, implementation, and maintenance of each ORF component program or plan to distinct functions within their organizations. By structuring the proposed rule to require a ''framework'' directed at operational resilience,

[51] *See* 7 U.S.C. 5.

[52] 17 CFR 23.603.

[53] Paragraph (a) of proposed Commission regulations 1.13 and 23.603 provides definitions for terms used within the ORF rule. Each proposed definition is discussed in the context of the relevant substantive regulatory requirement throughout the remainder of this notice.

[54] *See* paragraph (b)(1) of proposed Commission regulations 1.13 and 23.603.

[55] *See* paragraphs (b)(1)(i)–(iii) of proposed Commission regulations 1.13 and 23.603.

[56] *See, e.g.,* ISO/IEC 27031:2011, Information technology—Security techniques—Guidelines for information and communication technology readiness for business continuity (Mar. 2011) (''Failures of [information and communication technology (ICT)] services, including the occurrence of security issues such as systems intrusion and malware infections, will impact the continuity of business operations. Thus, managing ICT and related continuity and other security aspects form a key part of business continuity requirements. Furthermore, in the majority of cases, the critical business functions that require business continuity are usually dependent upon ICT. This dependence means that disruptions to ICT can constitute strategic risks to the reputation of the organization and its ability to operate . . . As a result, effective [business continuity management] is frequently dependent upon effective ICT readiness to ensure that the organization's objectives can continue to be met in times of disruptions.''). *See* Prudential Operational Resilience Paper, *supra* note 11, at 8 (''Secure and resilient information systems underpin the operational resilience of a firm's critical operations and core business lines.''); *see also* Prudential Third-Party Guidance, 88 FR 37920 (discussing the interplay of third-party risks and operational resilience).

[57] *See* paragraph (b)(2) of proposed Commission regulations 1.13 and 23.603; *see also* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''information and technology security program,'' ''third-party relationship program,'' and ''business continuity and disaster recovery plan'').

[58] *See* paragraph (b)(2) of proposed Commission regulations 1.13 and 23.603. *See* paragraphs (d) (information and technology security program), (e) (third-party relationship program), and (f) (business continuity and disaster recovery plan) of proposed Commission regulations 1.13 and 23.603 (describing the requirements for each program, respectively).

[59] *See* sections II.C (information and technology security program), II.D (third-party relationship program), II.E (business continuity and disaster recovery plan) of this notice, *infra.*

[60] *See* NFA ISSP Notice, *supra* note 43; NFA Third-Party Notice, *supra* note 43; and NFA BCDR Notice, *supra* note 43. NFA's requirement to establish a business continuity and disaster recovery plan does not currently apply to swap entities, *see* NFA Rule 2–38, paragraph (a), *supra* note 43.

[61] *See* 17 CFR 23.603.

however, the Commission intends for executive leadership at covered entities to address the risk areas covered by the ORF as a cohesive and interrelated whole, breaking down any unnecessary internal silos, and to consider all aspects of operational resilience in determining their operational strategies, risk appetite, and risk tolerance limits.[62]

2. Standard—*Proposed Paragraph (b)(3)*

The Commission is proposing to require that each covered entity implement the requirements of the proposed ORF rule in a manner that is appropriate and proportionate to the nature, scope, complexity, and risk profile of its business activities as a covered entity, following generally accepted standards and best practices (the (b)(3) standard).[63] The proposed (b)(3) standard reflects the general principles-based approach underpinning the proposed rule, which the Commission believes would be appropriate given the increased reliance on and rapid evolution of technology within the financial industry and its attendant risks.[64] This standard incorporates two themes that have broad support from other governmental and international standard-setting bodies when addressing matters related to operational resilience: (i) proportionality; and (ii) reliance on established standards and best practices.[65]

Broadly speaking, the principle of proportionality recognizes that operational resilience, and information and technology security, in particular, cannot be addressed with a one-size-fits-all approach.[66] On the contrary, differences in operational structures and business strategies among covered entities necessitate a more flexible and adaptive approach that would allow individual covered entities to best address their specific risks and evolve to address emerging challenges as they arise. Covered entities vary widely in terms of their business structure and risk profiles, such that a covered entity operating within a large bank holding company group structure and involved in a broad array of asset classes would likely have a different risk profile and different resources than an entity that is solely registered with the CFTC or that has a narrower scope to its CFTC-regulated business. The Commission would therefore expect that covered entities facing different operational risks may take different approaches to managing and monitoring those risks. Designing an operational resilience framework that would apply uniformly across all covered entities would not only pose significant challenges, it would likely be ineffective, imposing operational costs where no risks demand it. Accordingly, the Commission preliminarily believes that a proportional, risk-based approach would help ensure that firms, customers, counterparties, and the financial system at large can appropriately respond to and recover from operational shocks in context.

Interpretive notices adopted by NFA reflect a comparable approach. Specifically, NFA's notices on ISSPs and the use of third-party service providers establish general, baseline requirements (*e.g.,* assess risks associated with the use of information technology systems or with reliance on third-party service providers) and then direct NFA members, including covered entities, to tailor the specifics to their businesses.[67] This approach is also consistent with the CFTC's own approach with respect to system safeguard requirements for registered entities,[68] as well as those of the prudential regulators.[69] Generally accepted standards and best practices themselves also generally support a proportional approach.[70]

The Commission emphasizes, however, that ''proportional'' does not mean ''permissive.'' The Commission's proposed standard for the ORF rule would not support a ''race to the bottom,'' where covered entities default to the minimum requirements of the proposed rule. On the contrary, covered entities would be required to implement an ORF that is reasonably designed to reflect and address their unique risk profile and activities, consistent with the proposed (b)(3) standard. Accordingly, the Commission would expect larger, more complex entities that operate more varied business lines, rely on more technological platforms, or

[62] The specific governance requirements of the proposed rule, which include the requirement to establish risk appetite and risk tolerance limits with respect to the ORF, further support this view. *See* paragraph (c) of proposed Commission regulations 1.13 and 23.603.

[63] *See* paragraph (b)(3) of proposed Commission regulations 1.13 and 23.603.

[64] *See* BCBS Operational Resilience Principles, *supra* note 11, at 1 (''Recognising that a range of potential hazards cannot be prevented, the Committee believes that a pragmatic, flexible approach to operational resilience can enhance the ability of banks to withstand, adapt to and recover from potential hazards and thereby mitigate potentially severe adverse impacts.''); *see also* Prudential Operational Resilience Paper, *supra* note 11, at 9 (providing as a sound practice of operational resilience that firms review information systems ''on a regular basis against common industry standards and best practices.'').

[65] *See, e.g.,* BCBS Operational Resilience Principles at 2–3 (''The principles for operational resilience set forth in this document are largely derived and adapted from existing guidance that has been issued by the Committee or national supervisors over a number of years. The Committee recognizes that many banks have well established risk management processes that are appropriate for their individual risk profile, operational structure, corporate governance and culture, and conform to the specific risk management requirements of their jurisdictions. By building upon existing guidance and current practices, the Committee is issuing a principles-based approach to operational resilience that will help to ensure proportional implementation across banks of various size, complexity and geographical location.''); FSB Third-Party Report, *supra* note 44, at 10–11; IOSCO, *Principles on Outsourcing: Final Report* at 10 (IOSCO Outsourcing Report) (Oct. 2021) (providing that ''[t]he application and implementation of these Principles should be proportional to the size, complexity and risk posed by the outsourcing'' of tasks, functions, processes, services, or activities to a service provider that would otherwise be undertaken by the regulated entity itself).

[66] *See e.g.,* FINRA, 2018 Report on Selected Cybersecurity Practices at 1 (Dec. 2018) (FINRA Cybersecurity Report) (''[T]here is no one-size-fits-all approach to cybersecurity.''); NIST CSF, *supra* note 46, at 2 (''The [NIST CSF] is not a one-size-fits-all approach to managing cybersecurity risk for critical infrastructure. Organizations will continue to have unique risks—different threats, different vulnerabilities, different risk tolerances.'').

[67] *See* NFA ISSP Notice, *supra* note 43 (requiring each NFA member to adopt an ISSP appropriate to the its ''size, complexity of operations, type of customers and counterparties, the sensitivity of the data accessible within its systems, and its electronic interconnectivity with other entities''); NFA Third-Party Notice, *supra* note 43 (''NFA recognizes that a Member must have flexibility to adopt a written supervisory framework relating to outsourcing functions to a [third-party service provider] that is tailored to a Member's specific needs and business . . .'').

[68] *See, e.g.,* 17 CFR 37.1401(b) (SEFs); 17 CFR 38.1051(b) (DCMs); 17 CFR 39.18(b)(3) (DCOs); 17 CFR 49.24(c) (SDRs) (requiring registered entities to follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems); *see also* System Safeguards Testing Requirements for Derivatives Clearing Organizations, 81 FR 64322, 64329 (Sept. 19, 2016) (DCO System Safeguards Testing Requirements) (describing the CFTC's approach to system safeguards for DCOs as providing DCOs with ''flexibility to design systems and testing procedures based on the best practices that are most appropriate for that DCO's risks'').

[69] 12 CFR part 30, app. B (Interagency Guidelines Establishing Information Security Standards); *id.* at II.A. (Information Security Program) (''Each [financial institution] shall implement a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the [financial institution] and the nature and scope of its activities.''); FFIEC Information Technology Examination Handbook, Information Security at 2 (Sept. 2016) (FFIEC Information Security Booklet) (''Institutions should maintain effective information security programs commensurate with their operational complexities.'').

[70] The NIST CSF, for example, identifies activities designed to achieve specific cybersecurity outcomes and tiers practices by increasing degree of rigor and sophistication. In selecting a tier, NIST directs entities to consider their ''current risk management practices, threat environment, legal and regulatory requirements, information sharing practices, business/mission objectives, supply chain cybersecurity requirements, and organizational constraints.'' *See* NIST CSF, *supra* note 46, at 8.

have more complicated agreements with third-party service providers to arrive at an ORF that is appropriate to their likely increased level of operational risk.[71]

The requirement for covered entities to follow generally accepted standards and best practices serves to ground covered entities' approaches to operational resilience in practices that are widely recognized as effective in aiding financial institutions to mitigate and recover from operational shocks. In adopting system safeguard requirements for registered entities, which require registered entities to follow generally accepted standards and best practices, the Commission identified several sources of standards and best practices.[72] NFA and other bodies have compiled similar lists.[73] Among perhaps the most commonly relied on by financial institutions are the NIST CSF, ISO, the Center for internet Security (CIS), and FFIEC, whose examination booklets and Cyber Assessment Tool (CAT) are specifically designed to guide financial institutions.[74] The Commission would expect covered entities to use generally accepted standards and industry best practices that are appropriate and proportionate to the nature, size, scope, complexities, and risk profile of their business activities, in designing or updating an ORF that would comply with the proposed rule. For instance, in conducting the risk assessment required under proposed paragraph (c)(1), a covered entity would need to identify risks to its information and technology security with reference to risks discussed in an appropriate standard or based on industry best practices, and then assess and prioritize those risks using frameworks and metrics recommended by those standards or practices. Requiring covered entities to follow generally accepted standards and industry best practices in developing and implementing the ORF would help ensure that covered entities establish, document, implement, and maintain ORFs reasonably designed to address their particular operational resilience-related risks.

The proposed rule leverages these standards not only by directing covered entities to consider them in developing their approaches but by incorporating common themes contained within them into the substance of the proposed rule. In the Commission's view, reliance on such standards supports the use of a common lexicon, facilitating the development of understandable and transposable practices on a cross-border basis. The Commission further recognizes that generally accepted standards and best practices are likely to evolve over time, and the applicability of any particular standard may vary based on the unique circumstances and risk profile of each covered entity. Accordingly, the Commission preliminarily believes requiring covered entities to follow generally accepted standards and best practices supports the goal of an adaptive approach that can respond nimbly to rapid changes in emerging threats.[75]

3. Request for Comment

The Commission invites comment on all aspects of proposed paragraph (b), including the following questions:

1. *Applicability to FCMs.* In adopting the RMP rule for FCMs in 2013, the Commission determined to limit the rule's applicability to FCMs that hold or accept customer funds.[76] The CEA and Commission regulations define a ''futures commission merchant'' as an entity that solicits or accepts orders to buy or sell futures contracts, options on futures, retail off-exchange forex contracts or swaps, *and* accepts money or other assets from customers to support such orders.[77] Although some entities are, for various reasons, currently registered as FCMs despite not accepting customer funds, as the Commission explained in the adopting release for the FCM RMP rule, FCMs that do not accept or hold customer funds to margin, guarantee, or security commodity interests are generally not operating as FCMs.[78] With respect to the proposed ORF rule, the Commission has preliminarily determined to apply the proposed requirements to all registered FCMs. Although the customer protection concerns may be mitigated for FCMs that do not handle customer assets, the Commission preliminarily believes that the potential systemic risk that can result from failures to manage information and technology risk, third-party relationships, emergencies, or other significant disruptions persist for all FCMs, given their access to customer information and their potential relationships with and/or connectivity to other regulated entities, including exchanges and clearinghouses.[79]

a. Are the risks associated with information and technology security, third-party relationships, and emergencies or other significant disruptions substantially different or reduced for FCMs that do not hold customer funds? If yes, please explain.

b. Should the Commission consider limiting the ORF rule to FCMs that do not hold customer funds, consistent with the FCM RMP rule? Why or why not? Please explain.

2. *Standard.* The proposed rule would require covered entities to follow ''generally accepted standards and best practices'' in establishing, implementing, and maintaining their ORFs. Although this notice identifies various sources of such standards and practices, including NIST, ISO, CIS, and FFIEC, the proposed rule does not further define or otherwise limit the scope of ''generally accepted standards and best practices,'' acknowledging that there are several sources of recognized standards currently relied on by covered entities and that standards and practices

[71] *See* National Cyber Strategy, *supra* note 41, at 4 (''The most capable and best-positioned actors in cyberspace must be better stewards of the digital ecosystem.''); *see also* IOSCO Outsourcing Report, *supra* note 65, at 10.

[72] *See, e.g.,* DCO System Safeguards Testing Requirements, 81 FR 64322–23; 17 CFR 39.18(b)(3) (requiring DCOs to follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems)*; see also* 17 CFR 37.1401(b) (SEFs) (requiring the same); 17 CFR 38.1051(b) (DCMs) (same); 17 CFR 49.24(c) (SDRs) (same).

[73] *See, e.g.,* NFA, Cybersecurity FAQs, ''Does NFA recommend any particular consultants that can help a Member draft an ISSP or perform penetration testing?''; *see also* FFIEC, Cybersecurity Resource Guide for Financial Institutions (Sept. 2022) (rev. Nov. 2022).

[74] The Financial Services Sector Coordinating Council (FSSC) has also developed a NIST CSF profile specifically designed for financial institutions. The profile is now maintained, updated, and managed by the Cyber Risk Institute (CRI) and was last updated in January 2023. *See* CRI Profile v1.2 (Dec. 14, 2021), *available at https://cyberriskinstitute.org/the-profile/.*

[75] *See* National Cyber Strategy, *supra* note 41, at 9 (''By leveraging existing international standards in a manner consistent with current policy and law, regulatory agencies can minimize the burden of unique requirements and reduce the need for regulatory harmonization.'').

[76] *See* 17 CFR 1.11(a) (Nothing in this section shall apply to a futures commission merchant that does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result from soliciting or accepting orders for the purchase or sale of any commodity interest.).

[77] *See* 7 U.S.C. 1a(28)(A); 17 CFR 1.3 (defining ''futures commission merchant'') (emphasis added).

[78] As of July 31, 2023, twelve (12) entities were registered as FCMs but were not required to segregate any funds on behalf of customers. *See* CFTC, Financial Data for FCMs (July 31, 2023), *available at https://www.cftc.gov/MarketReports/financialfcmdata/index.htm.* The Commission made clear in the adopting notice for the FCM RMP rule that it would expect that, prior to changing their business model to begin accepting customer funds, any registered FCM that does not currently accept customer funds would need to establish a risk management program that complies with Commission regulation 1.11 and file such program with the Commission and with the FCM's designated self-regulatory organization (DSRO). *See* Final FCM RMP Rule, 78 FR 68517.

[79] The Final FCM RMP rule, by contrast, could be viewed as more directly targeting the management of specific risks associated with operating as an FCM.

are likely to evolve over time in response to changes in technology or emerging threats. Nevertheless, the Commission understands that, particularly in the United States, NIST and ISO standards are heavily relied on by covered entities and referenced by other regulators, making them widely recognized as the leading industry standards for cybersecurity and operational risk management.

a. Should the Commission further define or otherwise limit what constitutes ''generally accepted standards and best practices''? Specifically, should the Commission require covered entities to follow NIST or ISO standards, as some commenters on the RMP ANPRM recommended? [80] Why or why not? Please explain.

b. Are there any other standards or practices commonly relied on by covered entities that the Commission did not identify, directly or indirectly, in this notice? If so, please identify them and specify how they are currently relied on by covered entities.

B. Governance—Proposed Paragraph (c)

The topic of governance has gained increased attention within the context of operational resilience, particularly with respect to the area of information and technology security. As of the date of this notice, NIST is undergoing a process to update the NIST CSF, and new governance outcomes are expected to feature prominently.[81] Prudential regulators have also emphasized the role of effective governance to operational resilience.[82] In the Commission's view, the overall objective of an effective governance regime for an ORF should be the integration of operational resilience topics into existing reporting lines and operational structures, including the entity's overall operational strategy, to ensure active executive engagement and oversight in the management of operational risk that could challenge a covered entity's operational resilience.[83]

1. Approval of Components—*Proposed Paragraph (c)(1)*

Accordingly, to ensure that a covered entity's senior leadership is involved in key decision-making around operational resilience, and is ultimately held accountable for implementation of the ORF, the proposed rule would require covered entities to have their senior leadership annually approve the ORF.[84] In recognition of the wide variety of corporate structures represented among covered entities, however, the proposed rule would give covered entities broad flexibility and discretion to identify the appropriate senior-level individual or body to provide such approval.

Specifically, paragraph (c)(1) of the proposed rule would require that each ORF component program or plan required by paragraph (b)(2) of the proposed rule is approved in writing, on at least an annual basis, by either the senior officer, an oversight body, or a senior-level official of the covered entity.[85] The term ''oversight body'' itself would be broadly defined to encompass any board, body, or committee of a board or body of the covered entity specifically granted the authority and responsibility for making strategic decisions, setting objectives and overall direction, implementing policies and procedures, or overseeing the management of operations for the covered entity.[86] Consistent with Commission regulation 3.1(j), ''senior officer'' would mean the chief executive officer or other equivalent officer of the covered entity.[87] As an example, under the proposed rule, a covered entity could elect to have its information and technology security program annually approved by its chief executive officer, its chief information security officer, or a committee with oversight authority over information and technology security.[88] Again, the intention behind offering this flexibility is to ensure that covered entities would be able to rely on and incorporate operational resilience into their existing governance structures when complying with the proposed ORF rule, while ensuring that each component program or plan would be approved by an individual or group of individuals with senior-level responsibilities and authority.

2. Risk Appetite and Risk Tolerance Limits—*Proposed Paragraph (c)(2)*

The proposed rule would further require covered entities to establish and implement appropriate risk appetite and risk tolerance limits with respect to the three risk areas enumerated in paragraph (b)(1) (information and technology security, third-party relationships, and emergencies or other significant disruptions to the continuity of normal business operations).[89] Although the terms ''risk appetite'' and ''risk tolerance'' are sometimes used interchangeably, the Commission intends the terms to have distinct meanings within the context of the proposed rule. Specifically, in the context of the proposed rule, ''risk appetite'' would mean the aggregate amount of risk a covered entity is willing to assume to achieve its strategic objectives.[90] Risk appetite is typically documented through a risk appetite statement, which establishes qualitative and quantitative measures designed to help identify when risk appetite has been exceeded and what appropriate mitigating strategies that can be taken.[91]

[80] *See, e.g.,* R.J. O'Brien Letter, *supra* note 13, at 6 (''The Commission should also seek to implement the [NIST CSF] as a part of its standard for managing and mitigating this area of risk. The NIST CSF is widely accepted throughout many different industries and would set a universal standard and best practices for registrants to follow.'').

[81] *See* NIST, *NIST Cybersecurity Framework 2.0 Concept Paper: Potential Significant Updates to the Cybersecurity Framework* at 10–11 (Jan. 19, 2023) (discussing how the update ''will emphasize the importance of cybersecurity governance'' by adding a new govern function); *see also* CRI, *The Profile Workbook: Guidance for Implementing the CRI Profile v1.2.1 and Responding to its Diagnostic Statements* at 16 (rev. Jan. 2023) (CRI Profile Workbook) (providing guidance on governance outcomes that have already been incorporated into the NIST CSF financial services sector profile).

[82] *See* Prudential Operational Resilience Paper, *supra* note 11, at 3.

[83] *See* BCBS Operational Resilience Principles, *supra* note 11, at 4 (''Principle 1: Banks should utilise their existing governance structure to establish, oversee and implement an effective operational resilience approach that enables them to respond and adapt to, as well as recover and learn from, disruptive events in order to minimise their impact on delivering critical operations through disruption.'') (internal citation omitted).

[84] *See* paragraph (c)(1) of proposed Commission regulations 1.13 and 23.603.

[85] *Id.*

[86] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''oversight body'').

[87] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''senior officer''). *See also* 17 CFR 3.1(j) (defining ''senior officer'').

[88] Other possible senior-level officials could be the covered entity's chief risk officer or chief operating officer, as appropriate.

[89] *See* paragraph (c)(2)(i) of proposed Commission regulations 1.13 and 23.603. *See also* paragraph (b)(1) of proposed Commission regulations 1.11 and 23.603 (identifying the risk areas proposed to be covered by the ORF).

[90] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''risk appetite''). *See also* 12 CFR part 30, app. D, I.E.10 (Definitions) (defining ''risk appetite'' as the aggregate level and types of risk the board of directors and management are willing to assume to achieve a covered bank's strategic objectives and business program, consistent with applicable capital, liquidity, and other regulatory requirements); Prudential Operational Resilience Paper, *supra* note 11, at 14 (defining ''risk appetite'' as ''[t]he aggregate level and types of risk the board and senior management are willing to assume to achieve a firm's strategic business objectives, consistent with applicable capital, liquidity, and other requirements and constraints''); BCBS Operational Resilience Principles, *supra* note 11, at 3, n.7 (defining ''risk appetite'' as ''the aggregate level and types of risk a bank is willing to assume, decided in advance and within its risk capacity, to achieve its strategic objectives and business program'').

[91] *See* 12 CFR part 30, app. D (requiring covered financial institutions to have a comprehensive written risk appetite statement). *See also* CRI Profile

With its proposed definition of ''risk tolerance limit,'' the Commission intends to capture a more focused measure of acceptable risk. Specifically, ''risk tolerance limit'' would mean the amount of risk, beyond its risk appetite, that a covered entity is prepared to tolerate through mitigating actions.[92] Thus, risk tolerance limits assume a particular type of risk has materialized (*e.g.,* an operational disruption has occurred) and identify the amount of disruption a firm is prepared to tolerate beyond its risk appetite.[93] Risk tolerance limits are also more likely to be measured in quantitative terms (*e.g.,* number of hours a particular system or application is down).[94]

As with each component ORF program or plan, the proposed rule would require that a covered entity's risk appetite and risk tolerance limits be reviewed and approved in writing on at least an annual basis by either the senior officer, an oversight body, or a senior-level official of the covered entity.[95] This proposed requirement is intended to ensure that the risk appetite and risk tolerance limits are consistent with the covered entity's operational strategy and objectives, as established by senior leadership, and that senior leadership is involved in, and ultimately held accountable for, how operational risks faced by the covered entity are internalized by the covered entity.

The setting and approval of risk appetite and risk tolerance limits for operational risk is a well-recognized key component of effective governance and oversight.[96] The Commission therefore preliminarily believes the setting and approval of risk appetite and risk tolerance limits for operational risks captured by the ORF would be helpful to ensuring effective governance and oversight of the ORF. Specifically, the Commission believes that the process of identifying appropriate risk appetite and risk tolerance limits would have a disciplining effect, encouraging covered entities to think critically about the risks they face and their ability to comfortably manage them without incurring intolerable harm to themselves or their customers or counterparties. The Commission further believes that operating within set risk appetite and risk tolerance limits would help support a culture where senior leaders at covered entities can make more informed decisions about the risks they are willing to take and the mitigation measures they would need to employ to manage these risks, which would further support operational resilience.

3. Internal Escalations—*Proposed Paragraph (c)(3)*

To further ensure that senior leadership remains involved in and accountable for the ORF as it is implemented, the proposed rule would require either the senior officer, an oversight body, or a senior-level official of the covered entity to be notified of: (i) circumstances that exceed the risk tolerance limits established pursuant to paragraph (c)(2)(i) of the proposed rule; and (ii) incidents that require notification to the Commission, customers, or counterparties under the proposed rule, as further discussed in subsequent sections of this notice.[97]

The Commission believes that circumstances that would push a covered entity outside of its risk tolerance limits or trigger a Commission notification requirement would be extraordinary, non-business-as-usual events, and would likely require the involvement of senior leadership to direct responsive actions to preserve or mitigate damage to operational resilience and prevent situations of intolerable harm. Ensuring that appropriate senior leadership, as determined by the covered entity, is apprised of instances where expected risk tolerance limits have been exceeded would further help senior leadership determine whether the risk appetite and risk tolerance limits are appropriately calibrated and whether identified mitigation strategies are working, creating opportunities to update either as necessary.

4. Consolidated Program or *Plan*—*Proposed Paragraph (c)(4)*

The Commission is aware that many covered entities function as a division or affiliate of a larger entity or holding company structure; and that, in such instances, operational risks stemming from information and technology security, third-party relationships, and emergencies or other significant disruptions are generally monitored and managed at the enterprise level to address the risks holistically and to achieve economies of scale.[98] The proposed rule recognizes the benefits of such a consolidated approach and is not intended to interfere with covered entities' operational structures. Accordingly, the proposed rule would allow covered entities to satisfy the component program or plan requirement in paragraph (b)(2) through its participation in a consolidated program or plan, provided the consolidated program or plan meets the

Workbook, *supra* note 78, at 16 (''Risk appetite statements define certain risk tolerance metrics that help describe systems and services that the organization may consider high-risk.'').

[92] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''risk tolerance limit''). *See also* Prudential Operational Resilience Paper, at 3, n. 11; 14 (defining ''tolerance for disruption'' as ''determined by a firm's risk appetite for weathering disruption from operational risks considering its risk profile and the capabilities of its supporting operational environment'' and ''informed by existing regulations and guidance and by the analysis of a range of severe but plausible scenarios that would affect its critical operations and core business lines.''); CRI Profile Workbook at 291 (stating that ''risk tolerance'' ''reflects the acceptable variation in outcomes related to specific performance measures linked to objectives the entity seeks to achieve''). ISACA, *Risk IT Framework,* 2nd Ed. (July 27, 2020) (defining ''risk tolerance'' as ''the acceptable deviation from the level set by the risk appetite and business objectives'').

[93] The Commission recognizes that Commission regulations 1.11 and 23.600 incorporate the term ''risk tolerance limits.'' *See* 17 CFR 1.11(e)(1), 17 CFR 23.600(c)(1). As proposed to be defined in the ORF rule, however, ''risk tolerance limits'' would be limited to the context of the risks identified in paragraph (b)(1) of the proposed rule and associated disruptions. Accordingly, if adopted, the defined use of the term ''risk tolerance limit'' in the proposed rule would not be intended to affect how covered entities use or interpret the term in the context of the Commission's RMP rules.

[94] The Commission believes its proposed definitions are in line with proposed definitions of ''risk appetite'' and ''risk tolerance'' used by NIST. For example, in NIST Interagency or Internal Report 8286 (NIST IR 8286), NIST explains that a statement of risk appetite might be that ''[e]mail shall be available during the large majority of a 24-hour period,'' while the associated risk tolerance would be narrower, stating something like ''[e]mail services shall not be interrupted more than five minutes during core hours.'' *See* NIST IR 8286 at 5–6 (Oct. 2020). Accordingly, any existing risk appetite and risk tolerance limits established by covered entities pursuant to NIST or prudential regulator standards would be considered consistent with the proposed rule.

[95] *See* paragraph (c)(2)(ii) of proposed Commission regulations 1.13 and 23.603.

[96] *See, e.g.,* BCBS Operational Resilience Principles, *supra* note 11, at 4 (''The board of directors should review and approve the bank's operational resilience approach considering the bank's risk appetite and tolerance for disruption to its critical operations. In formulating the bank's tolerance for disruption, the board of directors should consider the bank's operational capabilities given a broad range of severe but plausible scenarios that would affect its critical operations. The board of directors should ensure that the bank's policies effectively address instances where the bank's capabilities are insufficient to meet its stated tolerance for disruption.''); CRI Profile v1.2, *supra* note 74.

[97] *See* paragraph (c)(3) of proposed Commission regulations 1.13 and 23.603. *See also* paragraphs (i) and (j) of proposed Commission regulations 1.13 and 23.603, discussed in section II.G of this notice, *infra.*

[98] In responding to the RMP ANPRM, several commenters noted how cybersecurity risk is generally managed at the enterprise level and should not be managed at the level of the entity regulated by the Commission. *See* FIA Letter at 11 (Sept. 18, 2023); International Swaps and Derivatives Association, Inc. (''ISDA'') and the Securities Industry and Financial Markets Association (''SIFMA'') Letter at 9 (Sept. 18, 2023).

requirements of the proposed rule.[99] As defined in the proposed rule, a ''consolidated program or plan'' would mean any information and technology security program, third-party relationship program, or business continuity and disaster recovery plan in which a covered entity participates with one or more affiliates and is managed and approved at the enterprise level.[100]

Nevertheless, the Commission does have a strong regulatory interest in ensuring that operational shocks, such as cyber incidents or technological failures, having an impact on the discrete interests and operations of the covered entity are appropriately considered through the unique lens of the covered entity, which is regulated by the Commission. Accordingly, for a covered entity to satisfy the component program or plan requirement through its participation in a consolidated program or plan, the consolidated program or plan would need to meet the requirements of the proposed rule, as discussed in this notice. Those requirements include the establishment of appropriate risk appetite and risk tolerance limits that address the covered entity, as well as testing and other requirements, as discussed further below.

With respect to the requirements in proposed paragraphs (c)(1) and (c)(2)(i) that senior leadership of the covered entity approve, respectively, the component program or plan and the risk appetite and risk tolerance limits at least annually, the Commission recognizes that such a requirement might be challenging in the context of a consolidated program or plan, which is likely to address matters related to affiliates that are not within the scope of knowledge or responsibility of the covered entity. Accordingly, the proposed rule would allow covered entities relying on a consolidated program or plan to satisfy the approval requirements in paragraphs (c)(1) and (c)(2)(i) of the proposed rule, provided that either the senior officer, an oversight body, or a senior-level official of the covered entity attests in writing, on at least an annual basis, that the consolidated program or plan meets the requirements of this section and reflects the risk appetite and risk tolerance limits appropriate to the covered entity.[101] Notably, the senior officer, an oversight body, or a senior-level official at the covered entity would still need to be notified when the risk appetite and risk tolerance limits related to the covered entity are exceeded.[102] The Commission believes that such an attestation requirement would promote efficiency by allowing covered entities to continue to rely on an enterprise-level ORF and governance structures that have acknowledged benefits while also ensuring that such enterprise-level ORF appropriately addresses the risks specific to the covered entity, and would ensure that the requirements of the Commission's proposed rule are addressed for those covered entities in the same way as they would for a covered entity that is not a part of a larger enterprise.[103]

5. Request for Comment

The Commission invites comment on all aspects of the proposed governance requirements for the ORF, including the following questions:

1. *Governance structures.* The proposed rule is intended to provide covered entities sufficient flexibility to integrate the proposed operational resilience requirements into existing reporting lines and operational structures, as well as to select the individual or body with senior-level responsibilities and authority to approve the component programs or plans of the ORF. Does the proposed rule accomplish this goal? If not, what other governance structure(s) should the Commission consider? Alternatively, should the Commission consider a more prescriptive, bright-line approach where only the senior officer or board of directors of the covered entity may provide any approvals required under the proposed rule? Please explain.

2. *Internal escalations.* The proposed rule would require that the senior officer, an oversight body, or other senior-level official(s) of the covered entity be notified of circumstances that exceed risk tolerance limits or that require reporting to the Commission or counterparties or customers under the proposed rule. Should the Commission require internal escalation to any other specific personnel or under any other circumstances? Please identify and explain why.

3. *Consolidated program or plan.* The proposed rule would allow covered entities relying on a consolidated program or plan to satisfy certain governance requirements by requiring the senior officer, an oversight body, or another senior-level official of the covered entity to attest in writing, on at least an annual basis, that the consolidated program or plan meets the requirements of the rule and reflects a risk appetite and risk tolerance limits appropriate to the covered entity. Is this standard workable for covered entities that function as a division or affiliate of a larger entity or holding company? Why or why not? Do such covered entities typically set their own risk appetite and risk tolerance limits, or are setting such limits conducted at the enterprise level? If they are set at the enterprise level, how is senior leadership of the covered entity typically involved in setting risk appetite and risk tolerance limits?

C. Information and Technology Security Program—Proposed Paragraph (d)

As mentioned above, the proposed rule would require each covered entity's ORF to include an information and technology security program, defined as a written program reasonably designed to identify, monitor, manage, and assess risks relating to information and technology security and that meets the minimum requirements for the program, as set forth in the proposed rule and discussed below.[104] The proposed rule would define ''information and technology security'' as the preservation of (a) the confidentiality, integrity, and availability of covered information and (b) the reliability, security, capacity, and resilience of covered technology.[105] ''Covered information'' would be defined to mean any sensitive or confidential data or information maintained by a covered entity in connection with its business activities as a covered entity.[106] ''Covered technology'' would be defined to mean any application, device, information technology asset, network service,

[99] *See* paragraph (c)(4)(i) of proposed Commission regulations 1.13 and 23.603.

[100] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''consolidated program''). Again, the specific definitions and minimum requirements of each program are discussed in sections II.C, II.D, and II.E of this notice, *infra*.

[101] *See* paragraph (c)(4)(ii) of proposed Commission regulations 1.13 and 23.603.

[102] *See* paragraph (c)(3)(i) of proposed Commission regulations 1.13 and 23.603.

[103] The Commission also believes this approach would be consistent with NFA's current interpretive notice on ISSPs. *See* NFA ISSP Notice, *supra* note 43 (''[T]o the extent a Member firm is part of a holding company that has adopted and implemented privacy and security safeguards organization-wide, then the Member firm can meet its supervisory responsibilities imposed by Compliance Rules 2–9, 2–36 and 2–49 to address the risks associated with information systems through its participation in a consolidated entity ISSP.'').

[104] *See* paragraph (d) of proposed Commission regulations 1.13 and 23.603. *See also* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''information and technology security program'').

[105] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''information and technology security'').

[106] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''covered information'').

system, and other information-handling component, including the operating environment, that is used by a covered entity to conduct its business activities, or to meet its regulatory obligations, as a covered entity.[107]

The proposed definition of ''covered information'' is intended to focus the requirements of the ORF on protecting data and information that are sensitive or otherwise intended to be kept confidential, whether by law or for business purposes. Notably, such data and information would include position, order, and account information, all of which covered entities have an obligation to keep confidential and which if made public could result in harm to customers, counterparties, or the markets more broadly. Often referred to as the ''CIA triad,'' confidentiality, integrity, and availability represent the three pillars of information security: preserving authorized restrictions on information access and disclosure, including means for protecting personal privacy and proprietary information; guarding against the improper modification or destruction of data and information, ensuring its authenticity; and ensuring the timely and reliable access to and use of information.[108] The Commission therefore believes that compromising any aspect of the CIA triad with respect to covered information would have meaningful consequences for customers, counterparties, the covered entity, or even the market.

The proposed definition of ''information and technology security'' is likewise intended to ensure that the ORF is designed to address risks to two key facets of a covered entities' business for which they are registered with the Commission: the technology they use to conduct their regulated business activities and the sensitive information stored or transmitted therein. The proposed definition of ''covered technology'' is sufficiently broad to capture all types of technology (and related components) but is tailored to focus on the technology that is used by covered entities in the context of their regulated business activities, such that its disruption would have an impact on regulated business activities. The Commission preliminarily believes that reliability, security, capacity, and resilience are all key attributes of covered technology that must be preserved for it to function as intended without posing a disruption to operations. Accordingly, the Commission believes that having a program designed to preserve the confidentiality, integrity, and availability of covered information and the reliability, security, capacity, and resilience of covered technology is key to ensuring operational resilience.

Under the proposed rule, each covered entity's information and technology security program would need to meet the (b)(3) standard, *i.e.,* be appropriate and proportionate to the nature, size, scope, complexities and risk profiles of the covered entity's business activities, following generally accepted standards and best practices.[109] The proposed rule would nevertheless establish certain minimum requirements for the information and technology security program, including a periodic risk assessment, effective controls, and an incident response plan. Each proposed minimum requirement is discussed in turn below.

1. Risk Assessment—*Proposed Paragraph (d)(1)*

As part of the information and technology security program, covered entities would be required to conduct and document the results of a periodic and comprehensive risk assessment reasonably designed to identify, assess, and prioritize risks to information and technology security.[110] Risk assessments are widely recognized as a necessary and effective first step to monitoring and managing risks to information and technology security.[111] According to NIST, the purpose of a risk assessment is to inform decision makers and support risk responses by identifying: (i) relevant threats to organizations or threats directed through organizations against other organizations; (ii) vulnerabilities both internal and external to organizations; (iii) impact (*i.e.,* harm) to organizations that may occur given the potential for threats exploiting vulnerabilities; and (iv) the likelihood that harm will occur.[112] Given this broad and important purpose, the Commission believes conducting a comprehensive risk assessment would be reasonably necessary for covered entities to have a thorough understanding of their information and technology security risks, including the types of threats the covered entities face, internal and external vulnerabilities, the impact of such risks, and their relative priorities, to guide mitigation efforts.

As stated, the risk assessment would need to identify, assess, and prioritize risks to information and technology security.[113] In broad terms, the Commission anticipates that conducting the assessment could first involve taking an inventory of covered technology and then identifying and assessing the likelihood and potential impact of reasonably foreseeable threats and vulnerabilities to information and technology security (*i.e.,* to the confidentiality, integrity, and availability of covered information, or to the reliability, security, capacity or resilience of covered technology) in light of the existing operational environment. Identified threats and vulnerabilities could derive from a wide array of sources, including both external cyber threats and internal gaps in existing systems or controls.

The Commission would then expect the risks to be prioritized in light of the covered entity's stated risk appetite and risk tolerance limits to help direct resources and other activities in order to best support information and technology security. If the proposal is adopted as final, the Commission would expect covered entities to use the results of each risk assessment as a basis for designing, implementing, and refining other elements of its information and technology security program, including

[107] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''covered technology'').

[108] *See* NIST, SP 1800–26, Data Integrity: Detecting and Responding to Ransomware and Other Destructive Events (Dec. 2020) (discussing the CIA triad).

[109] *See* paragraph (b)(3) of proposed Commission regulations 1.13 and 23.603.

[110] *See* paragraph (d)(1)(i) proposed Commission regulations 1.13 and 23.603.

[111] *See, e.g.,* ISO/IEC 27001:2022, *supra* note 48 (requiring a risk assessment to help organizations identify, analyze, and evaluate weaknesses in their information systems); ISO/IEC 31010:2019, *Risk management: Risk assessment techniques* (July 2, 2019); NIST, SP 800–39, *Managing Information Security Risk: Organization, Mission, and Information System View* at 37 (Mar. 2011) (NIST SP 800–39) (''Risk assessment identifies, prioritizes, and estimates risk to organizational operations (*i.e.,* mission, functions, image, and reputation), organizational assets, individuals, other organizations, and the Nation, resulting from the operation and use of information systems. Risk assessments use the results of threat and vulnerability assessments to identify and evaluate risk in terms of likelihood of occurrence and potential adverse impact (*i.e.,* magnitude of harm) to organizations, assets, and individuals.''); NIST, SP 800–30, *Guide for Conducting Risk Assessments,* Rev. 1, at ix (Sept. 2012) (NIST SP 800–30) (''Risk assessments are a key part of effective risk management and facilitate decision making . . .''). *See also* 12 CFR part 30, app. B (establishing a requirement to assess risk by identifying reasonably foreseeable threats, assessing the likelihood and potential damage of the threats, and assessing the sufficiency of arrangements to control risks); Prudential Operational Resilience Paper, *supra* note 11, at 4 (''The firm's operational risk management function implements and maintains risk identification and assessment approaches that adequately capture business processes and their associated operational risks, including technology and third-party risks.'').

[112] *See* NIST SP 800–30 at 1.

[113] *See* paragraph (d)(1)(i) proposed Commission regulations 1.13 and 23.603.

but not limited to, the development of controls, testing protocols, and the incident response plan, as discussed further below.[114] In this way, a well-conducted risk assessment should support the development of a more rational, effective, and valuable information and technology security framework, especially as the assessment is repeated and built upon over time.

The proposed rule would not prescribe a specific process or methodology for the risk assessment, but the risk assessment would need to be consistent with the proposed (b)(3) standard.[115] Following generally accepted standards and best practices, covered entities would need to implement processes and methodologies that ensure the risk assessment reflects the nature, size, scope, complexities, and risk profile of its business activities as a covered entity. Any such processes or methodologies should also be sufficient to identify, assess, and prioritize risks to information and technology security and to evaluate their potential impact on covered technology and covered information.[116]

To ensure that the risk assessment is conducted objectively, the proposal would require that the personnel involved in conducting the assessment are not responsible for the development or implementation of the covered technology or related controls.[117] Such personnel could be employees of the covered entity, an affiliated entity, or a third-party service provider. To ensure that senior leadership is aware of risks to information security, and can appropriately prioritize them within the covered entity's broader strategy and risk management framework, the proposed rule would expressly require that the results of the risk assessment be provided to the senior officer, oversight body, or other senior-level official who approves the information and technology security program upon the risk assessment's completion.[118] The Commission believes the results of the risk assessment would be key information for senior leadership in determining whether to approve an information and technology security program.

The proposed rule would require that the covered entity conduct the risk assessment at a frequency consistent with the (b)(3) standard (*i.e.,* a frequency appropriate and proportionate to the nature, scope, and complexities of its business activities as a covered entity, following generally accepted standards and best practices) but, in any case, no less frequently than annually.[119] Given the rapidly evolving nature of technological developments and related threats, the Commission preliminarily believes that a uniform requirement to conduct a risk assessment on at least an annual basis would support the development of a strong, foundational level of information and technology security across the industry, thereby mitigating the overall threat of systemic risk. However, the Commission understands that generally accepted standards and best practices may encourage more frequent risk assessments for covered entities that engage in broader or more complex business activities and would expect covered entities to conduct risk assessments more frequently if the circumstances so require.

As mentioned above, the proposed rule would allow covered entities to satisfy the requirement to have an information and technology security program through its participation in a consolidated information and technology security program.[120] Accordingly, such covered entities would be allowed to rely on a risk assessment that is conducted at an enterprise level. In such cases, the Commission would expect that the covered entities review the program and supporting policies and procedures for conducting the risk assessment to ensure it captures and assesses the risks to the covered entity consistent with the proposed rule so as to support the related attestation requirement.[121]

2. Effective Controls—*Proposed Paragraph (d)(2)*

The proposed rule would require that the information and technology security program establish, document, implement, and maintain controls reasonably designed to prevent, detect, and mitigate identified risks to information and technology security.[122] An essential component of any information and technology security program, and a critical component of a covered entity's overall ORF, controls (also referred to as ''countermeasures'' or ''safeguards'') include any measures (actions, devices, procedures, techniques) designed to promote information and technology security.[123] The selection, design, and implementation of controls can therefore have significant implications for a covered entity's information and technology security and overall operational resilience.[124] Accordingly, the Commission believes effective controls would be a critical component of a covered entity's overall ORF.

Although the proposed rule would not mandate that covered entities implement specific controls, it would require covered entities to consider, at a minimum, certain categories of controls, discussed below, and adopt those consistent with the (b)(3) standard.[125] If the proposal is adopted as final, the Commission would further expect that a particular covered entity's determination of which controls to implement would be guided by the results of its risk assessment, considering the covered entity's risk appetite and risk tolerance limits.[126]

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[114] *See* NIST SP 800–39 at 34 (''Information generated during the risk assessment may influence the original assumptions, change the constraints regarding appropriate risk responses, identify additional tradeoffs, or shift priorities.'').

[115] *See* paragraph (b)(3) of proposed Commission regulations 1.13 and 23.603, discussed *supra.* The Commission is aware of several sources for industry standards and best practices regarding information security risk assessments. *See, e.g.,* NIST SP 800–39; *see also* FFIEC Information Security Booklet, *supra* note 69.

[116] *See* paragraph (d)(1)(i) of proposed Commission regulations 1.13 and 23.603.

[117] *See* paragraph (d)(1)(ii) of proposed Commission regulations 1.13 and 23.603.

[118] *See* paragraph (d)(1)(iii) of proposed Commission regulations 1.13 and 23.603. *See also* NIST SP 800–30, *supra* note 111, at 1 (''The purpose of risk assessments is to inform decision makers and support risk responses . . .'').

[119] *See* paragraph (d)(1)(ii) of proposed Commission regulations 1.13 and 23.603.

[120] *See* paragraph (c)(4)(i) of proposed Commission regulations 1.13 and 23.603.

[121] *See* paragraph (c)(4)(ii) of proposed Commission regulations 1.13 and 23.603.

[122] *See* paragraph (d)(2) of proposed Commission regulations 1.13 and 23.603.

[123] *See* Committee on Payments and Market Infrastructures (CPMI), IOSCO, *Guidance on cyber resilience for financial market infrastructures* at 7 (Jun. 2016) (CPMI IOSCO Cyber Resilience Guidance) (noting that a strong information and communications technologies control environment is a fundamental and critical component of overall cyber resilience). *See also* NIST SP 800–53, *supra* note 46, at 8 (''Controls can be viewed as descriptions of the safeguards and protection capabilities appropriate for achieving the particular security and privacy objectives of the organization and reflecting the protection needs of organizational stakeholders. Controls are selected and implemented by the organization in order to satisfy the system requirements. Controls can include administrative, technical, and physical aspects.''); ISO/IEC 27001:2022, *supra* note 48, Annex A (*Information security management systems*) (providing guidelines for 93 objectives and controls).

[124] *See* Prudential Operational Resilience Paper, *supra* note 11, at 8 (identifying as a sound practice for operational resilience routinely applying and evaluating the effectiveness of processes and controls to protect confidentiality, integrity, availability, and overall security of data and information systems).

[125] *See* paragraphs (d)(2)(i)–(xii) of proposed Commission regulations 1.13 and 23.603 (identifying categories of controls for covered entities to consider). *See also* paragraph (b)(3) of proposed Commission regulations 1.13 and 23.603.

[126] *See* paragraph (c)(2) of proposed Commission regulations 1.13 and 23.603 (requiring covered

Adopted controls would also need to address risks to information and technology security identified through other means, including outcomes of continuous monitoring of threats and vulnerabilities, actual and attempted cyber-attacks, threat intelligence, scenario analysis, and the likelihood and realistic impact of such attacks. In other words, the controls would need to be linked to and address the identified and prioritized risks to information and technology security. The Commission would advise covered entities to document their consideration of controls within each of the enumerated categories and their reasoning for adopting specific controls within any given category, or for declining to adopt any controls within a particular category. Further, the Commission would expect those controls to be reviewed and revised as needed to reflect the results of the covered entity's most recent risk assessment.

The specific categories of controls the Commission would require covered entities to consider under the proposed rule include: access controls; access restrictions; encryption; dual control procedures,[127] segregation of duties, and background checks; change management practices; system development and configuration management practices; flaw remediation; measures to protect against destruction, loss, or damage to covered information; monitoring systems and procedures to detect attacks or intrusions; response programs; and measures to promptly recover and secure any compromised covered information.[128]

The Commission preliminarily believes that these categories of controls collectively represent a comprehensive array of controls for ensuring the information and technology security. Access controls, access restrictions, encryption, and background checks would limit access to covered technology and covered information to individuals with a legitimate business need in both physical and digital environments. Dual control procedures, segregation of duties, procedures relating to modifications to covered technology, and measures to protect against destruction, loss, or damage to covered information, would support the integrity and availability of covered information from accidental or intentional damage or disclosure to unauthorized recipients. Change management practices would ensure that the information and technology security program, and associated controls, continue to operate as intended over time as systems and processes are updated. Systems development, configuration management, and flaw remediation practices would operate to ensure the integrity and availability of covered technology throughout any updates to covered technology or following a vulnerability analysis.[129] Measures to protect against destruction of covered information due to environmental hazards would further ensure that covered information remains available even following a physical disruption. Monitoring systems and procedures, response programs, and measures to promptly recover and secure any compromised covered information would serve to detect unauthorized access to covered information and to recover it if the covered entity's access to the covered information were impaired (*e.g.,* through a ransomware attack).

The proposed rule is modeled after an approach adopted by prudential regulators. Since the early 2000s, prudential regulators have required financial institutions to consider a similar list of categories of controls when designing their information security programs.[130] In adopting their list of categories, prudential regulators described them as designed to control identified risks and to achieve the overall objective of ensuring the security and confidentiality of customer information.[131] Prudential regulators further emphasized that the categories were broad enough to be adapted by institutions of varying sizes, scope of operations, and risk management structures, such that the manner of implementing the guidelines would vary from institution to institution.[132] Given that the list of control categories developed by prudential regulators, many of which are included in the Commission's proposed rule, has a longstanding history of being effective and adaptable to the financial industry at large, the Commission preliminarily believes that incorporating a similar approach with respect to covered entities would also further the Commission's intent to adopt a flexible rule that can be tailored to each individual covered entity and adapted over time to respond to changing threat environments and risk profiles.[133]

3. Incident Response Plan—Proposed Paragraph (d)(3)

The proposed rule would require that the information and technology security program include a written incident response plan that is reasonably designed to detect, assess, contain, mitigate the impact of, and recover from an incident.[134] A hallmark of operational resilience is the recognition that although meaningful steps can be taken to prevent and deter risks to information and technology security, such risks may never be entirely eliminated.[135] As the ION incident illustrated, quick and complete recovery of covered technology and operations may be key to mitigating the potential systemic impact to the financial markets. Accordingly, a crucial aspect of any information and technology security program, and therefore any ORF, is having a plan to respond to and recover from events that may create risks to information and technology security.[136]

entities to establish and implement risk appetite and risk tolerance limits).

[127] Dual control procedures refer to a technique that requires two or more separate persons, operating together, to protect sensitive data and information. Both persons are equally responsible for protecting the information and neither can access the information alone. *See* Interagency Guidelines Establishing Standards for Safeguarding Customer Information and Rescission of Year 2000 Standards for Safety and Soundness, 66 FR 8616, 8622 (Feb. 1, 2001) (Interagency Guidelines Safeguarding Customer Information).

[128] *See* paragraphs (d)(2)(i)–(xi) of proposed Commission regulations 1.13 and 23.600.

[129] Based on its experience, the Commission further believes that that failures in change management, systems development, and vulnerability patching practices are common sources of disruption among financial institutions and are often neglected control areas.

[130] *See* Interagency Guidelines Safeguarding Customer Information, 66 FR 8616; *see also* 12 CFR part 30, app. B. The guidelines were expanded and retitled, ''Interagency Guidelines Establishing Information Security Standards'' in 2004, *see* Proper Disposal of Consumer Information Under the Fair and Accurate Credit Transactions Act of 2003, 69 FR 77610 (Dec. 28, 2004).

[131] *See* Interagency Guidelines Safeguarding Customer Information, 66 FR 8621.

[132] Commenters further supported the level of detail, *see id.* at 8622.

[133] NIST has compiled a comprehensive catalog of security and privacy controls for all types of computing platforms, including general purpose computing systems, cyber-physical systems, cloud systems, mobile systems, and Internet of Things (IoT) devices. *See* NIST SP 800–53, *supra* note 123.

[134] *See* paragraph (d)(3) of proposed Commission regulations 1.13 and 23.603. The Commission is aware that some covered entities may have established an incident response plan as a separate document or as an attachment to another plan, such as a BCDR plan. If the proposed rule is adopted, the Commission would be agnostic as to where a covered entity elects to house its incident response plan provided it otherwise meets the requirements of the proposed rule, including recordkeeping, furnishing it to the Commission upon request, and distributing it to personnel.

[135] *See* BCBS Operational Resilience Principles, *supra* note 12, at 1 (stating that, in recognition that ''the range of potential hazards cannot be prevented,'' the focus should be on ''the ability of banks to withstand, adapt to and recover from potential hazards and thereby mitigate potentially severe adverse impacts'').

[136] *See, e.g.,* BCBS Operational Resilience Principles at 7, n.18 (''The goal of incident

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The Commission believes, therefore, that an effective incident response plan would help covered entities minimize the potential impact to their operations and customers or counterparties when negative events occur, facilitating their recovery as swiftly and successfully as possible.[137] It can also assist in securing against the destruction or theft of sensitive and important confidential customer or counterparty information, which could have a very real impact on their business and assets.

For purposes of the proposed rule, ''incident'' would be defined as any event, occurrence, or circumstance that could jeopardize information and technology security, including if it occurs at a third-party service provider.[138] The purpose of the incident response plan is to identify and classify foreseeable types of incidents and to establish steps to detect, assess, contain, mitigate the impact of, and recover from incidents. The Commission's proposed definition of ''incident'' is intentionally broad to ensure that the incident response plan would address any event that could reasonably jeopardize (*i.e.,* endanger or put at risk) information and technology security, even if that danger never materializes or the incident response plan is otherwise successful at preventing or reversing the danger. As defined in the proposed rule, ''incident'' is broad enough to cover various types of risks to covered technology (*e.g.,* disruption or modification) or covered information (*e.g.,* disclosure or destruction), regardless of the source (*e.g.,* external threat actor or internal staff, physical or electronic) or whether the event was accidental or malicious in nature, since intent may not be readily determined at the outset of an incident. Common examples of incidents would include unauthorized access to a system or data; unauthorized changes to system hardware, software, or data; or a failure of controls that could, if not addressed, endanger information and technology security.

Consistent with the general framework for the ORF as a whole, the proposal would require the incident response plan to meet certain minimum requirements.[139] In broad terms, these requirements focus on identifying persons relevant to an incident response (*i.e.,* personnel involved in responding to the incident and persons who should be notified of such incidents) and how and when they should be involved; documenting the nature of the covered entity's response; and remediating any weaknesses that lead to the incident.[140] The Commission believes that clearly identifying parties who would be involved in incident response, including external parties like third-party service providers and law enforcement, and establishing associated roles and responsibilities would help ensure that incidents are: (1) resolved in a timely manner and by appropriate personnel; (2) adequately resourced financially, operationally, and staffing-wise; and (3) disclosed to appropriate persons either within senior leadership of the covered entity or externally, where required.[141] The process of documenting incidents and management's response, as well as any subsequent remediation efforts, would assist with any related reporting obligations and required information sharing, as well as with subsequent testing of the incident response plan or post-mortem analysis, which would potentially lead to adjustments in subsequent risk assessments and provide lessons learned that could serve to help prevent the occurrence of incidents in the future.[142]

Among these minimum requirements for the incident response plan is the need for it to include escalation protocols, *i.e.,* a process of identifying when to involve or alert specific personnel, including senior leadership, of an incident.[143] Specifically, the proposed rule would require that the senior officer, oversight body, or other senior-level official that has primary responsibility for overseeing the information and technology security program; the Chief Compliance Officer (CCO); [144] and any other relevant personnel be timely informed of incidents that may significantly impact the covered entity's regulatory obligations or require notification to the Commission.[145] This provision is designed to ensure that every individual who has a role in responding to an incident at a covered entity would be appropriately notified. CCOs of covered entities in particular have a duty to take reasonable steps to ensure compliance with Commission regulations relating to the covered entities' business as a covered entity.[146] Timely disclosure of incidents to the CCO that could impact a covered entity's regulatory obligations or require disclosure to the Commission would therefore be crucial for a covered entity CCO to fulfill the duty to take reasonable steps to ensure compliance. As previously discussed above in the section addressing governance, the Commission believes that involving senior leadership in incident response would be particularly important to ensure that they are apprised of and held accountable for the ultimate effectiveness of the ORF, and that incidents receive proper attention and are swiftly addressed.

4. Request for Comment

The Commission invites comment on all aspects of the proposed information and technology security program requirement, including the following questions:

1. *Risk Assessment.*

a. The proposed rule would require that the risk assessment be provided to relevant senior leadership of the covered entity upon its completion but would not require that such senior leadership certify in writing that they have received the results of the risk assessment or approve the results of the risk assessment. Such approvals and certifications may be required in other contexts to ensure that senior leadership

management is to limit the disruption and restore critical operations in line with the bank's risk tolerance for disruption.''). *See also* FFIEC Information Security Booklet, *supra* note 69, 50–51 (''containing the incident, coordinating with law enforcement and third parties, restoring systems, preserving data and evidence, providing assistance to customers, and otherwise facilitating operational resilience''); NIST, SP 800–184, *Guide for Cybersecurity Event Recovery* (Dec. 2016) (NIST SP 800–184) (''evaluate the potential impact, planned response activities, and resulting recovery processes long before an actual cyber event takes place''); CIS, *Incident Response Policy Template: Critical Security Controls* (Mar. 8, 2023) at 4 (''The primary goal of incident response is to identify threats on the enterprise, respond to them before they can spread, and remediate them before they can cause harm.'') (CIS Incident Response Template).

[137] *See* FFIEC, CAT at 52 (May 2017) (''The incident response plan is designed to ensure recovery from disruption of services, assurance of data integrity, and recovery of lost or corrupted data following a cybersecurity incident''); CPMI IOSCO Cyber Resilience Guidance, *supra* note 123, at 16 (recognizing the incident response plan enables the business ''to resume critical operations rapidly, safely and with accurate data'').

[138] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''incident'').

[139] *See* paragraphs (d)(3)(i)–(vi) of proposed Commission regulations 1.13 and 23.603.

[140] See id.

[141] *See also* NIST SP 800–61 (''It is important to identify other groups within the organization that may need to participate in incident handling so that their cooperation can be solicited before it is needed. Every incident response team relies on the expertise, judgment, and abilities of others . . .'').

[142] *See* NIST SP 800–184, *supra* note 132; CIS Incident Response Template, *supra* note 136, at 4 (''Without understanding the full scope of an incident, how it happened, and what can be done to prevent it from happening again, defenders will just be in a perpetual 'whack-a-mole' pattern.'').

[143] *See* paragraph (d)(3)(ii) of proposed Commission regulations 1.13 and 23.603.

[144] *See* 17 CFR 3.3 (establishing the qualifications and duties of covered entity CCOs).

[145] *See* paragraph (d)(3)(ii) of proposed Commission regulations 1.13 and 23.603. *See also* paragraph (i) of proposed Commission regulations 1.13 and 23.603 (requiring notification of certain incidents to the Commission), discussed in section II.H of this release, *infra.*

[146] *See* 17 CFR 3.3(d)(3).

is aware of risk assessments and consider them in establishing strategic goals, risk appetite, and risk tolerance limits. Should the Commission require such a certification or approval? Why or why not? Please explain.

b. Given the rapidly evolving technological and threat landscape, the proposed rule would require risk assessments to be performed on at least an annual basis to support the mitigation of systemic risk and develop a strong baseline standard across covered entities. The Commission is aware of standards imposing risk assessments as frequently as every six months and as infrequently as every two years. Should the Commission consider a shorter or longer baseline frequency for risk assessments? Why or why not? Please explain.

2. *Effective controls.* The proposed rule would require covered entities to consider broad categories of controls and determine which to adopt consistent with the proposed (b)(3) standard. The Commission is also aware that certain controls, including firewalls, antivirus, and multifactor authentication (MFA) are commonly recommended within the industry. With respect to MFA, which requires users to present two or more authentication factors at login to verify their identity before they are granted access, CISA advises that implementing MFA is important because it makes it more difficult for threat actors to gain access to information systems, even if passwords or PINs are compromised through phishing attacks or other means.[147] In 2021, FFIEC issued guidance advising financial institutions that MFA or controls of equivalent strength, including for those employees, could help more effectively mitigate risks when a financial institution's risk assessment indicates that single-factor authentication with layered security is inadequate.[148] The guidance added that MFA factors, which may include memorized secrets, look-up secrets, out-of-band devices, one-time-password devices, biometrics identifiers, and cryptographic keys, can vary in terms of usability, convenience, and strength and their ability to be exploited.[149] That same year, the Federal Trade Commission updated its rule for safeguarding customer information to mandate financial institutions to adopt MFA for all users.[150] The Commission preliminarily believes that requiring covered entities to implement such widely recommended controls, such as and including MFA, would help reduce cyber security risks and clarify expectations. Should the Commission mandate the use of any specific controls, including firewalls, antivirus, and/or MFA? Why or why not? Please explain.

3. *Incident response plan.* As proposed, covered entities would be required to notify their CCOs of incidents that they have determined may significantly impact regulatory obligations or require notification to the Commission. Commission staff are aware of instances where covered entity CCOs have not been notified of incidents sufficiently early to play a meaningful role in determining whether the incident implicates any CFTC requirements and in developing an appropriate remediation plan. Should covered entities be required to notify their CCOs of all incidents, only incidents that may require notification under the proposed rule, or incidents that may require notification under the proposed rule to other financial regulatory authorities? Why or why not?

D. Third-Party Relationship Program—Proposed Paragraph (e)

The second program required to be included as part of the proposed ORF would be a third-party relationship program, defined as a written program reasonably designed to identify, monitor, manage, and assess risks relating to third-party relationships that meets the requirements of the proposed rule.[151] The Commission understands that covered entities currently routinely rely upon third parties for a wide variety of products, services, and activities, including, for example, information technology, counterparty or customer relationship management, accounting, compliance, human resources, margin processing, trading, and risk management. Reliance on third-party service providers carries many potential benefits, including a reduction in operating costs and access to technological advancements that can improve operations and regulatory compliance.[152]

But that reliance is not riskless.[153] As the ION incident illustrated, operational disruptions of third-party services, particularly of those important to a firm's operations or regulatory obligations, can present challenges for individual firms and even the financial system as a whole.[154] The risks may vary from minor to significant, depending on the nature of the provider or the service being rendered, but they are inherent in the nature of a third-party service provider relationship, in which a firm relies on the performance of another entity and the quality and reliability of that performance is not in the direct control of the firm.[155] The Commission accordingly believes that, in order to support their operational resilience, covered entities should have a plan in place to identify, monitor, manage, and assess the risks associated with third-party relationships.[156]

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[147] CISA, Multi-Factor Authentication Fact Sheet (Jan. 2022), *available at https://www.cisa.gov/sites/default/files/publications/MFA-Fact-Sheet-Jan22-508.pdf.* NIST defines MFA as ''[a]n authentication system that requires more than one distinct authentication factor for successful authentication. Multi-factor authentication can be performed using a multi-factor authenticator or by a combination of authenticators that provide different factors. The three authentication factors are *something you know, something you have, and something you are.*'' NIST, SP 800–63–3, *Digital Identity Guidelines* at 49 (June 2017).

[148] FFIEC, Authentication and Access to Financial Institution Services and Systems at 7 (rev. Jan. 5, 2022).

[149] *Id.*

[150] *See* Standards for Safeguarding Customer Information, 86 FR 70272 (Dec. 9, 2021); *see also* 16 CFR 314.4(c)(5) (requiring financial intuitions to ''[i]mplement multi-factor authentication for any individual accessing any information system unless [a qualified individual, as defined in the rule] has approved in writing the use of reasonably equivalent or more secure access controls.'').

[151] *See* paragraph (e) of proposed Commission regulations 1.13 and 23.603. *See also* paragraph (a) of proposed regulations 1.13 and 23.603 (defining ''third-party relationship program'').

[152] *See* Prudential Third-Party Guidance, 88 FR 37927 (''The use of third parties can offer banking organizations significant benefits, such as access to new technologies, human capital, delivery channels, products, services, and markets.''); IOSCO Outsourcing Report, *supra* note 65, at 4 (''The benefits of outsourcing include lowering costs, increasing automation to speed up tasks and reduce the need for manual intervention, and providing flexibility to allow regulated entities to rapidly adjust both to the scope and scale of their activities.''); FFIEC, *Information Technology Examination Handbook, Outsourcing Technology Services Booklet* at 1 (June 2004) (''The ability to contract for technology services typically enables an institution to offer its customers enhanced services without the various expenses involved in owning the required technology or maintaining the human capital required to deploy and operate it.'').

[153] *See* Prudential Third-Party Guidance, 88 FR 37927 (''[T]he use of third parties can reduce a banking organization's direct control over activities and may introduce new risks or increase existing risks, such as operational, compliance, and strategic risks.'').

[154] *See supra* note 20 and accompanying text.

[155] *See* Prudential Third-Party Guidance, 88 FR 37927 (''Increased risk often arises from greater operational or technological complexity, newer or different types of relationships, or potential inferior performance by the third party. A banking organization can be exposed to adverse impacts, including substantial financial loss and operational disruption, if it fails to appropriately manage the risks associated with third-party relationships.'').

[156] For purposes of the proposed rule, the Commission would construe ''third-party service provider'' broadly and consistently with the terms ''third-party'' and ''business arrangement'' as used in the Prudential Third-Party Relationship Guidance. *See id.* (''Third-party relationships can include, but are not limited to, outsourced services, use of independent consultants, referral arrangements, merchant payment processing

Continued

As mentioned above, the Commission appreciates that the risks presented by individual third-party relationships may vary depending on the firm, the provider, or service. For instance, risks may be more elevated if the service provider is a new entrant to the marketplace or the service relates to a new, untested technology, and covered entities with more numerous or intricate third-party relationships may experience greater overall risk from third parties by virtue of the number and complexity of their relationships. Accordingly, the proposed rule would not require third-party relationship programs to apply an identical degree of scrutiny and oversight to all third-party relationships. Instead, consistent with the principles-based focus of the proposed rule, and the proposed (b)(3) standard, the Commission would expect covered entities to adopt a third-party relationship program that helps them identify and assess the risks of their existing and future third-party relationships and adapt their risk management practices consistent with those risks, their risk appetite and risk tolerance limits, and the nature, size, scope, complexity, and risk profile of their business activities, following generally accepted standards and best practices.[157]

1. Third-Party Relationship Lifecyle Stages—Proposed Paragraph (e)(1)

To guide covered entities in developing their third-party relationship programs, and to ensure that the programs address the full scope of risks that third-party relationships can present, the proposed rule would require the third-party relationship program to describe how the covered entity would address the risks attendant to each stage of the third-party relationship lifecycle.[158] Specifically, the proposed rule would require the program to address: (i) pre-selection risk assessment; (ii) the due diligence process for prospective third-party relationships; [159] (iii) contractual negotiations; (iv) ongoing monitoring during the course of the relationship; and (v) termination of the relationship, including preparations for planned and unplanned terminations.[160]

Each of these stages offers covered entities opportunities to assess and take steps to mitigate the potential risks associated with reliance on third-party service providers. At the outset, covered entities should determine whether it is appropriate for a third-party service provider to perform a particular service and evaluate the associated risks.[161] For instance, the determination to secure a third-party service provider may carry greater risks where the service directly impacts a regulatory requirement, where the third-party service provider would be given direct access to covered information, or where a disruption of services could impact regulatory compliance or have a negative impact on customers or counterparties. Due diligence provides covered entities with information to assess whether a prospective third-party service provider is equipped, operationally and otherwise, to perform as expected.[162] Contractual negotiations offer a possibility to mitigate potential risks by including provisions to assign specific responsibilities or liabilities, but may also contribute to risks, especially where a covered entity may have more limited negotiating power.[163] Ongoing monitoring of a third-party service provider's performance likewise aids covered entities in identifying whether selected third-party service providers remain able to perform as expected throughout the duration of the relationship.[164] Finally, the manner in which the relationship ends can have a major impact on the covered entity, particularly if it ends due to a breach of performance. Plans to address the termination, through contingencies or otherwise, could therefore prove important to ensuring the covered entity's ongoing operations.[165] The Commission therefore preliminarily believes that effective management of third-party risks would require covered entities to have a program that establishes methodologies and practices to assess and manage the risks of third-party relationships throughout each of these five stages of the third-party relationship lifecycle.[166]

2. Heightened Requirements for Critical Third-Party Service Providers—Proposed Paragraph (e)(2)

Although the Commission appreciates that third-party risks are not uniform, it nevertheless believes that certain circumstances warrant enhanced risk management practices across all covered entities. Specifically, the proposed rule would require that the third-party relationship program establish heightened due diligence and ongoing

services, services provided by affiliates and subsidiaries, and joint ventures. Some banking organizations may form third-party relationships with new or novel structures and features—such as those observed in relationships with some financial technology (fintech) companies.'').

[157] *See* paragraph (b)(3) of proposed Commission regulations 1.13 and 23.603. *See also* NFA Third-Party Notice, *supra* note 43 (''NFA recognizes that a Member must have flexibility to adopt a written supervisory framework relating to outsourcing functions to a Third-Party Service Provider that is tailored to a Member's specific needs and business . . .''); Prudential Third-Party Guidance, 88 FR 37924 (''[I]t is the responsibility of the banking organization to identify and evaluate the risks associated with each third-party relationship and to tailor its risk management practices, commensurate with the banking organization's size, complexity, and risk profile, as well as with the nature of its third-party relationships.'').

[158] *See* paragraph (e)(1) of proposed Commission regulations 1.13 and 23.603.

[159] The proposed rule is not intended to interfere with the obligation in Commission regulation 1.11(e) for FCMs to conduct onboarding and ongoing due diligence on depositories carrying customer funds. *See* 17 CFR 1.11(e)(3)(i)(A)–(B).

[160] *See* paragraphs (e)(1)(i)–(v) of proposed Commission regulations 1.13 and 23.603. *See also* NFA Third-Party Notice (requiring NFA members to establish a written supervisory framework that includes an initial risk assessment, onboarding due diligence, ongoing monitoring, termination, and recordkeeping); 12 CFR part 30, app. B, III.D. (Oversee Service Provider Arrangements) (requiring financial institutions to exercise appropriate due diligence in selecting service providers, contract with service providers to implement ''appropriate measures designed to meet the objectives of'' prudential guidelines for information security; and, where indicated by its risk assessment, monitor service providers to confirm they have satisfied their obligations).

[161] *See* NFA Third-Party Notice (''At the outset, a Member should determine whether a particular regulatory function is appropriate to outsource and evaluate the risks associated with outsourcing the function.''); Prudential Third-Party Guidance, 88 FR 37928 (''As part of sound risk management, effective planning allows a banking organization to evaluate and consider how to manage risks before entering into a third-party relationship.'').

[162] *See* IOSCO Outsourcing Report, *supra* note 65, at 18 (''It is important that regulated entities exercise due care, skill, and diligence in the selection of service providers. The regulated entity should be satisfied that the service provider has the ability and capacity to undertake the provision of the outsourced task effectively at all times.''); Prudential Third-Party Guidance, 88 FR 37929 (''Conducting due diligence on third parties before selecting and entering into third-party relationships is an important part of sound risk management. It provides management with the information needed about potential third parties to determine if a relationship would help achieve a banking organization's strategic and financial goals. The due diligence process also provides a banking organization with the information needed to evaluate whether it can appropriately identify, monitor, and control risks associated with the particular third-party relationship.'').

[163] *See* IOSCO Outsourcing Report at 21 (''Contractual provisions can reduce the risks of non-performance or aid the resolution of disagreements about the scope, nature, and quality of the service to be provided.'').

[164] *See id.* at 18 (''The regulated entity should also establish appropriate processes and procedures for monitoring the performance of the service provider on an ongoing basis to ensure that it retains the ability and capacity to continue to provide the outsourced task.'').

[165] *See id.* at 33 (''Where a task is outsourced, there is an increased risk that the continuity of the particular task in terms of daily management and control of that task, related information and data, staff training, and knowledge management, is dependent on the service provider continuing in that role and performing that task.'').

[166] *See* Prudential Third-Party Guidance, 88 FR 37928 (''Effective third-party risk management generally follows a continuous life cycle for third-party relationships.'').

monitoring practices with respect to third-party service providers deemed critical third-party service providers.[167] The proposed rule would define ''critical third-party service provider'' to mean a third-party service provider, the disruption of whose performance would be reasonably likely to either (a) significantly disrupt a covered entity's businesses operations or (b) significantly and adversely impact the covered entity's counterparties or customers.[168] The Commission understands that it is common practice for financial institutions, whether by regulatory mandate or otherwise, to identify a subset of services or providers more central to their operations and apply greater scrutiny and oversight to them to ensure the services are provided without disruption. The proposed rule's definition of ''critical third-party service provider'' focuses on the potential impact a disruption to performance would have on the covered entity's regulated business operations, customers, or counterparties. Where such an impact would be significant, as assessed in light of the covered entity's business activities, risk appetite, and risk tolerance limits, the Commission believes heightened due diligence for potential critical third-party service providers and ongoing monitoring for onboarded critical third-party service providers are warranted to both mitigate the potential for such an occurrence and to promote the ability for covered entities to take early and effective action if a critical third-party service provider's performance is disrupted to mitigate the impact and effectively recover.[169]

3. Third-Party Service Provider Inventory—Proposed Paragraph (e)(3)

To help ensure that covered entities implement a comprehensive and consistent approach to identifying their critical third-party service providers, covered entities would be required to create, maintain, and regularly update an inventory of third-party service providers they have engaged to support their activities as a covered entity, identifying whether each third-party service provider in the inventory is a critical third-party service provider.[170] The Commission preliminarily believes that the process of creating an inventory of service providers, particularly the deliberative process involved in designating certain providers as critical third-party service providers, would help covered entities assess and evaluate the risks they face from their third-party service providers, and determine when to apply heightened monitoring. Maintaining such an inventory would also reflect that not all third-party service providers present the same level and types of risks to a covered entity, and would help covered entities assess and evaluate who is providing services and the attendant risk that any disruption of those services would have on a covered entity's business. The inventory would also provide covered entities a holistic view of their third-party service providers, which would help them better understand how risks identified during due diligence and ongoing monitoring may interact or require additional management. Having a clear understanding of who is providing services, particularly those services identified as critical, would further assist covered entities in identifying potential interconnections that may not be readily apparent if the entities are not assembled and reviewed collectively.[171]

Covered entities relying on a consolidated third-party relationship program would be able to rely on an enterprise-wide third-party service provider inventory provided that the inventory meets the requirements of the proposed rule, including identifying critical third-party service providers specific to the covered entity.[172]

4. Retention of Responsibility—Proposed Paragraph (e)(3)

For the avoidance of doubt, the proposed rule would make clear that, notwithstanding their determination to rely on a third-party service provider, covered entities remain responsible for meeting their obligations under the CEA and Commission regulations.[173] This provision reflects the principle, widely recognized among financial regulatory authorities, including the Commission, that while financial institutions may be able to delegate functions to third-party service providers, they cannot delegate their responsibility to comply with applicable laws and regulations.[174] This provision is intended to ensure that covered entities are aware that they remain responsible for the performance of all applicable regulatory functions, whether performed by the covered entity or by a third-party service provider, and are accordingly fully subject to the Commission's jurisdiction, including its examination and enforcement authorities.

5. Application to Existing Third-Party Relationships

Should the proposed rule be adopted as final, the Commission would expect covered entities to apply their third-party relationship programs across all stages of the relationship lifecycle on a going-forward basis. Although the Commission would not require covered entities to renegotiate or terminate existing agreements, it would expect covered entities to conduct ongoing monitoring of existing third-party service providers consistent with the program and this regulation and, to the extent possible, to rely on its program with respect to termination. For any third-party service providers contemplated or onboarded after the effective date of the proposed rule, or for any contracts renegotiated or renewed after the effective date of the rule, however, the Commission would expect covered entities to apply the entirety of the third-party relationship program from pre-selection through termination.

[167] *See* paragraph (e)(2) of proposed Commission regulations 1.13 and 23.603.

[168] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''critical third-party service provider'').

[169] *See* NFA Third-Party Notice, *supra* note 43 (''Additionally, a Member's onboarding due diligence process should be heightened for Third-Party Service Providers that obtain or have access to a Member's critical and/or confidential data and those that support a Member's critical regulatory-related systems (*e.g.,* handling customer segregated funds, keeping required records, filing financial reports, etc.).'').

[170] *See* paragraph (e)(3) of proposed Commission regulations 1.13 and 23.603.

[171] Prudential Third-Party Guidance, 88 FR 37927 (''Maintaining a complete inventory of its third-party relationships and periodically conducting risk assessments for each third-party relationship supports a banking organization's determination of whether risks have changed over time and to update risk management practices accordingly.'').

[172] *See* paragraph (c)(4)(i) of proposed Commission regulations 1.13 and 23.603 (allowing covered entities to rely on consolidated programs).

[173] *See* paragraph (e)(3) of proposed Commission regulations 1.13 and 23.603.

[174] *See* NFA Third-Party Notice, *supra* note 43 (''If a Member outsources a regulatory function, however, it remains responsible for complying with NFA and/or CFTC Requirements and may be subject to discipline if a Third-Party Service Provider's performance causes the Member to fail to comply with those Requirements.''); Prudential Third-Party Guidance, 88 FR 37927 (''A banking organization's use of third parties does not diminish its responsibility to meet these requirements to the same extent as if its activities were performed by the banking organization in-house.''); IOSCO Outsourcing Report, *supra* note 65, at 12 (''The regulated entity retains full responsibility, legal liability, and accountability to the regulator for all tasks that it may outsource to a service provider to the same extent as if the service were provided in-house.''). *See also* 17 CFR 37.204 (SEFs); 17 CFR 38.154 (DCMs); 17 CFR 39.18(d) (DCOs) (providing that such registered entities retain responsibility for meeting relevant regulatory requirements when entering into contractual outsourcing arrangements).

6. Guidance on Third-Party Relationship Programs—Proposed Paragraph (e)(4); Appendix A to Part 1; Appendix A to Subpart J of Part 23

To assist covered entities in developing third-party relationship programs that adequately address risks from third-party relationships, the Commission is proposing guidance outlining potential risks, considerations, and strategies for covered entities to consider.[175] The proposed guidance addresses all five stages of the relationship lifecycle and, if adopted, would be codified as appendices to parts 1 and 23 of the Commission's regulations for FCMs and swap entities, respectively.[176] Designed to be broadly applicable to all covered entities, the proposed guidance identifies actions and factors for covered entities to consider. The factors and actions identified are not exhaustive, nor should they be viewed as a required checklist. The nonbinding guidance would merely be intended to aid covered entities as they design third-party relationship programs tailored to their own unique circumstances, consistent with the general ORF ''appropriate and proportionate standard'' discussed above.

In developing the proposed guidance, the Commission considered the recommendations of international standard-setting bodies, including IOSCO and FSB, in light of observations and lessons derived from its own oversight activities.[177] In an effort to incorporate as much consensus as possible, the Commission also gave special consideration to existing guidance from NFA and the guidance on third-party relationships recently adopted by prudential regulators, both of which currently apply to at least some covered entities.[178]

The full text of the guidance is included at the end of this notice as proposed appendix A to part 1 for FCMs and proposed appendix A to subpart J of part 23. The guidance is identical in substance for FCMs and swap entities.

7. Request for Comment

The Commission invites comment on all aspects of the proposed third-party relationship program requirement and associated guidance, including the following questions:

1. *Scope of Application.* NFA's interpretive notice on third-party relationships is limited in scope to ''outsourcing,'' which NFA defines as third-party relationships in which an NFA member has a third-party service provider or vendor perform certain functions that would otherwise by undertaken by the member itself to comply with NFA and CFTC requirements.[179] The proposed rule would follow the approach taken by prudential regulators in their third-party guidance, which more broadly addresses any circumstances where banking organizations rely on third parties for products, services, or activities to ''capture[ ] the full range of third-party relationships that may pose risk to banking organizations.'' [180] Should the Commission consider limiting the scope of its guidance to outsourcing of CFTC regulatory obligations? Why or why not? Please explain.

2. *Critical third-party service provider.* The proposed rule includes a definition of ''critical third-party service provider.'' The Commission understands it is common practice for financial institutions to identify and apply heightened oversight of third-party service providers they deem critical. NFA's interpretive notice related to third-party relationships, for instance, advises members to tailor the frequency and scope of ongoing monitoring reviews to the criticality of and risk associated with the outsourced function but does not define ''criticality'' for covered entities. Is the Commission's proposed definition consistent with existing standards or definitions of ''criticality'' applied by covered entities? If not, how is it different? Should the Commission consider allowing covered entities to generate and apply their own definition of ''critical third-party service provider''? Why or why not? Please explain.

3. *Guidance—Affiliated Third-Party Service Providers.* The proposed third-party relationship program requirement would apply to all third-party relationships, including where the third-party is an affiliate of the covered entity. This position is consistent with both NFA and prudential guidance related to third-party relationships.[181] Nevertheless, the Commission recognizes that arrangements with affiliates may present different or lower risks than with unaffiliated third parties. Should the Commission consider including any additional guidance with respect to the management of third-party service providers that are affiliated entities? If so, what factors should covered entities consider when evaluating relationships with affiliated third-party service providers?

4. *Guidance—Due Diligence.* The proposed guidance recommends that covered entities perform due diligence on prospective third-party service providers to assess their ability to deliver contracted services to an acceptable standard (*i.e.,* consistent with risk appetite and risk tolerance limits) and provides examples of information that covered entities should review and sources for obtaining that information.

a. Are there any additional due diligence tasks that should be conducted by the covered entity beyond reviewing information about the potential third-party service provider? Are there additional risks that should be included in the guidance for the covered entity to inquire into? If yes, please identify and explain.

b. Are there additional sources of due diligence information beyond those listed in the guidance (see section B of the guidance) that should be included in the guidance? If yes, please identify and explain.

c. Should covered entities be advised to periodically refresh their due diligence, or upon the occurrence of specific triggers (*e.g.,* a material change to the service outsourced)? Why or why not? Would such a recommendation be duplicative of the covered entity's ongoing monitoring activities, or would the subsequent due diligence provide additional valuable information to the covered entity beyond that provided by ongoing monitoring? Why or why not? Please explain.

d. The proposed guidance does not recommend that covered entities perform due diligence directly on any subcontractors secured by third-party service providers. Rather, the Commission's guidance suggests that covered entities review the operational risk management practices of the potential third-party service provider with respect to their subcontractors. Should the Commission recommend more enhanced due diligence of subcontractors? Why or why not? What

[175] *See* paragraph (e)(4) of proposed Commission regulations 1.13 and 23.603.

[176] *See* proposed Appendix A to part 1 and proposed Appendix A to Subpart J of part 23.

[177] *See* IOSCO Outsourcing Report, *supra* note 65; FSB Third-Party Report, *supra* note 44.

[178] *See* NFA Third-Party Notice; Prudential Third-Party Guidance, 88 FR 37920.

[179] *See* NFA Third-Party Notice, *supra* note 43.

[180] *See* Prudential Third-Party Guidance, 88 FR 37921–22.

[181] *See* NFA Third-Party Notice at n.1 (''Further, even if a Member outsources a regulatory obligation to an affiliate, . . . a Member should comply with this Notice's requirements.''); Prudential Third-Party Guidance, 88 FR 37927 (''Third-party relationships can include, but are not limited to, . . . services provided by affiliates and subsidiaries. . .'').

means are practicable for covered entities to conduct due diligence on subcontractors to their third-party service providers? Please identify and explain.

E. Business Continuity and Disaster Recovery Plan—Proposed Paragraph (f)

The third component of the ORF would be a business continuity and disaster recovery (BCDR) plan, defined as a written plan outlining the procedures to be followed in the event of an emergency or other significant disruption to the continuity of a covered entity's normal business operations and that meets the requirements of the proposed rule.[182] Similar to the incident response plan (and, in extreme cases, possibly triggered by an incident covered by the incident response plan), the proposed BCDR plan requirement recognizes the operational reality that not all operational disruptions can be prevented or immediately mitigated and asks covered entities to strategize and implement plans for how to minimize the impact to operations, customers, and counterparties when such adverse events occur.

Although NFA requires FCMs to establish and maintain a BCDR plan, if adopted, the proposed rule would create a new CFTC BCDR plan requirement for FCMs.[183] Current Commission regulation 23.603 contains an active BCDR plan requirement for swap entities.[184] In essence, the proposal would make certain amendments to the CFTC BCDR plan requirement for swap entities and expand the requirement to include FCMs. The proposed amendments to the swap entity BCDR plan requirement have two general purposes. For the most part, the proposal would streamline and simplify some of the language to help it further conform to the proposed ORF rule more broadly, in ways the Commission intends to be non-substantive. The proposal would also make a few substantive changes, informed either by the Commission's review of NFA's and CME's current BCDR requirements for their members or by its decade of experience applying current Commission regulation 23.603 to swap entities.[185] The proposed substantive changes, each subsequently discussed in this notice, relate to either the defined scope of and recovery objective for the BCDR plan or the testing and audit requirements for the plan.

Current Commission regulation 23.603 includes requirements that the proposed rule would apply to the entirety of the proposed ORF more broadly. Those requirements include requirements to: distribute the BCDR plan to relevant employees (current Commission regulation 23.603(c)); notify the Commission of emergencies or disruptions (current Commission regulation 23.603(d)); identify emergency contacts (current Commission regulation 23.603(e)); review, test, and update the BCDR plan (current Commission regulation 23.603(f) and (g)); and recordkeeping (current Commission regulation 23.603(i)). Each of these requirements is discussed in the relevant sections of this notice that follow.[186] Accordingly, the Commission's proposed amendment to the current BCDR audit requirement is discussed in the context of the ORF's broader proposed review and testing requirements.[187]

1. Definition of ''Business Continuity and Disaster Recovery Plan''

The proposed definition of ''business continuity and disaster recovery plan'' is slightly modified from the language in the current BCDR plan requirement for swap entities. Current Commission regulation 23.603 requires swap entities to establish and maintain a BCDR plan that ''outlines the procedures to be followed in the event of an emergency or other disruption of its normal business activities.'' [188] As stated above, the proposed rule would specify that the BCDR plan would need to address ''significant'' disruptions to the continuity of a covered entity's normal business operations, which the Commission preliminarily believes is more in line with what would constitute an ''emergency'' that would result in activation of a BCDR plan and how Commission regulation 23.603 has operated in practice.[189]

2. Purpose—Proposed Paragraph (f)(1)

Under the proposed rule, the BCDR plan would need to be reasonably designed to enable covered entities to: (i) continue or resume normal business operations with minimal disruption to customers or counterparties and the markets and (ii) recover and make use of all covered information, as well as any other data, information, or documentation required to be maintained by law and regulation.[190] The Commission preliminarily believes that this standard, which emphasizes the need to quickly resume regulated activities and to recover all information kept and required to be kept in connection with those activities, supports the overall regulatory objectives of the ORF rule of enhancing the operational resilience of covered entities to promote the protection of customers and the mitigation of system risk.

Current Commission regulation 23.603 requires swap entities' BCDR plans to ''be designed to enable the [swap entity] to continue or to resume any operations by the next business day with minimal disturbance to its counterparties and the market.'' The proposed rule would modify this language by requiring that the BCDR plan be ''reasonably'' designed to continue or resume operations with minimal disruption and by removing the requirement that such operations be resumed ''by the next business day.'' [191] The Commission views the qualification that the BCDR plan be ''reasonably'' designed as simply a more concrete expression of the Commission's current expectations, in recognition that what might be necessary to achieve recovery is not an absolute fact and may vary depending on the circumstances, including the nature, size, scope, complexity, and risk profile of a covered entity's business activities.[192] The

[182] *See* paragraph (f) proposed Commission regulations 1.13 and 23.603. *See* also paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''business continuity and disaster recovery plan'').

[183] *See* NFA Rule 2–38, *supra* note 43.

[184] *See* 17 CFR 23.603.

[185] *See* NFA Rule 2–38; CME Rule 983 (Disaster Recovery and Business Continuity).

[186] *See* sections II.F (Training), G (Review and Testing), H (Required Notifications), and I (Emergency Contacts, Recordkeeping) of this notice, *infra.* The proposed rule would not retain Commission regulation 23.603(h), which merely articulates the fact that swap entities are required to comply with Commission's BCDR requirements in addition to any other applicable BCDR requirements from other regulatory bodies. *See* 17 CFR 23.603(h). The Commission accordingly views this amendment as non-substantive.

[187] *See* paragraph (h) of proposed Commission regulations 1.13 and 23.603 and section II.G, *infra.*

[188] *See* 17 CFR 23.603(a).

[189] *See also* NFA Rule 2–38, *supra* note 43 (requiring certain members, including FCMs, to establish a BCDR plan to be followed in the event of a ''significant business disruption''). The proposed language change from ''normal business activities'' to ''the continuity of normal business operations'' is intended only to bring the language more in line with the focus of the proposed ORF rule on the resiliency of operations and is not intended to have substantive effect. *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''business continuity and disaster recovery plan''); 17 CFR 23.603(a).

[190] *See* paragraphs (f)(1)(i)–(ii) of proposed Commission regulations 1.13 and 23.603. *See also* 17 CFR 23.603(a).

[191] The Commission views the use of the phrase ''minimal disturbance'' in current Commission regulation 23.603 as equivalent to the phrase ''minimal disruption'' in the proposed rule and therefore views this change in language with respect to swap entities to be non-substantive. *Compare* 17 CFR 23.603(a) *with* paragraph (f)(1) of proposed Commission regulations 1.13 and 23.603.

[192] *See also* NFA Rule 2–38 (requiring BCDR plans be ''*reasonably* designed'') (emphasis added).

reasonableness of the plan would thus be viewed in light of the proposed (b)(3) standard (*i.e.,* what is appropriate and proportional to the covered entity, following generally accepted standards and best practices).

The proposal not to include a next business day recovery time objective is based in the Commission's preliminary view that, depending on the circumstances, a next business day recovery standard could be either too short or too long, to the point where it may be misdirecting the focus of the rule. The Commission understands that the ''next business day'' standard has been common for businesses to employ for BCDR purposes in the context of purely physical disasters, such as power outages or natural disasters. Based on its experience in recent years, however, the Commission believes a next-day standard may in some cases be impractical in an era where rapid innovation has deepened and expanded reliance on technology among financial institutions, and pandemics and cyberattacks have become more prevalent or alarming forms of disruption. With the ION incident, for instance, it took weeks before back office operations were back to normal. Nevertheless, the impact to customers and the markets during that time was manageable. Were even one business day to stretch between FCMs paying and collecting margin, for example, the Commission does not believe the impact to customers or the markets could be characterized as minimal.

Accordingly, the Commission preliminarily believes that by not including a precise recovery time objective, such as next business day, the emphasis of the proposed BCDR plan standard appropriately lies on ensuring that any disruption to customers, counterparties, and the markets is ''minimal.'' [193] For that standard to be met, however, the Commission would still expect covered entities to plan for a recovery that is expeditious. The longer a covered entity is not operating as usual, the more likely it is that customers and counterparties may be affected and that a crisis in confidence could develop, potentially affecting the industry more broadly.

Current Commission regulation 23.603 requires swap entities' BCDR plans to be designed ''to recover all documentation and data required to be maintained by applicable law and regulation.'' The proposal to require covered entities to reasonably design their BCDR plans to ''recover and *make use of* all *covered information,* as well as any other data, information, or documentation required to be maintained by law and regulation'' is intended to both incorporate the proposed defined term ''covered information,'' and make clear the need to also preserve the availability of the recovered data and information (*i.e.,* reliable access to and use of information), which the Commission believes is an integral component of information and technology security.[194] The Commission believes that making plans to ensure covered information—sensitive or confidential information and data the proposed ORF rule is designed, at its core, to ensure covered entities protect—as well as any other information covered entities are legally required to maintain, is recovered and accessible following an emergency is key to ensuring the protection of customers and counterparties and the ongoing orderly functioning of the commodity interest markets, as this information is vital to a covered entity's ability to assess its ongoing compliance with the Commission's regulations governing the requirements for covered entities.[195]

3. Minimum Contents—Proposed Paragraph (f)(2)

Consistent with the proposed (b)(3) standard for the ORF as a whole, the BCDR plan would need to be appropriate and proportionate to the covered entity, following generally accepted standards and best practices.[196] Accordingly, should the proposal be adopted as final, the Commission would expect each BCDR plan to be highly tailored to each specific covered entity. However, the proposed rule would also require the BCDR plan to include certain minimum contents, which are generally comparable to the current requirements in Commission regulation 23.603.[197]

First, the proposed rule would require the BCDR plan to identify its covered information, as well as any other data or information required to be maintained by law or regulation, and to establish and implement procedures to backup or copy it with sufficient frequency and to store it offsite in either hard-copy or electronic format.[198] The BCDR plan would also need to identify any resources, including covered technology, facilities, infrastructure, personnel, and competencies, essential to the operations of the swap entity or to fulfill the regulatory obligations of the swap entity, and establish and maintain procedures and arrangements to provide for their backup in a manner that is sufficient to meet the requirements of the rule (*i.e.,* to continue or resume operations with minimal disruption, to recover and make use of information).[199] These minimum requirements are intended to ensure that the BCDR plan meets the proposed recovery standard by ensuring covered entities have gone through the process of cataloging everything they need (information, technology, infrastructure, human capital, *etc.*) to operate as a covered entity, and have established ways to recover them and to continue or resume operations with minimal disruption to customers, counterparties, or the markets. Furthermore, in establishing arrangements for backup resources, the Commission would want covered entities to consider diversification to the greatest extent possible to reduce the likelihood that an emergency that affects a primary operating resource affects any planned backups. Accordingly, the proposed rule would require covered entities to establish backup arrangements for resources that are in one or more areas geographically separate from the covered entity's primary resources (*e.g.,* a different power grid than the primary facility).[200] The proposed rule would make clear those resources could be

[193] The Commission notes that neither NFA nor CME includes a specific recovery time objective in its BCDR plan requirements. *See* NFA Rule 2–38; CME Rule 938.

[194] *See supra* note 108 and accompanying text (discussing the ''CIA triad'' of confidentiality, integrity, and availability).

[195] In designing a BCDR plan that would meet this recovery standard, the Commission would advise covered entities to identify a broad range of events that could constitute emergencies or pose significant disruptions, including natural events (*e.g.,* hurricanes, wildfires), technical events (*e.g.,* power failures, system failures), malicious activity (*e.g.,* fraud, cyberattacks), failures of controls, and low likelihood but high impact events (*e.g.,* terrorist attacks, pandemics), and consider potential impact on business operations and data and information.

[196] *See* paragraph (b)(3) of proposed Commission regulations 1.13 and 23.603.

[197] *See* paragraph (f)(2) of proposed Commission regulations 1.13 and 23.603. *See also* 17 CFR 23.603(b). Although the exact language of the proposed minimum contents in paragraph (f)(2) may diverge somewhat from that of current Commission regulation 23.603(b), the modifications were intended to streamline language and incorporate the proposed terms ''covered information'' and ''covered technology.'' The Commission does not intend any of the changes to have a substantive impact on compliance with the Commission's BCDR plan requirement for swap entities.

[198] *See* paragraph (f)(2)(i) of proposed Commission regulations 1.13 and 23.603. *See also* 17 CFR 23.603(b)(1), (b)(6).

[199] *See* paragraph (f)(2)(ii) of proposed Commission regulations 1.13 and 23.603. *See also* 17 CFR 23.603(b)(2), (b)(4), (b)(5).

[200] *See* paragraph (f)(2)(ii) of proposed Commission regulations 1.13 and 23.603. *See also* 17 CFR 23.603(b)(5).

provided by third-party service providers.[201]

To ensure that critical third-party service providers are given particular consideration when planning for disruptions, the proposed rule would specifically require the BCDR plan to identify potential disruptions to critical third-party service providers and establish a plan to minimize the impact of such potential disruptions.[202] Additionally, given the importance of internal and external communication in times of crisis, and for duties and responsibilities to be well established, the proposed rule would require the BCDR plan to identify supervisory personnel responsible for implementing the BCDR plan, along with the covered entity's required ORF emergency contacts, and establish a procedure for communicating with relevant persons in the event of an emergency or significant disruption.[203]

The minimum contents of the proposed BCDR plan requirement were designed to align with the substance of the ''essential components'' of a BCDR plan identified in current Commission regulation 23.603(b), with certain modifications.[204] The changes are intended to streamline language, incorporate the proposed BCDR plan standard and defined terms (*e.g.,* covered information, covered technology, critical third-party service provider), and reorder and combine elements to improve readability and application. Key changes include:

- Replacing the identification or backup of documents and information essential to the continued operations of the swap entity and/or to fulfill the regulatory obligations of the swap dealer or major swap participant with covered information, as well as any other data or information required to be maintained by law and regulation.[205] This change is intended to align the information required to be identified in the proposed BCDR plan with its purpose (recover and make use of all covered information, as well as any other data, information, or documentation required to be maintained by law and regulation).
- Specifying that data and information must be backed up or copied with sufficient frequency ''to meet the requirements of this section,'' to make clear that the backup frequency should be linked to the broader purpose of the BCDR plan (*i.e.,* to continue or resume operations with minimal disruption and to recover and make use of in-scope information).[206]
- Removing the qualification that resource backups be designed to achieve the timely recovery of data and documentation and to resume operations as soon as reasonably possible and generally within the next business day.[207] This language could be viewed as in contradiction with the overall proposed purpose of the BCDR plan, which would not include a ''next business day'' recovery time objective.
- Replacing third parties that are necessary to the continued operations of the swap dealer or major swap participant with critical third-party service provider, as defined in the proposed rule, as the Commission believes these terms are intended to capture similar concepts.[208]

4. Accessibility—Proposed Paragraph (f)(3)

Finally, to ensure that the BCDR plan is available in the event of an emergency or other significant disruption that prevents a covered entity from accessing its primary office location, the proposed rule would require each covered entity to maintain copies of its BCDR plan at one or more accessible off-site locations.[209]

5. Request for Comment

The Commission invites comment on all aspects of the proposed business continuity and disaster recovery plan requirement, including the following question:

1. *Recovery time objective.* Under current Commission regulation 23.603, the Commission requires swap entities to establish and maintain a BCDR plan that is designed to enable the swap entity to continue or resume any operations ''by the next business day'' with minimal disturbance to is counterparties.[210] Noting that such a standard may pose some challenges, the Commission has proposed to not include a recovery time objective, relying on covered entities to establish a BCDR plan that allows for sufficiently exigent recovery so as to impose ''minimal disruption'' to customers, counterparties, or the markets.

a. Has a next business day standard posed challenges for swap entities to implement? Would such a standard be achievable for FCMs? Why or why not? Please explain.

b. Should the Commission consider including additional language to ensure covered entities design BCDR plans that enable quick recovery (*e.g.,* ''as soon as possible'' or ''as soon as practicable'')? Why or why not? Please explain.

2. *Transfer of business to another entity.* NFA and CME rules allow for BCDR plans to include the possibility of transferring their business to another regulated entity in the event of an emergency or disruption. NFA Rule 2–38 provides that a BCDR plan ''shall be reasonably designed to . . . transfer its business to another Member with minimal disruption to its customers, other members, and the commodity futures markets.'' [211] CME Rule 983 provides that clearing members must have procedures in place to allow them to continue to operate during periods of stress ''or to transfer accounts to another fully operational clearing member with minimal disruption to either [CME] or their customers.'' [212] Do any covered entities currently have arrangements with other covered entities to transfer business or accounts in the event of an emergency or disruption? Should the Commission consider adding the option to transfer business to another regulated entity into its proposed BCDR rule? Why or why not? How would such a transfer function in practice? Please explain.

F. Training and Plan Distribution—Proposed Paragraph (g)

To support the effectiveness of the ORF by ensuring personnel are aware of relevant policies, procedures, and

[201] *See id.*

[202] *See* paragraph (f)(2)(iii) of proposed Commission regulations 1.13 and 23.603. *See also* 17 CFR 23.603(b)(7) (identify ''potential business interruptions encountered by third parties that are necessary to the continued operations of the swap dealer or major swap participant and a plan to minimize the impact of such disruptions'').

[203] *See* paragraphs (f)(2)(iv)–(v) of proposed Commission regulations 1.13 and 23.603. *See also* paragraph (k) of proposed Commission regulations 1.13 and 23.603 (requiring emergency contacts), discussed in section II.I.1 of this notice, *infra;* 17 CFR 23.603(b)(3).

[204] *See* 17 CFR 23.603(b).

[205] *See* proposed paragraph (f)(2)(i) of Commission regulations 1.13 and 23.603; 17 CFR 23.603(b)(1) (Identification of the documents and data essential to the continued operations of the swap entity and to fulfill the obligations of the swap entity); (b)(6) (Back-up or copying of documents and data essential to the operations of the swap entity or to fulfill the regulatory obligations of the swap entity'').

[206] *Cf.* 17 CFR 23.603(b)(6) (Back-up or copying, with sufficient frequency, of documents and data).

[207] *See* 17 CFR 23.603(b)(4) (Procedures for, and the maintenance of, back-up facilities, systems, infrastructure, alternative staffing and other resources to achieve the timely recovery of data and documentation and to resume operations as soon as reasonably possible and generally within the next business day.).

[208] *See* 17 CFR 23.603(b)(7) (Identification of potential business interruptions encountered by third parties that are necessary to the continued operations of the swap dealer or major swap participant and a plan to minimize the impact of such disruptions.).

[209] *See* paragraph (e)(3) of proposed Commission regulations 1.13 and 23.603. *See also* 17 CFR 23.603(c).

[210] *See* 17 CFR 23.603(a).

[211] *See* NFA Rule 2–38, *supra* note 43.

[212] *See* CME Rule 983, *supra* note 185.

practices, the proposed rule would require that each covered entity establish, implement, and maintain training with respect to all aspects of the ORF.[213] Relevant training is important to ensuring the ORF operates as intended, and to supporting a firm culture that promotes and prioritizes operational resilience.[214] The training would therefore need to include, at a minimum, (i) cybersecurity awareness training for all personnel and (ii) role-specific training for personnel involved in establishing, documenting, implementing, and maintaining the ORF.[215] The importance of cybersecurity training is widely recognized, as incidents commonly occur because well-intentioned employees or other users make preventable mistakes.[216] The Commission would further expect that role-specific training would include not only training on relevant policies and procedures but additional relevant threat and vulnerability response training for personnel involved in the development and maintenance of the information and technology security program (*e.g.,* system administration courses for IT professionals, secure coding training for web developers).[217]

As with all aspects of the ORF, if the proposal is adopted as final, the Commission would expect each covered entity's ORF training to meet the (b)(3) standard (*i.e.,* be appropriate and proportionate to the nature, scope, and complexities of its business activities as a covered entity, following generally accepted standards and best practices).[218] To ensure the training remains relevant overtime and that personnel are adequately informed with respect to the ORF, covered entities would also be required to provide and update their ORF training as necessary, but no less frequently than annually.[219] Requiring that the training occur annually would be a new CFTC requirement with respect to the BCDR plan training requirement for swap entities.[220] The Commission nevertheless believes an annual training requirement is necessary for staff involved in BCDR planning to ensure they remain up-to-date on changes to the BCDR plan following the annual reviews and testing of the plan.[221]

To further support the proposed training requirement and ensure relevant personnel have access to and are aware of the current information and technology security, third-party relationships, and BCDR plans that form the ORF, the proposed rule would require that covered entities distribute copies of those plans to relevant personnel and promptly provide any significant revisions thereto.[222] This proposed plan distribution requirement is consistent with the current BCDR plan distribution requirement for swap entities in current Commission regulation 23.603.[223]

Request for Comment

The Commission invites comment on all aspects of the proposed training requirement.

G. Reviews and Testing—Proposed Paragraph (h)

To ensure the ORF remains viable and effective over time, the proposed rule would require covered entities to establish, implement, and maintain a plan reasonably designed to assess its adherence to, and the effectiveness of, the ORF through regular reviews and risk-based testing.[224] As discussed above, the purpose of the proposed ORF would be to identify, monitor, manage, assess, and report on risks relating to information and technology security, third-party relationships, and emergencies or other significant business disruptions.[225] Monitoring and managing these risks is a dynamic, ever-evolving process, especially given the increased reliance on and rapid evolution of technological advancements and related cyber risks.[226] The Commission believes regular reviews and testing are an important tool needed to confirm that systems and information remain protected, controls are working as expected, and policies and procedures are being followed.[227] Accordingly, the Commission preliminarily believes that regular reviews and testing would provide covered entities with essential information about the actual quality, performance, and reliability of the ORF in relation to its objectives and regulatory requirements. The Commission further expects that reviews and testing would be key to revealing unknown gaps or weaknesses in systems or controls that could then be analyzed to identify corrective actions designed to improve overall operational resilience over time.[228] The results of the reviews and testing should be used to support sound decision-making at the covered entity regarding prioritization and funding of resources in a manner

[213] *See* paragraph (g) of proposed Commission regulations 1.13 and 23.603.

[214] *See* FFIEC Information Security Booklet, *supra* note 69, at 17 (''Training ensures personnel have the necessary knowledge and skills to perform their job functions.''); CIS Critical Security Controls v.8., Control no. 14 (Security Awareness and Skills Training) at 43 (May 2021) (CIS Control 14) (training helps ''influence behavior among the workforce to be security conscious and properly skilled to reduce cybersecurity risks to the enterprise'').

[215] *See* paragraphs (g)(1)(i)–(ii) of proposed Commission regulations 1.13 and 23.603. Proposed paragraph (g)(1)(ii) would supplant the current requirement in Commission regulation 23.603 for swap entities to train relevant employees on applicable components of the BCDR plan. *See* 17 CFR 23.603(c). The Commission does not intend any substantive difference in the BCDR plan training for swap entities.

[216] The FSB found that most successful cyberattacks involved human error, which is why training is important for all personnel. *See* FSB, *Summary Report on Financial Sector Cybersecurity Regulations, Guidance and Supervisory Practices* at 7 (Oct. 13, 2017), *available at https://www.fsb.org/wp-content/uploads/P131017-1.pdf. See also* CIS Control 14 (''Users themselves, both intentionally and unintentionally, can cause incidents as a result of mishandling sensitive data, sending an email with sensitive data to the wrong recipient, losing a portable end-user device, using weak passwords, or using the same password they use on public site . . .); Prudential Operational Resilience Paper, *supra* note 11, at 11 (''The firm provides cybersecurity awareness education especially to personnel engaged in the operations of critical operations and core business lines, . . . and adequately trains them to perform their information security-related duties and responsibilities consistent with related processes and agreements.'').

[217] *See* CISA, Incident Response Plan (IRP) Basics (advising that all staff need to understand their role in maintaining and improving the security of the organization), *available at https://www.cisa.gov/sites/default/files/publications/Incident-Response-Plan-Basics_508c.pdf.*

[218] *See* paragraph (b)(3) of proposed Commission regulations 1.13 and 23.603; *supra* note 63 and accompanying text.

[219] *See* paragraph (g)(2) of proposed Commission regulations 1.13 and 23.603.

[220] *See* 17 CFR 23.603(c).

[221] *See* paragraph (h) of proposed Commission regulations 1.13 and 23.603, discussed in section II.G, *infra.*

[222] *See* paragraph (g)(3) of proposed Commission regulations 1.13 and 23.603.

[223] *See* 17 CFR 23.603(c) (Each swap entity shall distribute a copy of its business continuity and disaster recovery plan to relevant employees and promptly provide any significant revision thereto.).

[224] *See* paragraph (h) of proposed Commission regulations 1.13 and 23.603.

[225] *See* paragraph (b)(1) of proposed Commission regulations 1.13 and 23.603, *supra* note 55 and accompanying text.

[226] *See* Prudential Operational Resilience Paper, *supra* note 11, at 9 (''The firm also regularly reviews and updates its systems and controls for security against evolving threats including cyber threats and emerging or new technologies.'').

[227] *See, e.g.,* 17 CFR 37.1401 (SEFs); 17 CFR 38.1051 (DCMs); 17 CFR 39.18 (DCOs); 17 CFR 49.24 (SDRs) (requiring system safeguard testing). *See also* FFIEC Information Security Booklet, *supra* note 69 (providing that entities should have a documented testing and evaluation plan).

[228] *See also* CPMI IOSCO Cyber Resilience Guidance, *supra* note 123, at 18 (''Sound testing regimes produce findings that are used to identify gaps in stated resilience objectives and provide credible and meaningful inputs to the [entity's] cyber risk management process. Analysis of testing results provides direction on how to correct weaknesses or deficiencies in the cyber resilience posture and reduce or eliminate identified gaps.'').

that furthers operational resilience.[229] Without such regular reviews and testing, the Commission is concerned that the ORF would quickly grow stale and ineffective, allowing unseen vulnerabilities to go unaddressed and potentially weaken the stability of the covered entity or the financial system at large.

1. Reviews—Proposed Paragraph (h)(1)

Under the proposed rule, reviews would need to include an analysis of the adherence to, and the effectiveness of, the ORF, as well as any recommendations for modifications or improvements that address root causes of issues identified by the review.[230] Again, the Commission believes that the process of reviewing the ORF to evaluate both its current effectiveness and make recommendations for prospective improvements that relate to deficiencies found through the review would help ensure that the ORF remains effective at managing operational resilience as circumstances change over time.

The proposed rule would require covered entities to conduct such reviews at least annually and in connection with any material change to the activities or operations of the covered entity that is reasonably likely to affect the risks addressed by the ORF.[231] An annual review standard is consistent with the Commission's existing review requirement for the RMP for covered entities, the BCDR plan for swap entities, and NFA's ISSP Interpretive Notice.[232] Although the Commission would expect the ORF to be reviewed at least annually in its entirety, including not only the required plans but training and governance, the reviews could be broken into phases, staged over the course of the year. The Commission preliminarily believes that requiring the ORF to be reviewed on at least an annual basis and in connection with any relevant, material business change is sufficiently frequent to help ensure that the ORF remains effective and continues to meet its objectives over time.

The proposed review requirement for the ORF would replace the similar annual review requirement for swap entities' BCDR plans contained in current Commission regulation 23.603. Current Commission regulation 23.603(f) requires that a member of senior management for a swap entity review the BCDR plan annually or upon any material change to the business and to document any deficiencies found or corrective action taken.[233] The Commission preliminarily believes that the proposed annual review of the ORF, which would encompass a review of the BCDR plan, is sufficient to ensure the ORF's effectiveness and that it would no longer be necessary for a separate review of the BCDR plan to be conducted by senior management.

2. Testing—Proposed Paragraph (h)(2)

With respect to risk-based testing of the ORF, the proposed rule would generally provide that covered entities determine the frequency, nature, and scope of the testing consistent with the proposed (b)(3) standard.[234] Covered entities have available to them a wide range of testing tools, techniques, and methodologies, particularly with respect to information and technology security. Those tools and techniques include open source analysis, network security assessments, physical security reviews, source code reviews, compatibility testing, performance testing, and end-to-end testing, just to name a few.[235] Such testing methods can vary significantly in terms of what they test and how, and in the degree of sophistication and sensitivity they need to run them correctly and reliably.[236] Covered technology among covered entities varies, both in terms of the sensitivity of the data and information it contains and transmits, as well as its operational importance and risk profile.

The Commission therefore preliminarily believes that leaving the specifics of the design and implementation of ORF testing to the reasonable judgment of each covered entity would help ensure that such testing protocols remain nimble as operations and recommended testing techniques change progressively over time.[237] Covered entities would, however, need to ensure that the testing is reasonably designed to test the effectiveness of the function or system being tested.[238] Covered entities should determine which particular tests to incorporate, consistent with the (b)(3) standard and their risk assessments, to ensure the testing effectively targets their particular business lines, activities, operations, and risk profile. Covered entities would accordingly be encouraged to document the decision-making regarding how it determined the nature, scope, and frequency of testing.

Although the proposed rule would generally not mandate the use of any specific techniques, it would establish certain minimum testing frequencies with respect to a few testing categories that have broad consensus. With respect to testing of the information and technology security program, the proposed rule would require testing of key controls and the incident response plan at least annually.[239] Consistent with the definition in the Commission's system safeguard rules for registered entities, the proposal would define ''key controls'' as those controls that an appropriate risk analysis determines are either critically important for effective information and technology security, or are intended to address risks that evolve or change more frequently and therefore require more frequent review to ensure their continuing effectiveness in addressing such risks.[240] Given their importance to preserving information and technology security and recovering from incidents, the Commission believes that regular testing of the incident response plan and key controls on at least an annual basis is an important baseline requirement to ensure the continued effectiveness of

[229] *See id.* at 18 (''The results of the testing programme should be used by the [entity] to support the ongoing improvement of its cyber resilience.'').

[230] *See* paragraph (h)(1) of proposed Commission regulations 1.13 and 23.603.

[231] *Id.*

[232] *See* 17 CFR 1.11(f)(1); 17 CFR 23.600(e)(1) (requiring covered entities to review their RMPs on an annual basis or upon any material change in the business reasonably likely to alter their risk profile); 17 CFR 23.603(f) (requiring an annual review of swap entities' BCDR plan); NFA ISSP Notice, *supra* note 43 (providing that members should perform a regular review of their information systems security program at least once every twelve months).

[233] *See* 17 CFR 23.603(f).

[234] *See* paragraph (h)(2) of proposed Commission regulations 1.13 and 23.603. *See also* paragraph (b)(3) of proposed Commission regulations 1.13 and 23.603; *supra* note 63 and accompanying text.

[235] *See* NIST, SP 800–115, Technical Guide to Information Security Testing and Assessment (Sept. 2008).

[236] *Id.*

[237] *See also* Interagency Guidelines Safeguarding Customer Information, 66 FR 8623 (''The Agencies believe that a variety of tests may be used to ensure the controls, systems, and procedures of the information security program work properly and also recognize that such tests will progressively change over time''); FINRA Cybersecurity Report, *supra* note 66, at 13 (''Many firms determined the systems to be tested and the frequency with which they should be tested based on a risk assessment where higher risk systems were tested more frequently.'').

[238] *See* paragraph (h) of proposed Commission regulations 1.13 and 23.603 (requiring that the testing plan be reasonably designed to assess the adherence to, and the effectiveness of, the ORF).

[239] *See* paragraph (h)(2)(i)(A) of proposed Commission regulations 1.13 and 23.603.

[240] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''key controls''). *See also* 17 CFR 37.1401(h)(1) (SEFs); 17 CFR 38.1051(h)(1) (DCMs); 17 CFR 39.18(a) (DCOs); 17 CFR 49.24(j)(1) (SDRs) (defining ''key controls'' for purposes of system safeguard requirements).

the information and technology security program.[241]

The proposed rule would also require that testing of the information and technology security program include vulnerability assessments and penetration testing.[242] Vulnerability assessments include methods and techniques to identify, diagnose, and prioritize vulnerabilities in the security of covered technology.[243] Technical vulnerabilities can be identified through scanner tools, which can be run continuously or periodically, often daily, and may include checking servers for security patches to ensure they are current.[244] Penetration testing (or ''pen testing''), meanwhile, attempts to identify ways to exploit vulnerabilities and circumvent or defeat security features, mimicking potential real-world attacks. Experts have developed a wide variety of penetration tests (*e.g.,* wireless, network, web application, cloud, client side, social engineering, physical, threat-led) and approaches to or modes of completing them (*e.g.,* black box, white box, gray box).[245] Some tests go further by using cyber-threat intelligence in designing these simulated attacks, a testing referred to as threat-led penetration testing or ''red teaming.'' [246]

With respect to vulnerability assessments, the proposed rule would require covered entities to test their information and technology security programs using vulnerability assessments, including daily or continuous automated vulnerability scans.[247] The Commission preliminarily believes that some degree of vulnerability assessment is considered standard cybersecurity hygiene in order to monitor systems and controls for vulnerabilities, and that the availability of automated vulnerability scanning tools help provide a base level of monitoring that is easily accessible to all covered entities.[248]

With respect to penetration testing, the proposed rule would not require covered entities to undertake specific types of testing. Given the diverse nature of entities registered as FCMs and swap entities, the Commission believes that determination of the type and method of penetration testing would be best left to the reasoned judgement of each covered entity after conducting its own assessment. The Commission would, however, require that covered entities conduct some penetration testing at least annually.[249] The Commission preliminarily believes that annual penetration testing of some type, determined consistent with the proposed (b)(3) standard, would be important for covered entities to have knowledge and awareness of the actual vulnerability of their covered technology to internal or external threats. According to FINRA's 2018 cyber risk report, firms with strong cybersecurity programs conducted penetration tests at least annually and more frequently for mission critical, high risk systems such as for an online trading system.[250] Covered entities would also be encouraged to consider additional risk-based penetration testing after key events, such as any time a significant change is made to important elements of the firm's applications and systems infrastructure, in addition to any other regular compliance testing.

Current Commission regulation 23.603 includes a testing requirement for the BCDR plan for swap entities.[251] The proposed ORF testing provision would replace that requirement in current Commission regulation 23.603 and specify that, as part of the testing, covered entities would need to conduct a walk-through or tabletop exercise designed to test the effectiveness of backup facilities and capabilities at least annually.[252] The Commission preliminarily believes that swap entities currently test their BCDR plans through such exercises and that they are an important way to test the effectiveness of a BCDR plan in practice. Unlike current Commission regulation 23.603, however, the proposed rule would not require that covered entities' BCDR plans be audited every three years by a qualified third-party service provider.[253] Based on the Commission's experience, this audit requirement has proven redundant and unnecessary in light of the requirements to review and test the plan annually.

3. Independence—Proposed Paragraph (h)(3)

To support the reliability and objectivity of the review and testing results, the proposed rule would require the reviews and testing to be conducted by qualified personnel who are independent of the aspect of the ORF being reviewed or tested.[254] The personnel conducting the testing could be employees of the covered entity itself, an affiliate, or of a third-party service provider, provided that such personnel are sufficiently trained and not responsible for the development, installation, operation, or maintenance of the ''object'' of the testing (*e.g.,* covered technology, key controls, training, *etc.*). For example, a covered entity's internal audit department may be sufficiently trained and independent to test certain key controls but may need to secure a third-party to test certain systems or program installations if it does not have sufficient capabilities in-house. Covered entities would therefore be permitted under the proposal to determine whether a particular test should be conducted in-house or by a third-party service provider, provided that the qualification and independence requirements are met.[255]

This proposed independence requirement is consistent with the testing requirement for swap entity

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[241] *See* 17 CFR 37.1401(h)(5) (SEFs); 17 CFR 38.1051(h)(5) (DCMs); 17 CFR 39.18(e)(5) (DCOs); 17 CFR 49.24(j)(5) (SDRs) (annual testing of incident response plans and key controls); *see also* FFIEC, Information Technology Handbook, Audit Booklet at A–15 (Apr. 2012) (including testing of key controls at least annually as an examination point

[242] *See* paragraphs (h)(2)(i)(B)–(C) of proposed Commission regulations 1.13 and 23.603.

[243] *See* FFIEC Information Security Booklet, *supra* note 69, at 8.

[244] *Id.*

[245] *See* FINRA Cybersecurity Report, *supra* note 66, at 13.

[246] *See* FSI, FSI Insights on policy implementation No. 21, Varying shades of red: how red team testing frameworks can enhance the cyber resilience of financial institutions (Nov. 2019).

[247] *See* paragraph (h)(2)(i)(B) of proposed Commission regulations 1.13 and 23.603. *See also* 17 CFR 37.1401(h)(2) (SEFs); 17 CFR 38.1051(h)(2) (DCMs); 17 CFR 39.18(e)(2) (DCOs); 17 CFR 49.24(j)(2) (SDRs) (requiring automated vulnerability scanning).

[248] For instance, CISA makes available a free vulnerability scanner. *See* CISA, Cyber Hygiene Services, *available at https://www.cisa.gov/cyber-hygiene-services.*

[249] *See* paragraph (h)(2)(i)(C) of proposed Commission regulations 1.13 and 23.603.

[250] FINRA Cybersecurity Report, *supra* note 66, at 13–14. FFIEC's exam book also appears to contemplate at least some degree of penetration testing among financial institutions. *See* FFIEC Information Security Booklet, *supra* note 69, at 55 (noting that independent testing, including penetration testing and vulnerability scanning, is conducted according to the risk assessment for external-facing systems and the internal network).

[251] *See* 17 CFR 23.603(g) (requiring the BCDR plan to tested annually by qualified, independent internal personnel or a qualified third-party service).

[252] Current Commission regulation 23.603 does not specify the nature of the BCDR testing, *see id.*

[253] *See id.* (''Each business continuity and disaster recovery plan shall be audited at least once every three years by a qualified third party service. The date the audit was performed shall be documented, together with the nature and scope of the audit, any deficiencies found, any corrective action taken, and the date that corrective action was taken.'').

[254] *See* paragraph (h)(3) of proposed Commission regulations 1.13 and 23.603.

[255] If a covered entity determines to use a third-party service provider, the proposed requirements and guidance with respect to the management of third-party relationships would apply. *See supra* note 153 and accompanying text.

BCDR plans in current Commission regulation 23.603.[256]

4. Documentation—Proposed Paragraph (h)(4)

The proposed rule would require covered entities to document all reviews and testing of the ORF. The documentation would need to include, at a minimum: (i) the date the review or testing was conducted; (ii) the nature and scope of the review or testing, including methodologies employed; (iii) the results of the review or testing, including any assessment of effectiveness; (iv) any identified deficiencies and recommendations for remediation; and (v) any corrective action(s) taken, including the date(s) such actions were taken.[257] The Commission primarily believes documenting these key aspects of the testing and related results would not only assist in ensuring accountability for the testing, but would help covered entities take full advantage of any insights the testing may provide and to build upon their resiliency from lessons learned. Such documentation would also assist the Commission in performing its oversight duties with respect to covered entities and their implementation of their ORF.

This proposed documentation requirement is consistent with the requirement for swap entity BCDR plans in current Commission regulation 23.603.[258]

5. Internal Reporting—Proposed Paragraph (h)(5)

To support covered entities' compliance with the ORF rule and ensure that senior leadership is apprised of and held accountable for the effectiveness of the ORF, the proposed rule would expressly require covered entities to report on the results of their reviews and testing to the CCO and any other relevant senior-level official(s) and oversight body(ies).[259] The proposed rule would not mandate the form, method, or frequency of such reporting, but the Commission would encourage the reporting to be provided in a sufficiently timely manner so as to allow the CCO and senior leadership to act upon the information to take steps to improve compliance and the overall effectiveness of the ORF.

This requirement does not exist with respect to the swap entity BCDR plan requirement in current Commission regulation 23.603 and would therefore be a new requirement.

6. Request for Comment

The Commission invites comment on all aspects of the proposed review and testing requirements, including the following question:

1. *Key Controls.* The proposed rule would require covered entities to test key controls on at least an annual basis and includes a definition of ''key controls'' that is comparable to how the term is defined for purposes of the Commission's system safeguard requirements for registered entities.[260] Are covered entities currently testing key controls? How are they determining what controls should be regularly tested? Should the Commission consider allowing covered entities to define ''key controls'' for themselves consistent with the proposed (b)(3) standard?

H. Required Notifications—Proposed Paragraphs (i) and (j)

The proposed rule would require covered entities to notify the Commission, customers, or counterparties of certain events within the scope of the ORF. Notifications to the Commission would relate to incidents that have an adverse impact, or a covered entity's decision to activate its BCDR plan.[261] Notifications to customers or counterparties would relate to incidents that adversely impact their interests.[262] These notification provisions are discussed in turn below.

1. Commission Notification of Incidents—Proposed Paragraph (i)(1)

The proposed rule would require covered entities to notify the Commission of any incident that adversely impacts, or is reasonably likely to adversely impact, (A) information and technology security, (B) the ability of the covered entity to continue its business activities as a covered entity, or (C) the assets or positions of a customer or counterparty.[263] The notification would need to include any information available to the covered entity at the time of the notification that could assist the Commission in assessing and responding to the incident, including the date the incident was detected, possible cause(s) of the incident, its apparent or likely impacts, and any actions the covered entity has taken or is taking to mitigate or recover from the incident, including measures to protect customers or counterparties.[264] Covered entities would need to provide the notification as soon as possible, but no later than 24 hours after such incident has been detected.[265]

The purpose of this proposed notification provision is multifold. At a fundamental level, the proposed rule would allow the Commission to exercise its oversight function with respect to the ORF, offering the Commission a real-world, real-time insight into the effectiveness of a particular covered entity's ORF and whether it is operating as intended. Early warning of impactful incidents would also enable the Commission to be more responsive, providing guidance or appropriate relief to help the covered entity withstand and recover from the incident. The Commission would also expect such early warnings to aid it in identifying and reacting to events that could pose a more systemic threat, either to the markets due to the severity of the impact of the incident or to other covered entities due to the nature of the incident (*e.g.,* a ransomware attack against multiple covered entities or a third-party service provider engaged by more than one covered entity). In such potentially systemic circumstances, early awareness of the incident is expected to facilitate the Commission's role in coordinating industry efforts and information sharing, allowing it to help forestall the impact of potential broad-scale threats by sharing information with other regulators through its involvement in Financial and Banking Information Infrastructure Committee (FBIIC), issue timely statements to stabilize public confidence, and potentially take emergency regulatory action. Over time, the Commission preliminarily believes that the knowledge and experience gained from these incident reports could provide the Commission a vantage point from which to identify trends and lessons learned that could improve its supervisory guidance supporting industry efforts to

[256] *See* 17 CFR 23.603(g) (requiring the BCDR plan to tested annually by qualified, independent internal personnel or a qualified third-party service).

[257] *See* paragraph (h)(4)(i)–(v) of proposed Commission regulations 1.13 and 23.603.

[258] *See* 17 CFR 23.603(g) (''The date the testing was performed shall be documented, together with the nature and scope of the testing, any deficiencies found, any corrective action taken, and the date that corrective action was taken.'').

[259] *See* paragraph (h)(5) of proposed Commission regulations 1.13 and 23.603.

[260] *See, e.g.,* 17 CFR 37.1401(h)(1) (SEFs); 17 CFR 38.1051(h)(1) (DCMs); 17 CFR 39.18(a) (DCOs); 17 CFR 49.24(j)(1) (SDRs) (defining ''key controls'' for purposes of system safeguard requirements).

[261] *See* paragraph (i) of proposed Commission regulations 1.13 and 23.603.

[262] *See* paragraph (j) of proposed Commission regulations 1.13 and 23.603.

[263] *See* paragraph (i)(1)(A)–(C) of proposed Commission regulations 1.13 and 23.603.

[264] *See* paragraph (i)(1)(ii) of proposed Commission regulations 1.13 and 23.603.

[265] *See* paragraph (i)(1)(iii) of proposed Commission regulations 1.13 and 23.603.

enhance their ORF practices, or lead to other regulatory improvements.

As discussed above, the proposed rule would define ''incident'' as any event, occurrence or circumstance that could jeopardize (*i.e.,* put into danger) information and technology security.[266] This standard would include events that have the potential to harm information and technology security regardless of whether a harm actually materializes. The proposed notification standard, by contrast, would limit the scope of incidents required to be reported to the Commission to those where there is an observable negative impact or harm, or such negative impact or harm is reasonably likely. Covered entities would not, for instance, need to notify the Commission of unsuccessful attempts at unauthorized access, as the detection and deterrence of such an attempt would not require Commission action and would appear to be suggestive of an ORF that is operating as expected. If, however, a covered entity determines that an unauthorized person did access covered information, the Commission would need to be notified, regardless of how much information was accessed or whether the covered entity believes it has been used. The Commission would similarly want to know of any successful distributed denial-of-service attack that disrupts business operations, regardless of the length of time of that disruption.[267]

The Commission appreciates that, at the outset, information regarding an incident is likely to be incomplete and in flux, and the full impact and root cause of an incident may take some time to reveal itself. Covered entities may also not be able to detect incidents immediately after their occurrence, and with sophisticated malicious attacks, culprits often take steps to hide their intrusions. Nevertheless, the Commission preliminarily believes that delays in reporting an incident to the Commission could impede its ability to make timely assessments and take appropriate action. The Commission is concerned that such delays could have broad implications, especially when there are potential sector-wide ramifications or spill-over effects to other regulated entities that the Commission could assist in managing.

Accordingly, the proposed rule would not prescribe a specific form or content for the notification or include a materiality limiter. The proposed rule would only require that covered entities provide whatever information they have on hand at the time that could assist the Commission in its assessment and response activities.[268] If the proposed rule is adopted, the Commission would simply expect that as an incident progresses, covered entities would continue to engage with the Commission and provide updates as needed.[269]

The proposed rule would not prescribe a particular form for the notification but would require notification via email.[270]

2. Commission Notification of BCDR Plan Activation—Proposed Paragraph (i)(2)

For similar reasons, the proposed rule would also require covered entities to notify the Commission of any determination to activate its BCDR plan.[271] Consistent with the proposed incident notification, covered entities would need to notify the Commission of its determination to activate their BCDR plan within 24 hours of making that determination.[272] Current Commission regulation 23.603 requires swap entities to notify the Commission ''promptly'' of any emergency or other disruption that may affect the ability of a swap entity to fulfill its regulatory obligations or would have a significant adverse effect on the swap entity, its counterparties, or the market.[273] Based on the Commission's experience with this provision, which became particularly relevant during the onset of the COVID–19 pandemic, the Commission believes this standard has been open to wide interpretation among swap entities, leading to broad variations in the timeliness of the notifications to the Commission regarding their decisions to implement their BCDR plans and employ a remote work posture. The Commission therefore preliminarily believes that a more bright-line test that centers on the decision to activate the BCDR plan, an action that presumably would not occur absent an emergency or significant disruption impacting the covered entity, would be easier to apply. The Commission also believes such a standard would facilitate the prompt delivery of information to the Commission so that it may consider whether any action to support the continued integrity of the markets during the course of the emergency is necessary to continue to fulfill its oversight obligations. For that purpose, the Commission believes that 24 hours from activation of the BCDR plan would both encourage covered entities to inform the Commission with sufficient time for it to take any needed action and encourage covered entities to focus initial efforts on resuming or continuing operations.

Under the proposed rule, the notification would need to include all information available to the covered entity at that time, including the date of the emergency or disruption, a brief description thereof, its apparent impact, and any actions the covered entity has taken or is taking to mitigate or recover from the incident, including measures to protect customers and counterparties, as the Commission believes this information would be necessary for it to perform its oversight obligations and take responsive action if needed.[274] The proposed rule would not prescribe a particular form for the notification but would require notification via email.[275]

3. Notifications to Customers or Counterparties—Proposed Paragraph (j)

Finally, the proposed rule would require covered entities to notify customers or counterparties as soon as possible of any incident that could have adversely affected the confidentiality or integrity of such customer or counterparty's covered information or their assets or positions.[276] Such incidents could include the identification of a longstanding vulnerability that left exposed covered information, regardless of whether the covered entity has determined that a

[266] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''incident'').

[267] Covered entities would not need to notify the Commission of routine testing or planned maintenance.

[268] *See* paragraph (i)(1)(ii) of proposed Commission regulations 1.13 and 23.603.

[269] For avoidance of doubt, the proposed rule would not have any impact on covered entities' obligations to notify criminal authorities as appropriate or required by other law or regulation.

[270] *See* paragraph (i)(2)(iii) of proposed Commission regulations 1.13 and 23.603.

[271] *See* paragraph (i)(2)(i) of proposed Commission regulations 1.13 and 23.603.

[272] *See* paragraph (i)(2)(iii) of proposed Commission regulations 1.13 and 23.603.

[273] *See* 17 CFR 23.603(d) (''Each swap dealer and major swap participant shall promptly notify the Commission of any emergency or other disruption that may affect the ability of the swap dealer or major swap participant to fulfill its regulatory obligations or would have a significant adverse effect on the swap dealer or major swap participant, its counterparties, or the market.'').

[274] *See* paragraph (i)(2)(ii) of proposed Commission regulations 1.13 and 23.603.

[275] *See* paragraph (i)(2)(iii) of proposed Commission regulations 1.13 and 23.603. Current Commission regulation 23.603 does not prescribe the contents of the notification or the method of notification, so these would be new requirements for swap entities. *See* 17 CFR 23.603(d) (''Each swap dealer and major swap participant shall promptly notify the Commission of any emergency or other disruption that may affect the ability of the swap dealer or major swap participant to fulfill its regulatory obligations or would have a significant adverse effect on the swap dealer or major swap participant, its counterparties, or the market.'').

[276] *See* paragraph (j)(1) of proposed Commission regulations 1.13 and 23.603.

bad actor has obtained access to that information. The Commission preliminarily believes that covered entities owe an enhanced duty to protect the covered information provided to them by their customers and counterparties in order to ensure market integrity and support customer protections. The proposed notification standard therefore encompasses incidents where an impact on customers or counterparties may not be definite so that they may have an opportunity to take whatever actions they deem necessary to protect their interests.

Unlike with the proposed notifications to the Commission, however, the Commission preliminarily believes that the accuracy of information provided to customers and counterparties should be prioritized over early delivery to avoid causing unnecessary panic that could have potentially negative and irreversible spill-over effects. Accordingly, the proposed customer/counterparty notification provision does not include a specific minimum timing requirement for the notification other than to require the notification to be provided to customers and counterparties as soon as possible.[277] The proposed rule would further require covered entities to disclose to customers and counterparties information necessary for them to understand and assess the potential impact of the incident on their information, assets, or positions and take any necessary actions (*e.g.,* closing accounts, changing passwords).[278] Such information would include, at a minimum, a description of the incident, the particular way in which the customer or counterparty may have been adversely impacted, measures taken by the covered entity to protect against further harm, and contact information for the covered entity where the customer or counterparty may learn more or ask questions.[279]

4. Request for Comment

The Commission invites comment on all aspects of its proposed ORF notification provisions, including the following questions:

1. *Incident notification to Commission.* The proposed rule would require covered entities to notify the Commission of any incident that ''adversely impacts, or is reasonably likely to adversely impact,'' information and technology security, the ability of the covered entity to continue its business activities as a covered entity, or the assets or positions of a customer or counterparty. As discussed above, the Commission believes this standard would give the Commission an early warning of incidents that do result in an observable negative impact or harm, or such negative impact or harm is reasonably likely, *i.e.,* where information and technology security, business operations, or customers/counterparties is harmed or compromised. Given the purpose of the proposed rule as providing the Commission an early warning so that it may act to help mitigate the potential impacts of the event, the proposed rule does not include a materiality limiter. Should the Commission consider including changing the requirement to further limit the incident notice to the incidents with a ''material'' or ''significant'' adverse impact, or where such a material or significant adverse impact would be reasonably likely? If yes, how would including such a materiality limiter change the scope of incidents that would be reported to the Commission? In other words, what types of incidents would not be reported to the Commission under a standard that includes a materiality limiter, and why should the Commission not receive an early warning of those types of incidents? Please explain and provide examples.

2. *BCDR notification to Commission.* The Commission is proposing to change the notification requirement in Commission regulation 23.603 to trigger upon a covered entity's determination to activate its BCDR plan, rather than ''promptly'' after an emergency or other disruption. Do covered entities typically make a specific determination before activating the BCDR plan? What is the process for making that determination and who makes it? Are there aspects of the BCDR plan that may become active before any formal determination is made? Should the Commission instead require notification ''when'' or ''as soon as'' a BCDR plan is activated? Why or why not? Please explain.

3. *Notifications to customers or counterparties.* The proposed rule would require covered entities to provide affected customers and counterparties information necessary for the affected customer/counterparty to understand and assess the potential impact of the incident on its information, assets, or positions and to take any necessary action. Does the proposed rule provide sufficient information for covered entities to assess and comply with that standard?

I. Amendment and Expansion of Other Provisions in Current Commission Regulation 23.603

As mentioned in previous sections of this notice, the proposed rule would expand and apply the substance of existing provisions in current Commission regulation 23.603 to all covered entities and the ORF in its entirety. Such provisions not yet addressed include (1) the establishment of emergency contacts for the Commission and (2) recordkeeping obligations.[280]

1. Emergency Contacts—Proposed Paragraph (k)

To assist the Commission in responding to a reported incident, or an emergency or other significant disruption causing a covered entity to activate its BCDR plan, the proposed rule would require each covered entity to provide the Commission the name and contact information for two employees with knowledge of the covered entity's incident response plan and two employees with knowledge of the covered entity's BCDR plan.[281] Each identified employee would need to be authorized to make key decisions on behalf of the covered entity in the event of either an incident or the BCDR plan activation, as applicable, as the Commission would want to be sure to be contacting personnel with appropriate knowledge and authority.[282] Any updates to the ORF contacts would need to be made to the Commission as necessary to ensure the Commission's contact information remains accurate and up to date.[283]

This provision is consistent with the existing emergency contacts requirement in the swap entity BCDR plan requirement in current Commission regulation 23.603.[284]

[277] *See id.*

[278] *See* paragraphs (j)(2)(i)–(iv) of proposed Commission regulations 1.13 and 23.603.

[279] *See id.*

[280] *See* 17 CFR 23.603(e) and (i). The Commission would not retain Commission regulation 23.603(h) (business continuity and disaster recovery plans required by other regulatory authorities) as superfluous, *see supra* note 198.

[281] *See* paragraph (k)(1) of proposed Commission regulations 1.13 and 23.603. *See also* 17 CFR 23.603(e) (requiring the designation of two emergency contacts with respect to the BCDR plan for swap entities).

[282] *See* paragraph (k)(2) of proposed Commission regulations 1.13 and 23.603. The two employee contacts identified with respect to the information and technology security program could be the same as the employee contacts for the BCDR plan, provided that they have the requisite authority. *See id.*

[283] *See* paragraph (k)(3) of proposed Commission regulations 1.13 and 23.603.

[284] *See* 17 CFR 23.603(e) (''Each swap dealer and major swap participant shall provide to the Commission the name and contact information of two employees who the Commission can contact in the event of an emergency or other disruption. The

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2. Recordkeeping—Proposed Paragraph (l)

To aid the Commission in fulfilling its oversight responsibilities, the proposed rule would require each covered entity to maintain all records required pursuant to the proposed ORF rule, including the information and technology security program, the third-party relationship program, and the BCDR plan, in accordance with Commission regulation 1.31 and to make them available promptly upon request to representatives of the Commission and to representations of applicable prudential regulators as defined in section 1a(39) of the CEA.[285] This provision is consistent with the existing recordkeeping requirement in the swap entity BCDR plan requirement in current Commission regulation 23.603.[286]

3. Request for Comment

The Commission invites comment on all aspects of the proposed emergency contacts and recordkeeping requirements.

J. Cross-Border Application for Swap Entities

In September 2020, the Commission published a final rule addressing the cross-border application of certain provisions of the CEA applicable to swap entities.[287] The rule addresses the application of the registration thresholds and certain requirements applicable to swap entities and establishes a formal process for requesting comparability determinations for such requirements from the Commission.[288] Therein, the Commission classified current Commission regulation 23.603 (BCDR requirements for swap entities) as a group A requirement.[289] The Commission described the group A requirements as helping swap entities ''implement and maintain a comprehensive and robust system of internal controls to ensure the financial integrity of the firm, and, in turn, the protection of the financial system'' and as ''constitut[ing] an important line of defense against financial, operational, and compliance risks that could lead to a firm's default.'' [290] Pursuant to Commission regulation 23.23(f)(1), a non-U.S. swap entity may satisfy any applicable group A requirement on an entity-wide basis by complying with the applicable standards of a foreign jurisdiction to the extent permitted by, and subject to any conditions specified in, a comparability determination issued by the Commission.[291] In determining to offer substituted compliance for group A requirements broadly to all non-U.S. swap entities, the Commission explained its belief that group A requirements cannot be effectively applied on a fragmented jurisdictional basis, such that it would not be practical to limit substituted compliance for group A requirements to transactions involving only non-U.S. persons.[292]

As discussed above, the proposed rule would amend current Commission regulation 23.603 to contain the entirety of the ORF requirements applicable to swap entities, which would include requirements not only relating to BCDR but also those relating to information and technology security and third-party relationships. The Commission preliminarily believes that the same rationale for classifying BCDR requirements as a group A requirement would apply to the ORF rule more broadly. As discussed in detail above, the Commission preliminarily believes that the proposed information and technology security and third-party risk relationship requirements would also serve to help swap entities implement and maintain a comprehensive and robust system of internal controls, serving as an important line of defense against the threat of failure at the firm level and of the financial system more broadly. Accordingly, should the ORF rule be adopted, the Commission would continue to classify Commission regulation 23.603 in its entirety as a group A requirement, for which substituted compliance would broadly be available pursuant to the requirements of Commission regulation 23.23(f)(1).

As mentioned above, Commission regulation 23.23(f)(1) only allows substituted compliance ''to the extent permitted by, and subject to any conditions specified in, a comparability determination issued by the Commission under [Commission regulation 23.23(g)].'' [293] Current Commission comparability determinations do not address the entirety of the proposed ORF rule, as it has yet to be adopted. Rather, they only address the requirements in current Commission regulation 23.603, which are limited to the BCDR plan requirement.

The Commission appreciates that non-U.S. swap entities have come to rely on existing comparability determinations with respect to the current BCDR requirements in Commission regulation 23.603. Accordingly, in the interest of comity and good governance, should the proposed rule be adopted, the Commission has preliminarily determined to permit non-U.S. swap entities to continue to rely on current comparability determinations with respect to the Commission's BCDR requirements, even as amended. However, for substituted compliance to be available for the ORF rule in its entirety, an eligible swap entity or foreign regulatory authority would need to submit a request for a comparability determination pursuant to Commission regulation 23.23(g). The submission would need to address the full complement of the provisions of the ORF rule, however codified in amended Commission regulation 23.603, including the BCDR requirements. The Commission would then evaluate the request, considering amended Commission regulation 23.603 in its entirety, and, if the Commission were to conclude it appropriate to do so, issue updated comparability determinations that would supersede any pre-existing comparability determinations with respect to BCDR requirements for swap entities.

Request for Comment

The Commission invites comment on all aspects of the cross-border implications of the proposed rule.

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individuals identified shall be authorized to make key decisions on behalf of the swap dealer or major swap participant and have knowledge of the firm's business continuity and disaster recovery plan. The swap dealer or major swap participant shall provide the Commission with any updates to this information promptly.'').

[285] *See* paragraph (l) of proposed Commission regulations 1.13 and 23.603. *See* 7 U.S.C. 1(a)(39).

[286] *See* 17 CFR 23.603(i) (''The business continuity and disaster recovery plan of the swap dealer and major swap participant and all other records required to be maintained pursuant to this section shall be maintained in accordance with Commission Regulation § 1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.'').

[287] *See* Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 56924 (Sept. 14, 2020) (Final Cross Border Rule); 17 CFR 23.23.

[288] *Id.*

[289] *Id.* at 56964–65; 17 CFR 23.23(a)(6) (defining ''group A requirements'').

[290] Final Cross-Border Rule, 85 FR 56964 (providing that ''requiring swap entities to rigorously monitor and address the risks they incur as part of their day-to-day businesses lowers the registrants' risk of default—and ultimately protects the public and the financial system.'').

[291] *See* 17 CFR 23.23(f)(1). *See also* 17 CFR 23.23(a)(11) (defining ''non-U.S. swap entity''); 17 CFR 23.23(g) (describing the process for the issuance of comparability determinations).

[292] *See* Final Cross-Border Rule, 85 FR 56977.

[293] *See* 17 CFR 23.23(f)(1).

K. Implementation Period

Should the proposed rule be adopted, the Commission recognizes that covered entities may need time to establish an ORF or review and update existing plans and procedures for compliance with the proposed ORF rule. The Commission preliminarily believes that, given existing and applicable NFA, prudential, and foreign requirements, six months from the rule's adoption would be a sufficient amount of time for covered entities to achieve compliance with the ORF rule.

The Commission invites comment on the Commission's proposed implementation period for the proposed ORF rule, including the following questions:

1. Would six months be as sufficient amount of time for covered entities to develop compliant ORFs? If not, why not? Please explain.

2. If covered entities would need more than six months to implement the ORF as proposed, how much more time would they estimate to need, and what would they be doing with that time? Please be as detailed as possible.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies, in promulgating regulations, to consider the impact of those regulations on small entities—whether the rules will have a significant economic impact on a substantial number of small entities—and if so, to provide a regulatory flexibility analysis reflecting the impact.[294] The Commission has established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on small entities in accordance with the RFA.[295] The proposed regulations would affect FCMs, SDs, and MSPs. The Commission has previously determined that FCMs, SDs, and MSPs are not small entities for purposes of the RFA.[296] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 506(b) that the proposed rule and rule amendments would not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) imposes certain requirements on federal agencies, including the Commission, in connection with conducting or sponsoring any ''collection of information,'' as defined by the PRA.[297] The PRA is intended, in part, to minimize the paperwork burden created for individuals, businesses, and other persons as a result of the collection of information by federal agencies, and to ensure the greatest possible benefit and utility of information created, collected, maintained, used, shared, and disseminated by or for the Federal Government.[298] The PRA applies to all information, regardless of form or format, whenever the Federal Government is obtaining, causing to be obtained, or soliciting information, and includes required disclosure to third parties or the public, of facts or opinions, when the information collection calls for answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.[299]

This proposed rulemaking would result in new collection of information requirements within the meaning of the PRA. The Commission is therefore submitting this proposal to the Office of Management and Budget (OMB) for review.[300] The title for this collection of information is ''Operational Resilience Framework for Futures Commission Merchants, Swap Dealers, and Major Swap Participants.'' The OMB has not yet assigned this collection a control number. 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.[301]

If the proposed regulations are adopted, responses to this collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and part 145 of the Commission's regulations, ''Commission Records and Information.'' [302] In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' [303] The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[304]

1. Information Provided by Reporting Entities/Persons

The proposed regulations would require each covered entity to establish, document, implement, and maintain an ORF that includes an information and technology security program, a third-party relationship program, and a BCDR plan, each of which would need to be supported by written policies and procedures. In addition, the proposed regulations would impose the following reporting, recordkeeping, and disclosure obligations on each covered entity: (1) on an annual basis, written approval of each component program or plan of the ORF and of risk appetite and risk tolerance limits, or in the case of covered entities relying on a consolidated program or plan, written attestation; (2) on an annual basis, documenting review and testing of the ORF; (3) as applicable, notifying the Commission of certain ''incidents,'' as defined in the proposed rule; (4) as applicable, notifying the Commission upon activation of the BCDR plan; (5) as applicable, notifying customers or counterparties of certain ''incidents,'' as defined in the proposed rule; and (6) providing emergency contact information to the Commission in connection with the information and technology security program and the BCDR plan. These requirements will result in new PRA burdens for covered entities.

For purposes of the PRA, the term ''burden'' means the ''time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal Agency.'' [305] This total includes the anticipated burden associated with the development of the required written policies and procedures, satisfaction of various reporting, recordkeeping, and disclosure obligations, the documentation of required ORF testing and review, and the documentation of risk appetite and risk tolerance limits approval.

As of October 31, 2023, there are 160 covered entities that would become subject to the proposed rule (100 registered swaps dealers, 54 registered futures commission merchants, and 6 dually-registered swap dealers/futures commission merchants). The estimated burden associated with the proposed

[294] 5 U.S.C. 601 *et seq.*

[295] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982) (RFA Definitions of ''Small Entities'').

[296] *See* RFA Definitions of ''Small Entities,'' 47 FR 18619 (FCMs); Final Swap Entities RMP Rule, 77 FR 20193–94 (SDs and MSPs).

[297] 44 U.S.C. 3501 *et seq.*

[298] *Id.*

[299] *See* 44 U.S.C. 3502(3).

[300] *See* 44 U.S.C. 3507(d); 5 CFR 1320.11.

[301] *See* 44 U.S.C. 3507(a)(3); 5 CFR 1320.5(a)(3).

[302] *See* 5 U.S.C. 552. *See also* 17 CFR part 145.

[303] 7 U.S.C. 12(a)(1).

[304] *See* 5 U.S.C. 552a.

[305] 44 U.S.C. 3502(2).

information collections is calculated as follows:

a. Recordkeeping Requirements

The proposed regulation contains recordkeeping requirements that would result in a collection of information from ten or more persons over a 12-month period.

Establishing, documenting, implementing, and maintaining information and technology security program: As part of an overall ORF, proposed Commission regulations 1.13(d) and 23.603(d) would require covered entities to establish an information and technology security program reasonably designed to identify, monitor, manage, and assess risks relating to information and technology security, including through conducting and documenting risk assessments at least annually. Upon the risk assessment's completion, the results would need to be provided to the oversight body, senior officer, or other senior-level official who approves the information and technology security program. As part of the information and technology security program, the proposed rule would require the covered entity to establish, document, implement, and maintain controls to prevent, detect, and mitigate identified risks to information and technology security. In addition, the proposed rule would require that the information and technology security program include a written incident response plan reasonably designed to detect, assess, contain, mitigate the impact of, and recover from an incident.

The Commission anticipates that a covered entity would require an estimated 200 hours to develop their information and technology security program, including conducting and documenting an annual risk assessment and developing an incident response plan. This yields a total annual burden of 32,000 burden hours (160 respondents × 200 hours = 32,000 hours).

Accordingly, the aggregate annual estimate for the recordkeeping burden associated with this proposal would be as follows:[306]

Number of registrants: 160.

Estimated number of responses: 1.

Estimated total annual burden per registrant: 200 hours.

Frequency of collection: Annually.

Total annual burden: 32,000 burden hours [160 registrants × 200 hours].

Establishing, documenting, implementing, and maintaining third-party relationship program: Proposed Commission regulations 1.13(e) and 23.603(e) would require covered entities to develop a program reasonably designed to identify, monitor, manage, and assess risks relating to third-party relationships. The program would be required to address the risks attendant to each stage of the third-party relationship lifecycle and would be required to include an inventory of third-party service providers the covered entity has engaged to support its activities as a covered entity.

The Commission anticipates that a covered entity would require an estimated 160 hours annually to develop their third-party relationship program, including creating and maintaining a third-party service provider inventory. This yields a total annual burden of 25,600 hours (160 respondents × 160 hours = 25,600 burden hours). The aggregate annual estimate for the recordkeeping burden associated with this proposal would be as follows: [307]

Number of registrants: 160.

Estimated number of responses: 1.

Estimated total annual burden per registrant: 160 hours.

Frequency of collection: Annually.

Total annual burden: 25,600 burden hours [160 registrants × 160 hours].

Establishing, documenting, implementing, and maintaining BCDR plan: Proposed Commission regulations 1.13(f) and 23.603(f) would require covered entities to establish a written BCDR plan reasonably designed to identify, monitor, manage, and assess risks relating to emergencies or other significant disruptions to the continuity of normal business operations as a covered entity.[308] The proposed rule would require the BCDR plan be reasonably designed to enable the covered entity to: (1) continue or resume any activities as a covered entity with minimal disruption to customers, counterparties, and markets; and (2) recover and make use of covered information, in addition to any other data, information, or documentation required to be maintained by law and regulation. These plans would be required to, among other things, establish procedures for data backup and establish and maintain arrangements to provide for redundancies or their backup for covered technology, facilities, infrastructure, personnel, and competencies.

The Commission anticipates that a covered entity would require an estimated 50 hours annually to develop or to update their existing written BCDR plan. This yields a total annual burden of 8,000 burden hours (160 respondents × 50 hours = 8,000 hours).

Accordingly, the aggregate annual estimate for the recordkeeping burden associated with this proposal would be as follows:[309]

Number of registrants: 160.

Estimated number of responses: 1.

Estimated total annual burden per registrant: 50 hours.

Frequency of collection: Annually.

Total annual burden: 8,000 burden hours [160 registrants × 50 hours].

Documentation of ORF review: Proposed Commission regulations 1.13(h) and 23.603(h) would require covered entities to establish, implement, and maintain plans reasonably designed to assess their adherence to, and the effectiveness of, their ORF through regular reviews and risk-based testing.

The proposed rule would require that reviews be conducted at least annually and when any material change to covered entities' activities or operations occurs that is reasonably likely to affect

[306] This estimate reflects the aggregate information collection burden estimate associated with the proposed recordkeeping requirement for the first annual period following implementation of the proposed regulations. Because proposed Commission regulations 1.13(d) and 23.603(d) would require the one-time recordkeeping requirement as to developing the information and technology security program, Commission staff estimates that for each subsequent annual period, the number of burden hours would be reduced accordingly.

[307] This estimate reflects the aggregate information collection burden estimate associated with the proposed recordkeeping requirement for the first annual period following implementation of the proposed regulations. Because proposed Commission regulations 1.13(e) and 23.603(e) would require the one-time recordkeeping requirement as to developing the third-party relationship program, Commission staff estimates that for each subsequent annual period, the number of burden hours would be reduced accordingly.

[308] As discussed in section II.E (Continuity and Disaster Recovery Plan) of this notice, swap entities are already required to establish a written BCDR plan pursuant to current Commission regulation 23.603. The existing burdens for current Commission regulation 23.603 are found in the following information collection, Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants (OMB Control No. 3038–0084). The burden of swap entities updating their BCDR plan is included in the new collection of information established by the proposed rule, but the Commission is retaining its existing burden estimates under Control No. 3038–0084 at this time to avoid undercounting. The Commission will adjust its burden estimates associated with OMB Control No. 3038–0084 at a later date, as necessary.

[309] This estimate reflects the aggregate information collection burden estimate associated with the proposed recordkeeping requirement for the first annual period following implementation of the proposed regulations. Because proposed Commission regulations 1.13(f) and 23.603(f) would require the one-time recordkeeping requirement, as to developing the BCDR plan, Commission staff estimates that for each subsequent annual period, the number of burden hours would be reduced accordingly.

the risks identified in the ORF. With regard to testing, the proposed rule would require that the testing of information and technology security program include, at a minimum, the testing of key controls and the incident response plan at least annually; daily or continuous automated vulnerability scans; and penetration testing at least annually. Additionally, the proposed rule would require that testing of the BCDR plan must include, at a minimum, a walk-through or tabletop exercise designed to test the effectiveness of backup facilities and capabilities at least annually.

The proposed rule would also require covered entities to document all reviews and testing of their ORFs. The proposed rule would require that documentation to include, at a minimum, (i) the date the review or testing was conducted; (ii) the nature and scope of the review or testing, including methodologies employed; (iii) the results of the review or testing, including any assessment of effectiveness; (iv) any identified deficiencies and recommendations for remediation; and (v) any corrective action(s) taken or initiated, including the date(s) of such action(s).

The Commission anticipates that covered entities would require an estimated 80 hours annually to establish a plan to assess adherence to, and the effectiveness of, its ORF, as well as documenting all reviews and testing of the ORF. This yields a total annual burden of 12,800 hours (160 respondents × 80 hours = 12,800 burden hours).

The aggregate annual estimate for the recordkeeping burden associated with this proposal would be as follows: [310]

Number of registrants: 160.

Estimated number of responses: 1.

Estimated total annual burden per registrant: 80 hours.

Frequency of collection: Annually.

Total annual burden: 12,800 burden hours [160 registrants × 80 hours].

Documentation of approval of the component programs or plan, risk appetite, and risk tolerance limits: Proposed Commission regulations 1.13(c)(1) and 23.603(c)(1) would require covered entities to ensure that the information and technology security program, third-party relationship program, and BCDR plan are approved in writing on at least an annual basis by either the senior officer, an oversight body, or a senior-level official with primary responsibility for the component programs or plan. Proposed Commission regulations 1.13(c)(2) and 23.603(c)(2) would require the risk appetite and risk tolerance limits established by covered entities be approved in writing at least annually by either the senior officer, an oversight body, or a senior-level official. Proposed Commission regulations 1.13(c)(4)(ii) and 23.603(c)(4)(ii) would allow covered entities that rely on a consolidated program or plan for its ORF to meet the annual approval requirement for the component programs or plan of the ORF, risk appetite, and risk tolerance limits through an annual written attestation by either the senior officer, an oversight body, or a senior-level official.

The Commission anticipates that covered entities would require an estimated 20 hours annually to document approval of the ORF, risk appetite, and risk tolerance limits or to prepare the written attestation. This yields a total annual burden of 3,200 hours (160 respondents × 20 hours = 3,200 burden hours).

The aggregate annual estimate for the recordkeeping burden associated with this proposal would be as follows:

Number of registrants: 160.

Estimated number of responses: 1.

Estimated total annual burden per registrant: 20 hours.

Frequency of collection: Annually.

Total annual burden: 3,200 burden hours [160 registrants × 20 hours].

b. Reporting Requirements

The proposed regulation contains reporting requirements that would result in a collection of information from ten or more persons over a 12-month period.

Notification of incidents to the Commission: Proposed Commission regulations 1.13(i)(1) and 23.603(i)(1) would require covered entities to notify the Commission regarding incidents that adversely impact or are reasonably likely to adversely impact: (1) information technology and security; (2) the covered entity's ability to continue its business activities; or (3) the assets or positions of a customer or counterparty. These notifications would be required to include information that may assist the Commission in assessing and responding to the incident, including the date the incident was detected, possible cause(s) of the incident, its apparent or likely impacts, and any actions the covered entity has taken or is taking to mitigate or recover from the incident. Notifications would be required to be submitted via email as soon as possible, but no later than 24 hours after an incident is detected.

The Commission anticipates that covered entities may experience one reportable incident per year and that covered entities would expend approximately 10 hours to gather the information required and provide the required notification to the Commission. This would result in an estimated total annual burden of 1,600 hours (160 respondents × 1 reportable incident per year × 10 hours per reportable incident = 1,600 hours).

The aggregate annual estimate for the reporting burden associated with this proposal would be as follows:

Number of registrants: 160.

Estimated number of responses: 1.

Estimated total annual burden per registrant: 10 hours.

Frequency of collection: As needed.

Total annual burden: 1,600 burden hours [160 registrants × 10 hours].

Notification of BCDR plan activation: Proposed Commission regulations 1.13(i)(2) and 23.603(i)(2) would require covered entities to notify the Commission of any determination to activate the BCDR plan. Covered entities would be required to provide such notices via email and include any information available at the time of the notification that may assist the Commission in assessing or responding to the emergency or disruption, including the date of the emergency or disruption, a description thereof, the possible cause(s), its apparent or likely impacts, and any actions the covered entity has taken or is taking to mitigate or recover from the emergency or disruption, including measures taken or being taken to protect customers.

The Commission anticipates that approximately 3 covered entities may activate their BCDR plan per year and that such covered entities would expend approximately 10 hours to gather the information required and to provide the required notification to the Commission. This would result in an estimated total annual burden of 30 burden hours (3 BCDR activations per year × 10 hours per BCDR activation = 30 hours).

The aggregate annual estimate for the reporting burden associated with this proposal would be as follows:

Number of registrants: 3.

Estimated number of responses per respondent: 1.

Estimated total annual burden per registrant: 10 hours.

Frequency of collection: As needed.

[310] This estimate reflects the aggregate information collection burden estimate associated with the proposed recordkeeping requirement for the first annual period following implementation of the proposed regulations. Because proposed Commission regulations 1.13(h) and 23.603(h) would require the one-time recordkeeping requirement as to developing a plan to assess the effectiveness of the ORF, Commission staff estimates that for each subsequent annual period, the number of burden hours would be reduced accordingly.

Total annual burden: 30 burden hours [3 BCDR activations per year × 10 hours].

Filing emergency contact information: Proposed Commission regulations 1.13(k) and 23.603(k) would require covered entities to provide the Commission with emergency contact information for employees to serve as contacts in connection with required incident notifications under the ORF and the activation of the covered entity's BCDR plan.

The Commission anticipates that covered entities would require an estimated 1 hour annually to provide the Commission with emergency contact information. This yields a total annual burden of 160 burden hours (160 respondents × 1 hour = 160 burden hours).

The aggregate annual estimate for the reporting burden associated with this proposal would be as follows: [311]

Number of registrants: 160.

Estimated number of responses: 1.

Estimated total annual burden per registrant: 1 hour.

Frequency of collection: As needed.

Total annual burden: 160 burden hours [160 registrants × 1 hour].

c. Disclosure Requirements

The proposed regulation contains disclosure requirements that would result in a collection of information from ten or more persons over a 12-month period.

Notification of incidents to affected customers and counterparties: Proposed Commission regulations 1.13(j) and 23.603(j) would require covered entities to notify their customers and counterparties as soon as possible of any incident that is reasonably likely to have adversely affected the confidentiality or integrity of the customer's or counterparty's covered information, assets, or positions. The proposed rule would require that notifications include information necessary for the affected customer or counterparty to understand and assess the potential impact of the incident on its information, assets, or positions and to take any necessary action. Such notifications shall include, at a minimum, a description of the incident; the way the customer or counterparty, or its covered information, may have been adversely impacted; measures being taken by the covered entity to protect against further harm; and contact information for the covered entity where the customer or counterparty may learn more about the incident or ask questions.

The Commission anticipates that covered entities may experience 17 reportable incidents per year and that covered entities would expend approximately 50 hours to gather the required information necessary to provide notice of an incident and to prepare and deliver the required notification. This would result in an estimated total annual burden of 850 burden hours (17 reportable incidents per year × 50 hours per reportable incident = 850 burden hours).

The aggregate annual estimate for the disclosure burden associated with this proposal would be as follows:

Number of registrants: 17.

Estimated number of responses per respondent: 1.

Estimated total annual burden per registrant: 50 hours.

Frequency of collection: As needed.

Total annual burden: 850 burden hours [17 reportable incidents per year × 50 hours].

d. Total Burden

Based upon the estimates above, the aggregate annual cost for all covered entities is 84,240 burden hours.

It is expected that covered entities will utilize existing software, information technology and systems. Thus, the Commission believes any additional capital/startup costs or operational/maintenance costs incurred by respondents to report the information required by the proposed regulations to the Commission would be negligible, if any.

2. Request for Comment

The Commission invites the public and other federal agencies to comment on any aspect of the reporting, recordkeeping, and disclosure burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission will consider public comments on this proposed collection of information in:

(1) Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;

(2) Evaluating the accuracy of the Commission's estimate of the burden of the proposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;

(3) Enhancing the quality, utility, and clarity of the information proposed to be collected; and

(4) Minimizing the burden of the collection of information on covered entities, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, *e.g.,* permitting electronic submission of responses.

A copy of the supporting statements for the collections of information discussed above are available from the CFTC Clearance Officer, 1155 21st Street NW, Washington, DC 20581, 202–418–5714, or from *https://www.RegInfo.gov.* Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

- The Office of Information and Regulatory Affairs, Office of Management and Building, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission;
- 202–395–6566 (fax);
- *OIRAsubmissions@omb.eop.gov* (email).

Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rulemaking. Please refer to the **ADDRESSES** section of this notice of proposed rulemaking for comment submission instructions to the Commission. OMB is required to decide concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of receiving full consideration if OMB (and the Commission) receives it within 30 calendar days of publication of this notice. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rule.

C. Cost-Benefit Considerations

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.[312] 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 swaps markets; (3) price discovery; (4) sound risk

[311] This estimate reflects the aggregate information collection burden estimate associated with the proposed reporting requirement for the first annual period following implementation of the proposed regulations. Because proposed Commission regulations 1.13(k) and 23.603(k) would require the emergency contact information provided to the Commission to be updated only as necessary, Commission staff estimates that for each subsequent annual period, the number of burden hours would be reduced accordingly.

[312] *See* 7 U.S.C. 19(a).

management practices; and (5) other public interest considerations.[313] In conducting its analysis, the Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the considerations of section 15(a) of the CEA.

As detailed above, the proposed rule would require covered entities (FCMs, SDs, and MSPs) to establish, document, implement, and maintain an ORF reasonably designed to identify, monitor, manage, and assess risks relating to (i) information and technology security, (ii) third-party service providers, and (iii) emergencies or other significant disruptions to the continuity of their normal business operations.[314] The ORF would accordingly need to include a program or plan directed at each of these three risk areas (an information and technology security program, a third-party relationship program, and a business continuity and disaster recovery plan), as well as a plan for the review and testing of the ORF, each of which would need to meet certain specified minimum requirements.[315] The proposed rule would further establish governance, training, and recordkeeping requirements related to the ORF, as well as require notification of certain ORF-related events to the Commission and customers or counterparties.[316] The main purpose of the proposed ORF, as discussed above, is to promote sound practices for managing risks relating to information and technology security, third-party relationships, and emergencies or other significant disruptions, so as to support covered entity operational resilience, to the benefit of customers, counterparties, and the derivatives markets more broadly.

The Commission identifies and considers the benefits and costs of the proposed amendments relative to the baseline of the current status quo. As discussed above, all of the proposed requirements would be new CFTC requirements for covered entities, with the exception of the BCDR plan requirement for swap entities, which the proposed rule would amend in certain respects.[317] Nevertheless, the Commission preliminarily believes that many, if not all, covered entities currently registered with the Commission have likely adopted documents, policies, and practices consistent with the proposed ORF rule. Current NFA rules and interpretive notices, for instance, address the core risks at the center of the ORF—information and technology security, third-party risks, and BCDR planning—and establish related requirements that apply to covered entities, including a BCDR plan requirement for FCMs.[318] Additionally, many covered entities are subject to prudential regulation, which includes requirements relating to information security and notifications of related incidents.[319] Prudential regulators have also provided guidance relating to operational resilience and third-party relationships.[320] Furthermore, based on its oversight activities, the Commission preliminarily believes that certain aspects of the proposed rule requirements are already employed by many covered entities as recommended best practices.

The Commission acknowledges that, no matter the degree to which a covered entity currently operates in a manner consistent with the requirements of the proposed rule, covered entities would all incur some level of costs in reviewing the proposed rule and comparing their existing practices and procedures against it to ensure they meet the minimum requirements and make any necessary updates. Nevertheless, the Commission preliminarily believes that the actual costs and benefits of the proposed rule as realized by most current covered entities may not be as significant as they would be for entities not already subject to NFA or prudential authority or that have not already adopted operational resilience practices in line with general standards and best practices. The Commission also preliminarily believes that leveraging existing standards and guidance and aligning with other applicable authorities to the degree sensible and appropriate, as recommended by the National Cyber Strategy, in itself is a benefit to covered entities and the markets more broadly, by reducing compliance burdens while promoting practices that have proven to support operational resilience and positive regulatory outcomes. Customers, counterparties, and the public more generally would likely benefit as well, as the proposed rule would allow the Commission to exercise its oversight authority to foster compliance with the ORF requirements that are currently absent from its regulations.

By its terms, section 15(a) does not specifically require the Commission to quantify the costs and benefits of a new rule or to determine whether the benefits of the adopted rule outweigh its costs. Rather, section 15(a) requires the Commission to ''consider the costs and benefits'' of a subject rule.[321] 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 applicable proposed amendments in qualitative terms. However, the Commission lacks the data necessary to reasonably quantify all of the costs and benefits considered below. Additionally, any initial and recurring compliance costs for any particular covered entity would depend on its size, existing infrastructure, practices, and cost structures, as well as the nature, size, scope, complexity, and risk profile of its operations as a covered entity. It is impossible to place a reliable dollar figure on potential future incidents that might be prevented through this rulemaking because the threats are too varied. The constantly changing nature of technology exacerbates this difficulty.[322]

[313] *Id.*

[314] *See* paragraph (b)(1) of proposed Commission regulations 1.13 and 23.603.

[315] *See* paragraphs (b)(2) (components), (d) (information and technology security program), (e) (third-party relationship program), (f) (business continuity and disaster recovery plan), and (h) (reviews and testing) of proposed Commission regulations 1.13 and 23.603.

[316] *See* paragraphs (c) (governance), (g) (training), (i) (notifications to the Commission), (j) (notification of incidents to affected customers or counterparties), (k) (emergency contacts), and (l) (recordkeeping) of proposed Commission regulations 1.13 and 23.603.

[317] *See* 17 CFR 23.603.

[318] *See supra* note 43; *see also supra* note 60 (noting that NFA's requirement to establish a business continuity and disaster recovery plan does not apply to swap entities).

[319] *See* Computer-Security Incident Notification Requirements for Banking Organizations and their Bank Service Providers, 86 FR 66424 (Nov. 23, 2021); 12 CFR part 30, app. A (Interagency Guidelines Establishing Standards for Safety and Soundness); 12 CFR part 30, app. B (Interagency Guidelines Establishing Information Security Standards).

[320] *See supra* note 43. *See also supra* note 50. The Commission notes that the Prudential Operational Resilience Paper was ''written for use by the largest and most complex domestic firms,'' including financial institutions with average total consolidated assets greater than or equal to (a) $250 billion or (b) $100 billion and have $75 billion or more in average weighted short-term wholesale funding, average nonbank assets, or average off-balance-sheet exposure. *See* Prudential Operational Resilience Paper, *supra* note 11, at 1.

[321] *See* 7 U.S.C. 19(a).

[322] FSI Cybersecurity Paper, *supra* note 15, at 1 (''The cyber threat landscape is also characterised by a significant and continuous rise in the cost of cyber incidents. Statista (2023) estimated the global cost of cyber crime in 2022 at $8.4 trillion and

Continued

Regarding covered entities' costs, while the Commission generally believes—based on anecdotal information and its general understanding—that covered entities have already instituted, to a large degree, the practices called for in the proposed rule, the Commission lacks empirical evidence or data to verify that belief (including the number of covered entities whose practices currently meet the requirements being proposed) and quantify what, if any, material costs covered entities would incur to comply with the proposed regulations. To the extent covered entities would need to make operational changes to comply with the proposed amendments, the Commission expects they would be proportionate to the nature, size, scope, complexity, and risk profile of their operations as covered entities. The Commission therefore invites comments providing data and other empirical information to allow it to quantify the degree to which: (1) covered entities currently have implemented (or independent of the proposed amendments, otherwise plan to implement) practices that are compliant with the Commission's proposed regulations and (2) the expected additional costs for any covered entities that, to date, have not completely done so or are otherwise moving independently towards doing so.

The Commission notes that this cost-benefit consideration is based on its understanding that the derivatives markets regulated by the Commission function internationally with: (1) transactions that involve U.S. entities occurring across different international jurisdictions; (2) some entities organized outside of the United States that are registered with the Commission; and (3) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever they are located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the proposed regulations on all relevant derivatives activity, whether based on their actual occurrence in the United States, or on their connection with, or effect on, U.S. commerce.

In the sections that follow, the Commission discusses the costs and benefits associated with the proposed rule, as well as reasonable alternatives, relative to the baseline. The Commission generally requests comment on all aspects of its cost-benefit consideration, including the baseline; assumptions and methodology employed; the identification and measurement of costs and benefits relative to the baseline; the identification, measurement, and assessment of any costs and benefits not discussed herein; data and any other information to assist or otherwise inform the Commission's ability to better quantify or qualitatively understand and describe the costs and benefits of the proposed amendments; whether and what specific alternatives would be more reasonable in terms of their costs and benefits and why; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's discussion and/or requests for comments.

1. Costs and Benefits

The following sections discuss the costs and benefits that the Commission preliminarily expects to result from the requirements in the proposed rule.

e. Generally—Proposed Paragraph (b)

The proposed rule would require covered entities to establish, document, implement, and maintain an ORF reasonably designed to identify, monitor, manage, and assess risks relating to: (i) information and technology security; (ii) third-party relationships; and (iii) emergencies or other significant disruptions to the continuity of normal business operations as covered entities.[323] The ORF would need to, at a minimum, include an information and technology security program, a third-party relationship program, and a business continuity and disaster recovery plan, and each component program or plan would need to be supported by written policies and procedures.[324] Covered entities would further need to ensure that their ORF is appropriate and proportionate to the nature, size, scope, complexity, and risk profile of their business activities as covered entities, following generally accepted standards and best practices.[325]

The Commission anticipates that the main source of costs associated with establishing, documenting, implementing, and maintaining the ORF, as required, would derive from creating and implementing the necessary core component programs and plan, the detailed requirements and costs and benefits of which are discussed in greater detail in the sections that follow. As discussed above, although the Commission expects that most covered entities have already established at least some of elements of the ORF in place by virtue of NFA or other requirements, covered entities would, at minimum, need to devote time and resources to reviewing their existing programs to ensure they meet the requirements of the proposed rule and making any necessary amendments. Accordingly, the Commission anticipates all covered entities would incur at least a one-time fixed cost associated with reviewing their existing programs to ensure compliance, and to identify and make any potential required updates. Specifically, the Commission expects covered entities would incur a one-time initial cost of $41,000 (410 hours[326] × $100/hour) to review their existing programs and identify and make any necessary changes, or an estimated aggregate dollar cost of $6,560,000 (160 covered entities × $41,000).[327]

To the extent that covered entities' current operational resilience practices do not meet the minimum requirements

expects this to go beyond $11 trillion in 2023. This reflects an annual increase of 30% in the cost of cyber crime during the 2021–23 period. Moreover, the average cost of a data breach between 2020 and 2022 increased by 13%, with the financial industry scoring the second highest average cost after healthcare at $6 million. According to Chainalysis (202[3]), 2022 was the biggest year ever for crypto hacking, with $3.8 billion stolen from cryptocurrency businesses. Cyber insurance demand continues to outweigh supply and that the cyber protection gap appears to be widening amid a market characterised by rising premiums, narrowing coverage and tighter underwriting standards.'').

[323] *See* paragraph (b)(1) of proposed Commission regulations 1.13 and 23.603.

[324] *See* paragraph (b)(2) of proposed Commission regulations 1.13 and 23.603.

[325] *See* paragraph (b)(3) of proposed Commission regulations 1.13 and 23.603.

[326] This hour estimate reflects the aggregate amount of time the Commission estimates covered entities will expend establishing, documenting, implementing and maintaining the core component programs and plan of their ORF (*i.e.,* information and technology security program, third-party relationship program, and business continuity and disaster recovery plan). *See* section III.B (Paperwork Reduction Act) of this notice, *supra.*

[327] The cost estimates in this section were determined using an average salary of $100.00 per hour. The Commission believes that this is an appropriate salary estimate for purposes of the proposed rule based upon the May 2022 Bureau of Labor Statistics' average hourly rate for the following positions: (1) $63.08 for management occupations; (2) $41.39 for business and financial operations occupations; (3) $51.99 for computer and mathematical occupations; (4) $67.71 for computer engineering occupations; (5) $59.87 for legal occupations; and (6) $21.90 for office and administrative support occupations. Based on this data, the Commission took the mean hourly wage for these positions and increased it to $100 in recognition that some covered entities are large financial institutions whose employees' salaries may exceed the mean wage. *See* U.S. Bureau of Labor Statistics, May 2022 National Occupational Employment and Wage Estimates (last updated Apr. 25, 2023), *available at https://www.bls.gov/oes/current/oes_nat.htm#43-0000.*

of the proposed rule, they may incur more and other forms of costs in updating the programs. Such costs could include fixed costs associated with securing new technology or other services (*e.g.,* upgrading technology, incorporating penetration testing), or even adding new staffing to support new required functions, as well as new ongoing costs related to monitoring and training. By requiring that the ORF, and consequently the associated programs and plan, are appropriate and proportionate to the covered entity, the Commission expects that the extent of those costs should be reasonably mitigated, such that covered entities should be able to tailor their ORFs to their unique circumstances and not incur costs to adopt practices or technologies that would not be recommended or necessary for them.

Additionally, to the extent costs in updating programs are unavoidable, the Commission believes the proposed ORF rule is reasonably designed to ensure that the costs would support covered entities' operational resilience, and the broader security of the derivatives markets as a whole, as discussed in greater detail below. More specifically, the Commission believes the proposed ORF rule is reasonably designed to ensure customer and counterparty information and assets remain protected, and that the derivatives markets remain stable and functioning, particularly as covered entities become ever more reliant on rapidly evolving technology and/or third-party service providers to support their operations. Requiring all covered entities to have a framework directed at operational resilience that meets certain minimum requirements, including governance, training, and testing requirements, would give the CFTC, customers, counterparties, and covered entities themselves confidence that there exists among all covered entities a certain foundational level of security and resilience. Requiring covered entities to base their ORFs on generally accepted standards and best practices further buttresses that assurance by making sure adopted practices are grounded in standards that are commonly known and accepted, widely recognized as effective, and require adaptation as risk profiles change. Relying on existing known standards should also help mitigate implementation costs compared to complying with specific and detailed requirements created by the Commission and applied more uniformly. Furthermore, as the Commission engages in oversight of ORFs, it would expect to be able to identify additional recommended best practices unique to covered entities that it could share through guidance or future rulemakings, which would operate to further support the stability of the derivatives markets.

f. Governance—Proposed Paragraph (c)

The proposed rule would require that each of the three required component programs and plan (the information and technology security program, the third-party relationship program, and the business continuity and disaster recovery plan) be approved in writing, on at least an annual basis, by either the senior officer, an oversight body, or a senior-level official of the covered entity.[328] Covered entities would likely experience some costs associated with selecting the responsible official or body to provide the approval and associated costs to obtain their approval, including the time and resources needed to develop any explanatory materials, making amendments in light of any comments from leadership, and ministerial costs associated with obtaining signatures. More specifically, the Commission estimates that covered entities would incur an initial cost of $4,000 (40 hours × $100/hour) to select the responsible official or body to approve the component programs and plan of the ORF,[329] or an estimated aggregate dollar cost of $640,000 (160 covered entities × $4,000). Additionally, the Commission estimates that covered entities will incur an ongoing annual cost of $1,000 for the approval of the component programs or plan of the ORF (10 hours × $100/hour),[330] or an estimated aggregate dollar cost of $160,000 (160 covered entities × $1,000).

However, the Commission anticipates that providing a covered entity broad discretion to select whomever it deems appropriate to provide the approval would serve to mitigate some of those costs by allowing the covered entity to embed the approval process within its existing operational structures. The Commission further believes that requiring regular and formal approval of the ORF component programs and plan by senior leadership would help ensure that the ORF is in line with operational strategy and risk capacity, improving the chances that the covered entity would be adequately prepared for, and able to withstand and recover from operational shocks, that could otherwise significantly harm customers, counterparties, or even have spillover effects into the derivatives market as a whole.

The proposed rule would further require covered entities to establish risk appetite and risk tolerance limits with respect to the risk areas underlying the ORF (information and technology security, third-party relationships, and emergencies or other significant disruptions to the continuity of normal business operations).[331] The Commission believes that establishing and operating within established risk appetite and risk tolerance limits would help ensure that covered entities do not engage in activities that would present risks beyond those they can comfortably manage, helping to mitigate the potential for covered entities to take on risk that could lead to intolerable harm to customers or disruption to the financial system at large.

Covered entities that do not currently have a practice of creating a risk appetite statement and establishing and monitoring metrics for risk tolerance limits would likely incur costs associated with establishing a methodology to identify them, which would involve time and staffing resources, or perhaps even the use of consultants, but the Commission anticipates such costs should be reduced year over year as such covered entities gain experience and streamline processes. Nevertheless, the Commission understands that establishing risk appetite and tolerance limits is common practice in the financial industry, and is included as a recommended part of governance in the NIST financial sector profile.[332] To the extent that covered entities already follow this practice, such covered entities would incur general costs associated with reviewing their risk appetite and risk tolerance limits against the rule requirements to ensure they cover the full scope of the rule, but they would avoid the heavier resource burdens of developing risk appetite and risk tolerance limits from whole cloth.

The risk appetite and risk tolerance limits would further need to be

[328] *See* paragraph (c)(1) of proposed Commission regulations 1.13 and 23.603.

[329] Covered entities may also incur subsequent costs in the event there is a change in official or body responsible for the approval of the ORF component programs or plan.

[330] As discussed *supra* in section III.B (Paperwork Reduction Act) of this notice, the Commission expects covered entities will expend a total of 20 burden hours to approve the component programs and plan of the ORF, risk appetite, and risk tolerance limits, or to prepare a written attestation.

[331] *See* paragraph (c)(2)(i) of proposed Commission regulations 1.13 and 23.603.

[332] *See* CRI Profile Workbook, *supra* note 81, at 16 (''An appropriate governing authority . . . endorses and periodically reviews the cyber risk appetite and is regularly informed about the status of and material changes in the organization's inherent cyber risk profile).

reviewed and approved in writing on at least an annual basis by the oversight body, senior officer, or other senior-level official with primary responsibility for the relevant risk area.[333] Similar to the broad approval of the ORF component programs and plan in general, covered entities would likely incur some costs preparing information for approval, making amendments in response to comments, and obtaining signatures. Specifically, the Commission estimates covered entities would incur an ongoing annual cost of $1,000 for the approval of risk appetite and risk tolerance limits (10 hours × $1,000),[334] or an estimated aggregate dollar cost of $160,000 (160 covered entities × $1,000). The Commission believes that the process of securing formal approval would encourage covered entities to think critically about the risk appetite and risk tolerance limits they establish and to justify them in light of operational strategy. This exercise should bring more awareness to activities that create operational risk and lead to better outcomes from an operational resilience standpoint, with attendant benefits to customers, counterparties, and the market more broadly.

Relatedly, the proposed rule would require covered entities to notify selected senior leadership of circumstances that exceed risk tolerance limits and incidents requiring notification to either the Commission or customers and counterparties.[335] The Commission understands that such an internal escalation requirement would require covered entities to incur some costs in developing policies and procedures that reflect this requirement, or reviewing existing escalation protocols to ensure they meet the terms of the rule, but the Commission believes the requirement is sufficiently flexible to allow covered entities to rely on existing operational structures and reporting lines, and does not anticipate that any organizational changes, or attendant costs, would be necessary. Additionally, the Commission views the involvement and awareness of senior leadership in cases where risk tolerance limits are exceeded, or where significant incidents have occurred that clearly threaten operational resilience, as critical to ensuring recovery efforts are coordinated and thus more likely to be successful.

The proposed rule would allow covered entities that form a part of a larger enterprise to satisfy the requirements of the proposed rule through their participation in a consolidated program or plan that meets the requirements of the proposed rule.[336] Additionally, a covered entity relying on a consolidated program or plan would be able to satisfy the requirements for senior leadership to approve both the component program or plan and risk appetite and risk tolerance limits by having senior leadership attest on an annual basis that the consolidated program or plan meet the requirements of the proposed ORF rule, and reflects risk appetite and risk tolerance limits appropriate to the covered entity.[337] The Commission estimates that covered entities would incur an ongoing annual cost of $2,000 (20 hours × $100/hour) to prepare an written attestation,[338] or an estimated aggregate dollar cost of $320,000 (160 covered entities × $2,000). The Commission believes allowing covered entities to rely on a consolidated program or plan would mitigate costs for such entities, specifically by benefiting from economies of scale present in relying on shared corporate infrastructure and a larger parent company's resources to manage operational risk at a broader enterprise level, and through using existing practices that meet the requirements of the proposed rule.

Nevertheless, the Commission expects that such covered entities would incur at least some costs associated with reviewing the consolidated program or plan to ensure it meets the requirements of the proposed rule and reflect risk appetite and risk tolerance limits appropriate to the covered entities. Such covered entities may face challenges in ensuring that their consolidated programs or plans, which may be written with the parent corporate entity as the primary focus, appropriately address the risks as they relate more specifically to the business and operations of the covered entity, which may be a relatively small line of business for the parent. Accordingly, a covered entity may incur some costs, in terms of time and staffing resources, associated with amending any consolidated program or plan to ensure it reflects the proposed rule's requirements and risk appetite and risk tolerance limits appropriate to the covered entity. The Commission cannot accurately quantify such costs, as these costs could range from minimal to more substantial depending on the complexity of the organization and how closely the current consolidated program or plan meets the requirements of the proposed rule, including how particularized they are with respect to identifying and managing the risks specific to the covered entity. The Commission believes that such requirements are important to ensuring that all covered entities, regardless of their operational structure, have a baseline level of operational risk management that is tailored to the entity itself, helping reduce risk to the overall financial system and the commodity derivatives markets in particular. The Commission also preliminarily believes that the overall costs of the proposed rule are reduced, without any loss of benefit, by allowing covered entities to rely on consolidated programs or plans over requiring them to duplicate existing larger corporate entity efforts to produce programs or plans that are independent and unique to the covered entity.

g. Information and Technology Security Program—Proposed Paragraph (d)

The proposed rule would require covered entities to have an information and technology security program, defined as a written program reasonably designed to identify, monitor, manage, and assess risks relating to information and technology security and that meets certain requirements.[339] Specifically, the information and technology security program would need to include (1) a risk assessment, conducted at least annually; (2) effective controls; and (3) an incident response plan.[340] The proposed risk assessment requirement would require covered entities to identify and devote resources to planning and performing the risk assessment and then analyzing its results. These resources would need to include reliance on personnel not responsible for the development or implementation of covered technology or related controls, which could impose additional staffing needs on some

[333] *See* paragraph (c)(2)(ii) of proposed Commission regulations 1.13 and 23.603.

[334] As discussed in section III.B (Paperwork Reduction Act) of this notice, the Commission expects covered entities will expend a total of 20 burden hours annually to document approval of the component plans of the ORF, risk appetite, and risk tolerance limits, or to prepare a written attestation.

[335] *See* paragraphs (c)(3)(i)–(ii) of proposed Commission regulations 1.13 and 23.603.

[336] *See* paragraph (c)(4)(i) of proposed Commission regulations 1.13 and 23.603.

[337] *See* paragraph (c)(4)(ii) of proposed Commission regulations 1.13 and 23.603.

[338] As discussed *supra* in section III.B (Paperwork Reduction Act) of this notice, the Commission expects covered entities will expend a total of 20 burden hours annually to document approval of the component programs or plans of the ORF, risk appetite, and risk tolerance limits, or to prepare a written attestation.

[339] *See* paragraphs (a) (defining ''information and technology security program'') and (b)(2) (components) of proposed Commission regulations 1.13 and 23.603.

[340] *See* paragraph (d) of proposed Commission regulations 1.13 and 23.603.

covered entities.[341] The amount of time and resources expended would likely vary depending on the size, complexity, and risk profile of the covered entity and its degree of reliance on covered technology. The Commission believes that larger covered entities with more complex business operations and broader risk profiles would likely need to devote more permanent and extensive resources, staffing and otherwise, to performing and analyzing their risk assessments. Presenting the results of the assessment to selected senior leadership would also require the devotion of time and staffing resources to prepare for and respond to leadership feedback.

In establishing effective controls, covered entities would be required to consider a broad range of categories of controls, determine which to implement in line with identified risks, implement them, and then review and revise the controls as needed over time in response to continued risk assessments. Depending on the types of controls they would need to implement, covered entities may take on additional costs to acquire new security technology and/or hire additional staff or third-party service providers to oversee and implement the controls. Again, the Commission would expect any outlays to be appropriate and proportionate to the covered entity and its risk profile, so the exact costs would vary by covered entity. Nevertheless, given that the approach of the proposed rule, and list of required categories, closely aligns with the longstanding approach adopted by prudential regulators with respect to information and technology security controls, the Commission believes that costs for at least prudentially regulated covered entities may be reduced compared to other covered entities that have not been required to apply and consider such categories of controls.[342]

Development of an incident response plan would likely require a noticeable devotion of resources at the outset, as staff would need to dedicate time and effort to forming and documenting the plan, including creating policies and procedures for identifying the types of incidents that need to be reported and to whom. Should an incident occur, the plan would require staff at the covered entity to devote time to documenting and responding to the incident, as well as identifying and taking on remediation efforts.

Nevertheless, the Commission expects that, given the NFA's ISSP Notice, covered entities would likely not need to expend resources to develop an information and technology security program from scratch. Notably, NFA requires its members to adopt and enforce a written ISSP, assess and prioritize the risks associated with its use of information technology systems, document and describe in their ISSPs safeguards deployed in light of identified and prioritized threats and vulnerabilities, and create an incident response plan.[343] Accordingly, some of the compliance burdens associated with implementing an information and technology security program should be reduced. Covered entities overseen by prudential regulators are also required to consider similar categories of controls to those in the proposed rule, so compliance costs as realized by prudentially regulated covered entities may be even further reduced.[344] Notably, however, NFA does not mandate that a risk assessment be conducted at least annually by personnel not responsible for the development or implementation of covered technology or related controls. Although the Commission believes these requirements to be consistent with generally accepted standards and best practices, such that covered entities may be following them anyway, some covered entities may nevertheless experience some additional costs associated with ensuring or otherwise acquiring staff sufficiently independent to conduct the risk assessment and in potentially conducting the risk assessment more frequently than they currently do. The Commission also recognizes that, if adopted, the proposed rule would at minimum require covered entities to expend resources to review the ISSPs they established pursuant to NFA rules to ensure they meet the requirements of the information and technology security program.

Notwithstanding the potential operational and staffing costs to covered entities associated with the proposed rule, the Commission believes the benefits of the requirements of the proposed information and technology security program are well established. Risk assessments are crucial to identifying threats and vulnerabilities, which is key to directing resources to mitigate those risks in a way that increases the effectiveness of security efforts. The Commission likewise believes the benefits of an independent risk assessment (a more unbiased and reliable assessment) and conducting it at least annually (ensuring the information and technology security program is up-to-date and responsive in light of current threat landscape and vulnerabilities at the covered entity) are important to supporting covered entity operational resilience. Likewise, controls are the methods or techniques for monitoring and managing those risks and safeguarding information, operations, and assets. Without them, the potential for a system weakness to be exploited, and for customers and counterparties, covered entities, or the market at large to be harmed is increased, as the interconnected nature of the commodity derivatives markets enhances the possibility for spillover effects. Incident response plans operate to reduce the potential magnitude of the harm should a safeguard fail by creating a concrete plan, known in advance, for how the covered entity should respond, thereby shortening response times following an incident. Accordingly, the Commission believes the proposed minimum requirements of the information and technology security program, in combination with the Commission's oversight, would further support the development of a foundational level of operational risk management practices with respect to information and technology security that would benefit customers, counterparties, and the market at large.

h. Third-Party Relationship Program—Proposed Paragraph (e)

The proposed rule would require covered entities to have a third-party relationship program, defined as a written program reasonably designed to identify, monitor, manage, and assess risks relating to third-party relationships.[345] The program would need to describe how covered entities address the risks attendant to each of the five identified stages of the third-party relationship lifestyle, ranging from pre-selection to termination, with heightened due diligence and monitoring required for critical third-party service providers.[346] The proposed rule would further require covered entities to create, maintain, and regularly update an inventory of third-party service providers engaged to support their activities as covered entities, identifying whether each is a critical third-party service provider.[347]

[341] *See* paragraph (d)(1)(ii) of proposed Commission regulations 1.13 and 23.603.

[342] *See supra* note 130 and accompanying text.

[343] *See* NFA ISSP Notice, *supra* note 43.

[344] *See* 12 CFR part 30, app. B.

[345] *See* paragraphs (a) (defining ''third-party relationship program'') and (e) (third-party relationship program) of proposed Commission regulations 1.13 and 23.603.

[346] *See* paragraphs (e)(1)(i)–(v) and (e)(2) of proposed Commission regulations 1.13 and 23.603.

[347] *See* paragraph (e)(3) of proposed Commission regulations 1.13 and 23.603.

As with the information and technology security program, complying with this aspect of the proposed rule would require covered entities to expend staff resources at the outset to develop the program and put it into writing. Although NFA requires its members, including covered entities, to have a written supervisory framework for its third-party service providers, which could help mitigate these costs, NFA's written supervisory framework only extends to outsourcing functions, *i.e.,* regulatory functions that would otherwise be undertaken by the NFA member itself to comply with NFA and CFTC requirements.[348] Accordingly, covered entities would likely experience at least some staffing burdens expanding their NFA frameworks to fit the broader scope of third-party relationships covered by the proposed rule and implementing it across their third-party service providers more broadly. However, applying the proposed (b)(3) standard, covered entities should be able to align their third-party risk management practices to the risks presented by each individual third-party service provider, which would allow covered entities to tailor and fit the costs of their third-party practices to their unique circumstances. Covered entities following prudential rules and guidance with respect to third-party service providers, which applies to all third-party relationships, would likely experience reduced costs compared to other covered entities with respect to any need to modify their existing programs.[349] Additionally, the proposed rule would not require covered entities to perform due diligence or renegotiate contracts with existing third-party service providers, which would avoid a potentially substantial initial fixed cost from implementing the third-party relationship program.

Creating an initial inventory of third-party service providers, and assessing whether they meet the definition of ''critical third-party service provider'' would also require a temporary redirection of staff resources, with the amount of time and resources required varying depending on the extent and complexity of a given covered entity's reliance on third-party service providers. With respect to critical third-party service providers, the Commission preliminarily believes that many, if not all, covered entities currently have in place a process to identify and categorize covered entities as ''critical'' or otherwise requiring enhanced supervisory activities. Additionally, NFA requires its members to have heightened due diligence for third-party service providers that obtain or have access to critical and/or confidential data and those that support critical regulatory-related systems, which could potentially reduce burdens on covered entities in designing and implementing heightened due diligence and monitoring with respect to critical third-party service providers.[350] Although the Commission preliminarily believes that its proposed definition of ''critical third-party service provider'' should identify many, if not all, of the same providers covered entities would themselves identify as ''critical,'' the Commission recognizes that the process of applying the proposed definition to an existing process would, at minimum, require some initial expenditure of staff resources to ensure existing practices and taxonomies align with the proposed rule.[351] Additionally, the process of creating an inventory of third-party service providers, which is not currently required by NFA or prudential regulators, could be particularly burdensome, especially for covered entities with a large number of complex third-party relationships, or that rely on an affiliate to secure and coordinate third-party service providers as part of a larger enterprise-wide function, potentially involving staff from many different departments or the review of multiple contracts or contract databases.

Nevertheless, the Commission believes that requiring covered entities to have a program to identify, monitor, manage, and assess risks relating to third-party relationships, and inventory their third-party service providers, would have meaningful benefits at the individual covered entity-level, as well as for customers and counterparties and the derivatives markets at large. Given their roles and interconnectedness in the derivatives markets, an operational shock at one covered entity can have ripple effects across the markets. Requiring covered entities to develop and maintain a program to help evaluate and address the risk at each stage of the third-party relationship—from before selecting a third-party service provider to how such a relationship would be supervised and terminated—may not only help covered entities be more fully aware of and manage the risks of their third-party relationships, it could also help increase overall confidence levels in the derivatives markets by ensuring customers and counterparties that there is a foundational level of third-party risk management practices across covered entities.

Additionally, the proposed rule could operate to raise minimum standards with regards to how third-party risks are managed, by introducing enhanced due diligence or monitoring practices for critical third-party service providers, for instance, which could lead to real and measurable reduction in risk to the financial system. The act of creating an inventory of third-party service providers would also help increase the likelihood of identifying interdependencies or overdependencies, which could cause covered entities to reevaluate particular relationships (*i.e.,* diversify third-party service providers to reduce concentration risk) or take on additional activities (*e.g.,* insurance) to help mitigate those risks, thereby promoting operational resilience. Identifying critical third-party service providers should also help enhance operational awareness of those entities and ensure they receive the required heightened monitoring to ensure that the risk of disruption to critical services, which could have a broader impact on the markets or customers and counterparties, is mitigated.

i. Business Continuity and Disaster Recovery Plan—Proposed Paragraph (f)

The proposed rule would require covered entities to have a BCDR plan, defined as a written plan outlining the procedures to be followed in the event of an emergency or other significant disruption to the continuity of normal business operations and that meets certain requirements.[352] This would be a new CFTC requirement for FCMs, but current Commission regulation 23.603 imposes a BCDR plan requirement on swap entities that is substantially similar to the proposed rule, as the proposed rule was modeled after the current BCDR requirement for swap entities with certain modifications.[353] Additionally, although the CFTC does not currently impose a BCDR plan requirement on FCMs, NFA and CME do, which the Commission believes should help FCMs mitigate the costs of establishing a BCDR plan for purposes of complying with the proposed rule, particularly since some of the amendments to the current BCDR plan requirement for swap entities have the effect of further aligning the regulatory

[348] *See* NFA Third-Party Notice, *supra* note 43.

[349] *See* 12 CFR part 30, app. B, III.D. (Oversee Service Provider Arrangements); Prudential Third-Party Guidance, *supra* note 43.

[350] *See* NFA Third-Party Notice, *supra* note 43.

[351] *See* paragraph (a) of proposed Commission regulations 1.13 and 23.603 (defining ''critical third-party service provider'').

[352] *See* paragraphs (a) (defining ''business continuity and disaster recovery plan'') and (b)(2) (components) of proposed Commission regulation 1.13 and 23.603.

[353] *See* 17 CFR 23.603.

text with NFA and CME BCDR plan requirements.[354]

The proposed rule would require covered entities' BCDR plans to be reasonably designed to enable the covered entities to continue or resume any activities as a covered entity with minimal disruption to counterparties, customers, and the markets, and to recover and make use of covered information, as well as any other data, information, or documentation required to be maintained by law and regulation.[355] The proposed rule would further require the BCDR plans to include certain minimum contents, including: identifying and backing up required information; identifying and developing backups for required resources, including technology, facilities, and staff; identifying potential disruptions to critical third-party service providers; identifying implicated personnel; and establishing a communication plan.[356]

To design a BCDR plan that meets that standard, covered entities would need to expend resources to establish and preserve backup resources (staffing, technology, inputs) for use in the event of the BCDR plan's activation, and to create backups of the information the BCDR plan would cover. Depending on the size and complexity of a particular covered entity's business, those costs could be sizeable, as they may require negotiating and entering into new contracts with backup resource providers, or other third-party service providers. Covered entities would also need to expend resources to establish a plan to minimize the impact of disruptions and establish a communication plan, which would include identifying implicated persons and bodies and establishing potential contacts, methods, modes, and priorities of communication. Finally, the resources to document all of this work in the plan would likely be more than simply ministerial effort, as staff would likely have to spend time working through various deliberative points, at least at the outset in first developing the BCDR plan. The costs to maintaining the plan would likely be reduced compared to the initial fixed costs, however, as the plan put into action over time.

Nevertheless, the Commission expects that most covered entities have already incurred at least some of these potential costs by virtue of either the existing CFTC BCDR plan requirements for swap entities, or the NFA and CME BCDR plan requirements applicable to FCMs. Notably, the ''essential elements'' of NFA's BCDR Notice aligns closely with the minimum requirements for the Commission's proposed BCDR plan requirement, requiring FCMs to establish backups in one more reasonably separate geographic areas, to backup or copy essential documents and data and store them off-site, to consider the impact of interruptions by third-parties and ways to minimize the impact, and to develop a communication plan.[357] Accordingly, although the Commission expects FCMs would incur at least some costs reviewing their BCDR plans to ensure they meet the proposed CFTC requirements, the Commission preliminarily believes most FCMs would be able to avoid the more substantial initial costs of developing a BCDR plan from scratch.

The Commission further believes that the expenditure of resources required to create the proposed plan would help give the derivatives markets and customers and/or counterparties confidence that covered entities' operations would be able to be quickly reestablished following an emergency or significant disruption, improving the overall resilience of the market and perhaps lowering customer/counterparty risk and its associated costs. Having a plan that centralizes key information related to an emergency—including identifying core information, personnel, systems, and resources needed to resume operations—should also help facilitate covered entities in achieving the recovery time objective of being back up and running with minimal disruption to counterparties, customers, and the derivatives markets, supporting market confidence and reducing overall systemic risk. Maintaining copies of the plan in accessible off-site locations should impose no more than ministerial costs and would help ensure that covered entities can access the plan in a crisis.

The proposed rule would amend the current BCDR plan requirement for swap entities in a few ways, some of which the Commission expects would have cost-benefit implications.[358] For instance, the proposed rule would require covered entities to ''recover and make use of all covered information, as well as any other data, information, or documentation required to be maintained by law and regulation,'' which expands the information BCDR plans would be required to cover beyond that required to be maintained by applicable law and regulation, and makes clear the information should not only be recovered but also accessible and still useable.[359] Depending on current BCDR plan practices by swap entities, the proposal could potentially cause covered entities to expand the sources of information they need to backup and/or augment their backup systems to ensure the information stored there is useable. The proposed rule would also no longer require swap entities to ensure their BCDR plans are designed to enable swap entities to continue or resume operations ''by the next business day.'' [360] Although the Commission does not believe that this change would have an impact on the actual recovery time of swap entities following an emergency or other significant disruption, given that both current Commission regulation 23.603 and the proposed rule require that the BCDR plan be designed to ensure recovery with minimal disruption to counterparties and the market, swap entities could need to dedicate at least some staff time to review their BCDR plans to ensure that they continue to meet the rule requirements.

j. Training and Distribution—Proposed Paragraph (g)

The proposed rule would require covered entities to establish, implement, and maintain training with respect to the ORF, including general cybersecurity awareness training and role-specific training for personnel involved in the ORF.[361] If the proposed rule is adopted, covered entities would need to expend resources to develop and/or evaluate and acquire externally sourced training. Those outlays would include the costs associated with establishing the training at the outset, as well as ongoing costs associated with updating and providing the training at least every year.[362] There would also be administrative costs associated with distributing copies of the component programs or plan to relevant personnel and providing them with any significant revisions.[363] Nevertheless, the

[354] *See* NFA Rule 3–38, *supra* note 43; CME Rule 983, *supra* note 185.

[355] *See* paragraph (f)(1) of proposed Commission regulation 1.13 and 23.603.

[356] *See* paragraph (f)(2) of proposed Commission regulation 1.13 and 23.603.

[357] *See* NFA BCDR Notice, *supra* note 43.

[358] As with the other sections of this notice, portions of the BCDR plan requirement for swap entities in current Commission regulation 23.603 that have been expanded in the proposal to apply to the ORF more broadly, notably testing, are discussed in the context of the discussion of those specific requirements.

[359] *See* 17 CFR 23.603(a).

[360] *Id.*

[361] *See* paragraph (g)(1) of proposed Commission regulations 1.13 and 23.603.

[362] *See* paragraph (g)(2) of proposed Commission regulations 1.13 and 23.603

[363] *See* paragraph (g)(3) of proposed Commission regulations 1.13 and 23.603.

Commission believes that establishing, implementing, and maintaining a training program is crucial to realizing the benefits of the proposed ORF. Not only would it help ensure that employees of covered entities are kept aware of good cyber hygiene practices, which should reduce the potential for covered information to be compromised and customers and counterparties to be negatively impacted, training would help ensure that the ORF practices covered entities establish are accurately implemented and maintained by the personnel tasked with operationalizing the ORF. Although allowing covered entities to provide training less frequently than annually would reduce compliance costs for covered entities, the Commission believes that annual training is needed to preserve its benefits given the rapidly evolving pace of technology and the potential for human error to result in actual harm to operations or even customers or counterparties.[364]

k. Reviews and Testing—Proposed Paragraph (h)

The proposed rule would require covered entities to establish, implement, and maintain a plan reasonably designed to assess adherence to, and the effectiveness of, their ORF through regular reviews and risk-based testing.[365] At the outset, covered entities would need to dedicate staff resources to develop a review and testing plan for the ORF; ongoing staff resources would be needed to conduct reviews at least annually and risk-based testing at a frequency that is appropriate and proportionate to each covered entity's nature, size, scope, complexity, and risk profile, following generally accepted standards and best practices.[366] Covered entities would further assume regular costs associated with documenting the reviews and testing (*e.g.,* results of testing, assessment of effectiveness, recommendations for modifications/improvements/corrective actions) and reporting on them to the CCO and any other relevant senior-level official(s) and oversight body(ies).[367] In general, the ongoing costs of the required testing and reviews are likely to vary by covered entity, with larger, more complicated covered entities likely expending significantly more resources to conduct testing consistent with the proposed (b)(3) standard.[368]

With respect to the reviews of the ORF, the proposed rule would require that they be conducted at least annually and in connection with any material change that is reasonably likely to affect the risks addressed by the ORF. The proposed rule would further require the reviews to include an analysis of adherence to, and the effectiveness of the ORF, as well as any recommendations for improvements.[369] This standard is generally consistent with, and would replace, the current review standard in current Commission regulation 23.603 for swap entity BCDR plans, such that associated costs for reviewing the BCDR plan should not be affected by the proposal.[370] NFA's ISSP Notice and BCDR Notice also require NFA members to review their ISSPs or BCDR pans on a regular or periodic basis.[371] Accordingly, while covered entities may experience some staffing costs in assuring their reviews are at least annual, costs associated with establishing a review process more broadly should have already been realized by most covered entities.

For testing, the proposed rule would generally require that its frequency, nature, and scope would be determined consistent with the proposed (b)(3) standard.[372] The Commission believes that such a risk-based standard would allow covered entities to tailor testing to their unique business and risk profile, focusing testing efforts on areas that would be the most impactful or revealing and avoiding unnecessary costs. Nevertheless, with respect to testing of the information and technology security program, the proposed rule would require covered entities to assume costs for some specific testing, including testing of key controls and the incident response plan, as well as daily or continuous vulnerability assessments and penetration testing at least annually.[373] Although regular testing of key controls and the incident response plan is likely to require time and staff resources, the Commission believes that without testing, it would be impossible for covered entities to know whether the controls are functioning to mitigate risk as expected, and for the incident response plan to be actionable in times of emergency. Daily or continuous vulnerability assessments and penetration testing at least annually could require additional staff and technology outlays.[374] The exact cost of testing as realized by each covered entity, however, is likely to vary depending on the scope and complexity of its operations, and the degree to which it has already incorporated vulnerability assessments and penetration testing as part of its ISSP.[375]

The Commission believes that vulnerability assessments and penetration testing are essential for covered entities to know what their vulnerabilities are and how they might be exploited, so they can take steps to mitigate associated risks, including by adapting internal controls, which are a key component of preserving operational resilience. Given the dynamic, ever changing nature of technology and cybersecurity, the Commission believes that continual and active action and engagement are necessary to ensure controls are operating as intended, and for covered entities to have an accurate assessment of the risks to their covered information and technology. By not mandating specific types of penetration testing, however, the Commission believes the proposed rule is adapted to allow the wide range of covered entities subject to the proposed rule to adopt types of testing that are recommended for and best fit their unique circumstances, so as to achieve the highest level of improved cybersecurity without incurring unnecessary costs. The Commission further believes such testing is essential cyber hygiene and their use among covered entities would help ensure a base level of monitoring in the derivatives markets that is readily accessible.

[364] *See supra* note 18 and accompanying text.

[365] *See* paragraph (h) of proposed Commission regulations 1.13 and 23.603.

[366] *See* paragraph (b)(3) of proposed Commission regulations 1.13 and 23.603.

[367] *See* paragraphs (h)(4) and (h)(5) of proposed Commission regulations 1.13 and 23.603.

[368] The Commission estimates, on average, that covered entities will incur an initial annual cost of $8,000 (80 hours × $100/hour) to establish a plan to assess adherence to, and the effectiveness of, its ORF, and to document all reviews and testing of the ORF, or an estimated aggregate dollar cost of $1,280,000 (160 covered entities × $8,000).

[369] *See* paragraph (h)(1) of proposed Commission regulations 1.13 and 23.603

[370] *See* 17 CFR 23.603(f) (''A member of the senior management of each swap dealer and major swap participant shall review the business continuity and disaster recovery plan annually or upon any material change to the business. Any deficiencies found or corrective action taken shall be documented.'')

[371] *See* NFA BCDR Notice, *supra* note 43; NFA ISSP Notice, *supra* note 43.

[372] *See* paragraph (h)(2) of proposed Commission regulations 1.13 and 23.603.

[373] *See* paragraph (h)(2)(i) of proposed Commission regulations 1.13 and 23.603.

[374] CISA makes available a free vulnerability scanner, *see supra* note 248.

[375] The NFA ISSP Notice provides that a member ''may include penetration testing of the firm's systems, the scope and timing of which is highly dependent upon the Member's size, business, technology, its electronic interconnectivity with other entities and the potential threats identified in its risk assessment.'' *See* NFA ISSP Notice, *supra* note 43.

With respect to testing of the BCDR plan, the proposed rule would require covered entities to dedicate time and staff resources to conduct a walk-through or tabletop exercise designed to test the effectiveness of backup facilities and capabilities at least annually, which could involve outreach to operators of backup facilities.[376] Such a periodic effort would likely consume staff time and resources to put into place, including potentially in designing tabletop exercise scenarios. The Commission expects that this aspect of the proposed rule would not have any cost impact on swap entities, as current 23.603 requires annual testing of their BCDR plan, and the Commission does not believe the clarification that the testing be a walk-through or tabletop exercise would have substantive effect.

Because the proposed rule would require the reviews and testing to be conducted by qualified personnel who are independent of the aspect of the ORF being reviewed or tested, the Commission anticipates this work would either be conducted by internal compliance audit staff, external independent auditors, or other internal staff, provided they were not involved in creating the ORF component being tested.[377] Accordingly, this independence requirement could require covered entities to reassign duties or secure additional staffing resources, either of which would impose some additional costs.

Nevertheless, the Commission believes that annual reviews and testing are essential to ensuring that the ORF is operating as intended, and thus to ensuring the intended and expected benefits of the ORF with respect to protecting customers and mitigating systemic risk are actually realized. Without proper review and testing, determining whether the intended benefits of the ORF are being achieved would not be possible. Although eliminating the independence requirement could alleviate some potential staffing burdens on covered entities, the Commission believes that independence in reviews and testing is critical to preserving their benefits by helping to ensure that the results are reliable and unbiased. The Commission further believes that by allowing covered entities to adjust the frequency, nature, and scope of their risk-based testing of the ORF in a manner that is appropriate and proportionate to the circumstances, following generally accepted standards and best practices, the proposed rule would ensure that costs of the rule would be as well tailored to the covered entity as possible to realize benefits at the least cost.

With respect to the BCDR plan requirement for swap entities in particular, the Commission believes the proposed rule could reduce review and testing costs. First, it would eliminate costs associated with securing an independent auditor to audit the plan every three years.[378] Although there may be some benefits to having an independent audit of a BCDR plan, including having an external party with fresh eyes identify issues and potential improvements that might not be readily apparent to internal staff, the Commission preliminarily believes, based on its experience, that the internal reviews and testing of the BCDR plan are sufficient to achieve iterative improvements to the BCDR plan, making the costs associated with the independent audit unnecessary. Second, the proposed rule would eliminate the separate requirement that a member of senior management for a swap entity review the BCDR plan annually or upon any material change to the business and to document any deficiencies found or corrective action taken.[379] While the proposed rule would retain the annual review requirement for the BCDR plan, not requiring the review to be undertaken by a member of senior management may result in at least some burden reduction for senior management.

l. Notification Provisions—Proposed Paragraphs (i) and (j)

The proposed rule would require covered entities to provide certain notifications to either the Commission or affected customers or counterparties.[380] Notifications to the Commission, made electronically via email, would relate either to the covered entity's determination to activate the BCDR plan, or an ''incident,'' as defined in the proposed rule, that adversely impacts, or is reasonably likely to adversely impact information and technology security, the covered entity's ability to operate, or the assets or positions of a customer or counterparty.[381] In both cases, the notifications to the Commission would be intended to function as early warnings and thus would not need to be complete or detailed. Understanding that the information available to covered entities would be preliminary and incomplete at the time of the notification, the Commission would not expect covered entities to expend considerable resources to assemble notifications that are perfectly accurate and complete. Rather, the proposed rule would only require that the information provided to the Commission would be whatever the covered entity has available at the time that could assist the Commission in its oversight or response, with the understanding that resources should predominantly be directed at mitigating and recovering from the incident, emergency, or significant disruption.[382] Prioritizing an early warning over complete information should not only reduce the costs for covered entities in delivering the notification, but also allow the Commission the best opportunity to take quick responsive action, if appropriate.

Accordingly, while the Commission recognizes that there would be at least some information gathering and administrative costs associated with providing the notice, the Commission does not intend or expect the resource burden for providing the notification to be significant.[383] This limited early-warning function for the notice requirement is further supported by the relatively brief 24-hour time period for providing the notices.[384]

With respect to the BCDR plan in particular, the Commission does not believe covered entities would expend significant resources to notify the Commission, since the notification trigger (activation of the BCDR plan) is relatively bright-line. The Commission recognizes that with respect to the incident notification, however, covered entities may need to engage in some deliberation to determine whether an incident has or is reasonably likely to have an adverse impact, which would consume some staff resources. Preliminarily, the Commission estimates that covered entities activating their BCDR plan would incur a cost of $1000 (10 hours × $100/hour) to notify the Commission, or an estimated aggregate dollar cost of $160,000 (160 covered entities × $1,000). The Commission believes, however, that these costs may go down over time, as covered entities

[376] *See* paragraph (h)(2)(i) of proposed Commission regulations 1.13 and 23.603.

[377] *See* proposed paragraph (h)(3) of proposed Commission regulations 1.13 and 23.603.

[378] *See* 17 CFR 23.603(g).

[379] *See* 17 CFR 23.603(f).

[380] *See* paragraphs (i) and (j) of proposed Commission regulations 1.13 and 23.603.

[381] *See* paragraph (i) of proposed Commission regulations 1.13 and 23.603.

[382] *See* paragraphs (i)(1)(ii) and (i)(2)(ii) of proposed Commission regulations 1.13 and 23.603.

[383] The Commission estimates that for each ''incident'' requiring notification, covered entities will incur a cost of $1,000 (10 hours × $100/hour) to gather the information required and to provide notification to the Commission, or an estimated aggregate dollar cost of $160,000 (160 covered entities × $1,000).

[384] *See* paragraphs (i)(1)(iii) and (i)(2)(iii) of proposed Commission regulations 1.13 and 23.603.

gain familiarity in applying the notification provision. The Commission also preliminarily believes that an adverse impact standard would be potentially easier to apply than one that included a materiality limiter, which could introduce further need for interpretation and internal deliberation for covered entities to determine whether the impact is ''material'' or ''significant.'' Additionally, scoping notifications to incidents with a likely adverse impact and to BCDR activation would help focus the Commission's oversight activities and responsive efforts on cases where it could act to support the derivatives markets and customers and counterparties, potentially reducing the potential for ripple effects.

In addition to notifications to the Commission, the proposed rule would require covered entities to notify affected customers or counterparties as soon as possible of any incident that is reasonably likely to have adversely affected the confidentiality or integrity of their covered information, assets, or positions.[385] Because the rule does not contain a specific timing limit for providing this notification, the Commission does not expect that this notification requirement would cause covered entities to need to divert any resources while managing the incident to draft the notification. Rather, the Commission expects that most of the costs associated with this notification requirement would be in spending the necessary staff resources to gather and report facts as accurately as possible to aid affected customers and counterparties in understanding and assessing the potential impact of the incident on their information, assets, or positions and to take any necessary action.[386] Covered entities may also need to dedicate staff resources to interacting with customers or counterparties after the notification is given to provide more information or answer questions. The Commission estimates that for each ''incident'' requiring notification, covered entities will incur a cost of $5,000 (50 hours × $100/hour) to gather the required information necessary to provide notice to customers or counterparties and to prepare and deliver the required notification, or an estimated aggregate dollar cost of $800,000 (160 covered entities × $5,000). The Commission believes that this notification could produce substantial benefits to customers and counterparties, especially where state or other federal law does not otherwise require such notifications, as they would give customers and counterparties the information they would need to further protect their information and assets and allow them to seek other avenues of redress.

m. Emergency Contacts and Recordkeeping—Proposed Paragraphs (k) and (l)

The proposed rule would require covered entities to provide the Commission with the name and contact information of employees in connection with incidents triggering notification to the Commission and in connection with the activation of the covered entity's BCDR plan.[387] The identified employees would need to be authorized to make key decisions on behalf of the covered entity and have knowledge of the covered entity's incident response plan or BCDR plan, as appropriate.[388] Covered entities would also need to update their contacts with the Commission, as necessary.[389] The Commission believes that ensuring it has knowledgeable contacts with whom to direct communications during a crisis would aid the Commission's ability to take any necessary responsive action, and that the costs associated with identifying and updating the appropriate contacts would be ministerial in nature.[390] With respect to BCDR plan emergency contacts for swap entities, the proposed rule is identical in substance to current Commission regulation 23.603, such that it should impose no additional costs on swap entities.[391]

The proposed rule would also further require covered entities to maintain all records required to be maintained pursuant to this section in accordance with Commission regulation 1.31, and make them available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.[392] Covered entities would incur costs associated with maintaining a recordkeeping system that allows for easy records retrieval, which would require both staff resources and likely reliance on electronic recordkeeping systems. The Commission believes these costs are likely mitigated for most covered entities, as they would be able to rely on existing recordkeeping systems designed to maintain other records in accordance with Commission regulation 1.31, and proper recordkeeping would help covered entities demonstrate compliance with the ORF rule, and ensure their ORFs are operating as expected as they conduct required reviews and testing.

2. Section 15(a) Factors

a. Protection of Market Participants and the Public

The Commission believes the proposed rule would support protection of market participants and the public. The Commission preliminarily believes the proposed rule will help protect market participants and the public by increasing the operational resiliency of covered entities to disruptions caused by natural disasters, cyber-attacks, and failures at third-party service providers. As covered entities are responsible for safeguarding customers' accounts, executing trades, maintaining records, and reporting to relevant agencies, their operational resiliency will mitigate the negative impact on customers, clients, and counterparties in case of an incident. The proposed rule may also help reduce the likelihood of an incident due to proposed proactive measures such as penetration and vulnerability testing and cyber security training. For market participants and the public more generally, the benefits include enhanced market protection against the spread of contagion risk to the financial system from operational risks.

b. Efficiency, Competitiveness, and Financial Integrity of Markets

The Commission believes the proposed rule would enhance the financial integrity of CFTC-regulated derivatives markets. SDs, MSPs, and FCMs are essential intermediaries in the financial markets regulated by the Commission. Due to the interconnectedness of markets, disruptions to the business operations of these intermediaries pose risks to other markets. The Commission believes that increasing and helping to ensure the operational resiliency of these covered entities would help improve the financial integrity of the derivatives markets. The proposed rule's requirement to report to the Commission incidents and BCDR plan

[385] *See* paragraph (j)(1) of proposed Commission regulations 1.13 and 23.603.

[386] *See* paragraph (j)(2) of proposed Commission regulations 1.13 and 23.603.

[387] *See* paragraph (k)(1) of proposed Commission regulations 1.13 and 23.603.

[388] *See* paragraph (k)(2) of proposed Commission regulations 1.13 and 23.603.

[389] *See* paragraph (k)(3) of proposed Commission regulations 1.13 and 23.603.

[390] The Commission estimates that covered entities will incur a cost of $100 (1 hour × $100/hour) to provide the Commission with emergency contact information, or an estimated aggregate dollar cost of $16,000 (160 covered entities × $100).

[391] *See* 17 CFR 23.603(3).

[392] *See* paragraph (l) of proposed Commission regulations 1.13 and 23.603.

activation would assist the Commission effectuate a timely response to business disruptions, which will help mitigate the impact on other market participants and promote financial stability and confidence. Additionally, to the degree that the proposed rule aligns with other existing applicable requirements, including NFA rules and interpretive notices, and incorporates generally accepted standards and best practices currently broadly relied on by covered entities, the proposed rule would support regulatory convergence and the efficiencies that may generate.

c. Price Discovery

The Commission does not anticipate the proposed rule directly impacting the price discovery process. Nevertheless, if a trading disruption would be prevented or shortened by this proposed rulemaking, then price discovery would be improved.

d. Sound Risk Management Practices

The Commission believes the proposed rule would promote the development of sound risk management practices among covered entities. Programs, plans, policies, and procedures are required for operational risks, which now explicitly include cybersecurity and third-party risks that adhere to current best practices. These processes seek to help covered entities identify, protect, detect, respond, and recover from such risks. As such, the operational risk management processes of covered entities may be improved.

e. Other Public Interest Considerations

The proposed rule relies on and incorporates aspects of existing standards and practices developed by other regulators and standard-setting bodies, including NFA rules and interpretive notices; prudential rules and guidance; and NIST, ISO, FFIEC and other sources of cyber and operational resilience standards. Accordingly, the proposed rule should support the development of further convergence in the area of operational resilience and allow covered entities to develop ORFs that are adaptive and responsive to rapidly changing circumstances and technology, which the Commission believes could lead to better protection of markets against the spread of contagion risks to the financial system from operational risks, in general.

3. Request for Comments

As noted, the Commission invites public comment on all aspects of its cost-benefit consideration, including, but not limited to the baseline and the identification and measurement of costs and benefits relative to it; the identification, measurement, and assessment of any costs and benefits not discussed herein; whether the Commission has misidentified any costs or benefits; what, if any, alternatives would be more reasonable in terms of their costs and benefits; and the Section 15(a) factors described above. The Commission asks that commenters explain and support the reasons for positions asserted in their comment letters and, further, include in them any data or other information that they may have to assist the Commission's ability to better quantify the costs and benefits of the Proposal.

1. Has the Commission misidentified any costs or benefits? If so, please explain.

2. Please explain whether compliance costs would increase or decrease as a result the proposed rule. Please provide all quantitative and qualitative costs, including, but not limited to personnel costs and technological costs.

3. The Commission seeks additional information on the costs and benefits of the proposed rule's requirement for covered entities to have a governance regime for their ORF, including risk appetite and tolerance limits, consolidated programs or plans, and internal escalation policies. Specifically, to what extent do covered entities already have or plan to have relevant programs or plans, policies, and procedures compliant with those prescribed in the proposed rule? To what practical extent do NFA's requirements, prudential regulation and/or best practices currently duplicate or differ from the ORF governance regime, including risk appetite limits, consolidated programs or plans, and internal escalation policies, being proposed? Will covered entities experience additional or lowered costs to comply with the proposed rule, and if so, to what degree?

4. The Commission seeks additional information regarding the costs and benefits of establishing an information and technology security program. Specifically, to what extent are covered entities already conducting comprehensive risk assessments that follow standards described in the proposed rule? Are these assessments being conducted on at least an annual basis? Do existing effective controls likewise meet the standards in the proposed rule? Will covered entities experience additional or lowered costs relative to current practice to establish, document, and maintain an incident response plan as called for in the proposed rule, and if so, to what degree?

5. The Commission seeks additional information regarding the costs and benefits of establishing a business continuity and disaster recovery plan. In particular, is the Commission's proposed rule different from current practice, and, if so, how? Would covered entities experience additional or lowered costs to comply with the proposed rule, and, if so, to what degree?

6. The Commission seeks additional information regarding the costs and benefits of the proposed rule's required notice of ORF events to the Commission. Will covered entities experience additional or lowered costs to comply with the proposed rule, and, if so, to what degree? Will compliance with the 24-hour cap for as-soon-as-possible notification entail additional costs relative to some shorter or longer cap and, if so, why and to what degree?

7. The Commission seeks additional information on the costs and benefits of the proposed rule's requirement that covered entities provide notification to customers and counterparties following an incident. In particular, is the Commission's proposed rule different from current practice, and, if so, how? Would covered entities experience additional or lowered costs to comply with the proposed rule, and, if so, to what degree?

8. The Commission seeks additional information regarding the costs and benefits of ORF review and testing. In particular, to what extent, if any, does the proposed rule differ from existing procedures? How do covered entities determine the amount of review and testing that is appropriate? Do all covered entities currently undertake penetration and vulnerability testing, and at what frequency? Would covered entities experience additional or lowered costs to comply with the proposed rule, and, if so, to what degree?

9. The Commission seeks additional information regarding the costs and benefits of the cross-border application of the proposed rule. Would added specificity in the proposed regulations improve the cost-benefit calculus for those covered entities impacted by their cost-benefit application? If so, in what areas would more specificity be helpful and how would costs and benefits be impacted?

D. 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 CEA 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 this Act.'' [393]

The Commission preliminarily believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission invites comment on whether the proposed rule implicates any other specific public interest to be protected by the antitrust laws.

The Commission has also assessed the proposal for potential anticompetitive effects. To the extent that there are substantial fixed costs associated with improved operational risk management, there may be competitive implications, though likely anticompetitive impacts have not been identified. Smaller firms may bear a disproportionate cost relative to larger firms in total asset size due to this proposed rule. Nevertheless, smaller firms may be able to realize economies of scope and scale through outsourcing to third-parties, albeit at the cost of raising their third-party risk exposure. In addition, the proposed rule allows smaller firms to choose programs or plans, policies, and procedures that are appropriate to their businesses, further mitigating competitive concerns.

The Commission invites comment on its CEA section 15(b) assessment, including what other means, if any, would be more procompetitive than what the Commission now proposes and why.

List of Subjects

17 CFR Part 1

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

17 CFR Part 23

Banks, Banking, Commodity futures, Reporting and recordkeeping requirements, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR parts 1 and 23 as set forth below:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24 (2012).

■ 2. Add § 1.13 to read as follows:

§ 1.13 Operational Resilience Framework for Futures Commission Merchants

(a) *Definitions.* For purposes of this section:

Affiliate means, with respect to any person, a person controlling, controlled by, or under common control with, such person.

Business continuity and disaster recovery plan means a written plan outlining the procedures to be followed in the event of an emergency or other significant disruption to the continuity of normal business operations and that meets the requirements of paragraph (f) of this section.

Consolidated program or plan means any information and technology security program, third-party relationship program, or business continuity and disaster recovery plan in which the futures commission merchant participates with one or more affiliates and that is managed and approved at the enterprise level.

Covered information means any sensitive or confidential data or information maintained by a futures commission merchant in connection with its business activities as a futures commission merchant.

Covered technology means any application, device, information technology asset, network service, system, and other information-handling component, including the operating environment, that is used by a futures commission merchant to conduct its business activities, or to meet its regulatory obligations, as a futures commission merchant.

Critical third-party service provider means a third-party service provider, the disruption of whose performance would be reasonably likely to:

(i) Significantly disrupt a futures commission merchant's business operations as a futures commission merchant; or

(ii) Significantly and adversely impact the futures commission merchant's customers.

Information and technology security means the preservation of:

(i) The confidentiality, integrity, and availability of covered information; and

(ii) The reliability, security, capacity, and resilience of covered technology.

Incident means any event, occurrence, or circumstance that could jeopardize information and technology security, including if it occurs at a third-party service provider.

Information and technology security program means a written program reasonably designed to identify, monitor, manage, and assess risks relating to information and technology security and that meets the requirements of paragraph (d) of this section.

Key controls mean controls that an appropriate risk analysis determines are either critically important for effective information and technology security or intended to address risks that evolve or change more frequently and therefore require more frequent review to ensure their continuing effectiveness in addressing such risks.

Oversight body means any board, body, or committee of a board or body of the futures commission merchant specifically granted the authority and responsibility for making strategic decisions, setting objectives and overall direction, implementing policies and procedures, or overseeing the implementation of operations for the futures commission merchant.

Risk appetite means the aggregate amount of risk a futures commission merchant is willing to assume to achieve its strategic objectives.

Risk tolerance limit means the amount of risk, beyond its risk appetite, that a futures commission merchant is prepared to tolerate through mitigating actions.

Senior officer means the chief executive officer or other equivalent officer of the futures commission merchant.

Third-party relationship program means a written program reasonably designed to identify, monitor, manage, and assess risks relating to third-party relationships and that meets the requirements of paragraph (e) of this section.

(b) *Generally.* (1) *Purpose and scope.* Each futures commission merchant shall establish, document, implement, and maintain an Operational Resilience Framework reasonably designed to identify, monitor, manage, and assess risks relating to:

(i) information and technology security;

(ii) third-party relationships; and

(iii) emergencies or other significant disruptions to the continuity of normal business operations as a futures commission merchant.

(2) *Components.* The Operational Resilience Framework shall include an information and technology security program, a third-party relationship program, and a business continuity and disaster recovery plan. Each component program or plan shall be supported by written policies and procedures.

(3) *Standard.* The Operational Resilience Framework shall be

[393] 7 U.S.C. 19(b).

appropriate and proportionate to the nature, size, scope, complexity, and risk profile of its business activities as a futures commission merchant, following generally accepted standards and best practices.

(c) *Governance.* (1) *Approval of components.* Each component program or plan required by paragraph (b)(2) of this section shall be approved in writing, on at least an annual basis, by either the senior officer, an oversight body, or a senior-level official of the futures commission merchant.

(2) *Risk appetite and risk tolerance limits.* (i) Each futures commission merchant shall establish and implement appropriate risk appetite and risk tolerance limits with respect to the risk areas identified in paragraph (b)(1) of this section.

(ii) The risk appetite and risk tolerance limits established pursuant to paragraph (c)(2)(i) of this section shall be reviewed and approved in writing on at least an annual basis by either the senior officer, an oversight body, or a senior-level official of the futures commission merchant.

(3) *Internal escalations.* The senior officer, an oversight body, or a senior-level official of the futures commission merchant shall be notified of:

(i) circumstances that exceed risk tolerance limits established and approved pursuant to paragraph (c)(2)(i) of this section; and

(ii) incidents that require notification pursuant to paragraphs (i) or (j) of this section.

(4) *Futures commission merchants forming part of a larger enterprise.* (i) *Generally.* A futures commission merchant may satisfy the requirements of paragraph (b)(2) of this section through its participation in a consolidated program or plan, provided that each consolidated program or plan meets the requirements of this section.

(ii) *Attestation.* A futures commission merchant that relies on a consolidated program or plan pursuant to paragraph (c)(4)(i) of this section may satisfy the requirements in paragraphs (c)(1) and (c)(2)(ii) of this section provided that either the senior officer, an oversight body, or a senior-level official of the futures commission merchant attests in writing, on at least an annual basis, that the consolidated program or plan meets the requirements of this section and reflects a risk appetite and risk tolerance limits appropriate to the futures commission merchant.

(d) *Information and technology security program.* (1) Risk assessment.

(i) The information and technology security program shall require the futures commission merchant to conduct and document the results of a comprehensive risk assessment reasonably designed to identify, assess, and prioritize risks to information and technology security.

(ii) Such risk assessment shall be conducted at a frequency consistent with the standard set forth in paragraph (b)(3) of this section, but at least annually, and be conducted by personnel not responsible for the development or implementation of covered technology or related controls.

(iii) The results of the risk assessment shall be provided to the oversight body, senior officer, or other senior-level official who approves the information and technology security program upon the risk assessment's completion.

(2) *Effective controls.* The information and technology security program shall require the futures commission merchant to establish, document, implement, and maintain controls reasonably designed to prevent, detect, and mitigate identified risks to information and technology security. Each futures commission merchant shall consider, at a minimum, the following types of controls and adopt those consistent with the standard set forth in paragraph (b)(3) of this section:

(i) Access controls on covered technology, including controls to authenticate and permit access only by authorized individuals and controls preventing misappropriation or misuse of covered information by employees;

(ii) Access restrictions designed to permit only authorized individuals to access physical locations containing covered information, including, but not limited to, buildings, computer facilities, and records storage facilities;

(iii) Encryption of electronic covered information, including while in transit or in storage on networks or systems, to which unauthorized individuals may have access;

(iv) Dual control procedures, segregation of duties, and background checks for employees or third-party service providers with responsibilities for or access to covered information;

(v) Change management practices, including defined roles and responsibilities, logging, and monitoring practices;

(vi) Systems development and configuration management practices, including practices for initializing, changing, testing, and monitoring configurations;

(vii) Flaw remediation, including vulnerability patching practices;

(viii) Measures to protect against destruction, loss, or damage of covered information due to potential environmental hazards, such as fire and water damage or technological failures;

(ix) Monitoring systems and procedures to detect actual and attempted attacks on or intrusions into covered technology;

(x) Response programs that specify actions to be taken when the futures commission merchant suspects or detects that unauthorized individuals have gained access to covered technology, including appropriate reports to regulatory and law enforcement agencies; and

(xi) Measures to promptly recover and secure any compromised covered information.

(3) *Incident response plan.* The information and technology security program shall include a written incident response plan that is reasonably designed to detect, assess, contain, mitigate the impact of, and recover from an incident. This incident response plan shall include, at a minimum:

(i) The roles and responsibilities of the futures commission merchant's management, staff, and third-party service providers in responding to incidents;

(ii) Escalation protocols, including a requirement to timely inform the oversight body, senior officer, or other senior-level official that has primary responsibility for overseeing the information and technology security program; the chief compliance officer of the futures commission merchant; and any other relevant personnel of incidents that may significantly impact the futures commission merchant's regulatory obligations or require notification to the Commission;

(iii) The points of contact for external coordination of incident responses as determined necessary by the futures commission merchant based on the severity of incidents;

(iv) The required reporting of incidents, whether by internal policy, contract, or law, including as required in this section;

(v) Procedures for documenting incidents and managements' response; and

(vi) The remediation of weaknesses in information and technology security, controls, and training, if any.

(e) *Third-party relationship program.* (1) *Third-party relationship lifecycle stages.* The third-party relationship program shall describe how the futures commission merchant addresses the risks attendant to each stage of the third-party relationship lifecycle, including:

(i) Pre-selection risk assessment;

(ii) Due diligence of prospective third-party service providers;

(iii) Contractual negotiations;

(iv) Ongoing monitoring; and

(v) Termination, including preparations for planned and unplanned terminations.

(2) *Heightened duties for critical third-party service providers.* The third-party relationship program shall establish heightened due diligence practices for potential critical third-party service providers and heightened monitoring for critical third-party service providers.

(3) *Third-party service provider inventory.* As part of its third-party relationship program, each futures commission merchant shall create, maintain, and regularly update an inventory of third-party service providers the futures commission merchant has engaged to support its activities as a futures commission merchant, identifying whether each third-party service provider in the inventory is a critical third-party service provider.

(3) *Retention of responsibility.* Notwithstanding a futures commission merchant's determination to rely on a third-party service provider, each futures commission merchant remains responsible for meeting its obligations under the Act and Commission regulations.

(4) *Guidance on third-party relationship program.* For guidance outlining potential risks, considerations, and strategies for developing a third-party relationship program consistent with paragraph (e), see Appendix A to this part.

(f) *Business continuity and disaster recovery plan.* (1) *Purpose.* The business continuity and disaster recovery plan shall be reasonably designed to enable the futures commission merchant to:

(i) Continue or resume normal business operations with minimal disruption to customers and the markets; and

(ii) Recover and make use of covered information, as well as any other data, information, or documentation required to be maintained by law and regulation.

(2) *Minimum contents.* The business continuity and disaster recovery plan shall, at a minimum:

(i) Identify covered information, as well as any other data or information required to be maintained by law and regulation, and establish and implement procedures to backup or copy all such data and information with sufficient frequency to meet the requirements of this section, and to store such data and information off-site in either hard-copy or electronic format;

(ii) Identify any resources, including covered technology, facilities, infrastructure, personnel, and competencies, essential to the operations of the futures commission merchant or to fulfill the regulatory obligations of the futures commission merchant, and establish and maintain procedures and arrangements to provide for their backup in a manner that is sufficient to meet the requirements of this section. Such arrangements must provide for backups that are located in one or more areas that are geographically separate from the futures commission merchant's primary systems, facilities, infrastructure, and personnel, and may include the use of resources provided by third-party service providers;

(iii) Identify potential disruptions to critical third-party service providers and establish a plan to minimize the impact of such disruptions;

(iv) Identify supervisory personnel responsible for implementing each aspect of the business continuity and disaster recovery plan, including the emergency contacts required to be provided pursuant to paragraph (k) of this section; and

(v) Establish a plan for communicating with the following persons in the event of an emergency or other significant disruption, to the extent applicable: employees; customers; swap data repositories; execution facilities; trading facilities; clearing facilities; regulatory authorities; data, communications and infrastructure providers and other vendors; disaster recovery specialists; and other persons essential to the recovery of documentation and data, the resumption of operations, and compliance with the Act and Commission regulations.

(3) *Accessibility.* Each futures commission merchant shall maintain copies of its business continuity and disaster recovery plan at one or more accessible off-site locations.

(g) *Training and distribution.* (1) *Training.* Each futures commission merchant shall establish, implement, and maintain training with respect to all aspects of the Operational Resilience Framework, including, but not limited to:

(i) Cybersecurity awareness training for all personnel; and

(ii) Role-specific training for personnel involved in establishing, documenting, implementing, and maintaining the Operational Resilience Framework.

(2) *Frequency.* Each futures commission merchant shall provide and update the training required in paragraph (g)(1) as necessary, but no less frequently than annually.

(3) *Distribution.* Each futures commission merchant shall distribute copies of each component program or plan required by paragraph (b)(2) of this section to relevant personnel and promptly provide any significant revisions thereto.

(h) *Reviews and Testing.* Each futures commission merchant shall establish, implement, and maintain a plan reasonably designed to assess its adherence to, and the effectiveness of, its Operational Resilience Framework through regular reviews and risk-based testing.

(1) *Reviews.* Reviews of the Operational Resilience Framework shall be conducted at least annually and in connection with any material change to the activities or operations of the futures commission merchant that is reasonably likely to affect the risks identified in paragraph (b)(1) of this section. Reviews shall include an analysis of adherence to, and the effectiveness of, the Operational Resilience Framework and any recommendations for modifications or improvements that address root causes of any issues identified by the review.

(2) *Testing.* The frequency, nature, and scope of risk-based testing of the Operational Resilience Framework shall be determined by the futures commission merchant, consistent with the standard in paragraph (b)(3) of this section.

(i) Testing of the information and technology security program shall include, at a minimum:

(A) Testing of key controls and the incident response plan at least annually;

(B) Vulnerability assessments, including daily or continuous automated vulnerability scans; and

(C) Penetration testing at least annually.

(ii) Testing of the business continuity and disaster recovery plan shall include, at a minimum, a walk-through or tabletop exercise designed to test the effectiveness of backup facilities and capabilities at least annually.

(3) *Independence.* The reviews and testing shall be conducted by qualified personnel who are independent of the aspect of the Operational Resilience Framework being reviewed or tested.

(4) *Documentation.* Each futures commission merchant shall document all reviews and testing of the Operational Resilience Framework. The documentation shall, at a minimum, include:

(i) The date the review or testing was conducted;

(ii) The nature and scope of the review or testing, including methodologies employed;

(iii) The results of the review or testing, including any assessment of effectiveness;

(iv) Any identified deficiencies and recommendations for remediation; and

(v) Any corrective action(s) taken or initiated, including the date(s) such action(s) were taken.

(5) *Internal reporting.* Each futures commission merchant shall report on the results of its reviews and testing to the futures commission merchant's chief compliance officer and any other relevant senior-level official(s) and oversight body(ies).

(i) *Notifications to the Commission.* (1) *Incidents.* (i) *Notification trigger.* Each futures commission merchant shall notify the Commission of any incident that adversely impacts, or is reasonably likely to adversely impact:

(A) information and technology security;

(B) the ability of the futures commission merchant to continue its business activities as a futures commission merchant; or

(C) the assets or positions of a customer of the futures commission merchant.

(ii) *Contents.* The notification shall provide any information available to the futures commission merchant at the time of notification that may assist the Commission in assessing and responding to the incident, including the date the incident was detected, possible cause(s) of the incident, its apparent or likely impacts, and any actions the futures commission merchant has taken or is taking to mitigate or recover from the incident, including measures to protect customers.

(iii) *Timing and method.* Each futures commission merchant shall provide the incident notification as soon as possible but in any event no later than 24 hours after such incident has been detected. The notification shall be provided via email to *ORFnotices@cftc.gov.*

(2) *Business continuity and disaster recovery plan activation.* (i) *Notification trigger.* Each futures commission merchant shall notify the Commission of any determination to activate the business continuity and disaster recovery plan.

(ii) *Contents.* The notification shall provide any information available to the futures commission merchant at the time of notification that may assist the Commission in assessing or responding to the emergency or disruption, including the date of the emergency or disruption, a description thereof, the possible cause(s), its apparent or likely impacts, and any actions the futures commission merchant has taken or is taking to mitigate or recover from the emergency or disruption, including measures taken or being taken to protect customers.

(iii) *Timing and method.* Each futures commission merchant shall provide the business continuity and disaster recovery plan activation notification within 24 hours of determining to activate the business continuity and disaster recovery plan. The notification shall be provided via email to *ORFnotices@cftc.gov.*

(j) *Notification of incidents to affected customers.* (1) *Notification trigger.* Each futures commission merchant shall notify a customer as soon as possible of any incident that is reasonably likely to have adversely affected the confidentiality or integrity of the customer's covered information, assets, or positions.

(2) *Contents.* The notification to affected customers shall include information necessary for the affected customer to understand and assess the potential impact of the incident on its information, assets, or positions, and to take any necessary action. Such notification shall include, at a minimum:

(i) a description of the incident;

(ii) the particular way in which the customer, or its covered information, may have been adversely impacted;

(iii) measures being taken by the futures commission merchant to protect against further harm; and

(iv) contact information for the futures commission merchant where the customer may learn more about the incident or ask questions.

(k) *Emergency Contacts.* (1) Each futures commission merchant shall provide the Commission the name and contact information of:

(i) two employees whom the Commission may contact in connection with incidents triggering notification to the Commission under paragraph (i)(1) of this section; and

(ii) two employees whom the Commission may contact in connection with the activation of the futures commission merchant's business continuity and disaster recovery plan triggering notification to the Commission under paragraph (i)(2) of this section.

(2) The identified employees shall be authorized to make key decisions on behalf of the futures commission merchant and have knowledge of the futures commission merchant's incident response plan or business continuity and disaster recovery plan, as appropriate.

(3) The futures commission merchant shall update its emergency contacts with the Commission as necessary.

(l) *Recordkeeping.* Each futures commission merchant shall maintain all records required to be maintained pursuant to this section in accordance with section 1.31 of this chapter and shall make them available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators, as defined in section 1a(39) of the Act.

■ 3. Add appendix A to part 1 to read as follows:

Appendix A to Part 1—Guidance on Third-Party Relationship Programs

The following guidance offers factors, actions, and strategies for futures commission merchants to consider in preparing and implementing third-party relationship programs reasonably designed to identify, monitor, manage, and assess risks relating to third-party relationships, as required by Commission regulation 1.13. The guidance is also not intended to reduce or replace the obligation of futures commission merchants to comply with the requirements in Commission regulation 1.13, including the requirement to ensure that each futures commission merchant's Operational Resilience Framework is appropriate and proportionate to the nature, size, scope, complexity, and risk profile of its business activities as a futures commission merchant, following generally accepted standards and best practices. The guidance is not exhaustive and is nonbinding.

The guidance is written to be broadly relevant to all futures commission merchants, but it may not be universally applicable. The degree to which the guidance would be applicable to a particular futures commission merchant would depend on its unique facts and circumstances and may vary from relationship to relationship. Each futures commission merchant should assess the relevance of the guidance as it applies to its particular risk profile and tailor its third-party relationship program accordingly.

Comparable guidance for swap dealers and major swap participants is included in Appendix A to subpart J of part 23 of the Commission's regulations.

A. Pre-Selection Risk Assessment—Commission Regulation 1.13(e)(1)(i)

Before entering into a third-party relationship, futures commission merchants should determine which services should be performed by a third-party and plan for how to manage associated risks. The Commission appreciates that reliance on third-party service providers may be unavoidable, particularly given the rapid pace of technological innovation, which may render it uneconomical or even infeasible for financial institutions to meet all of their technological needs in-house.

Nevertheless, given the risks associated with relying on third-party service providers, and that each additional third-party relationship a futures commission merchant

employs is likely to add further risk and complexity, a futures commission merchant's third-party relationship program should include a deliberative process for affirmatively determining whether to source a particular service from a third-party service provider. In determining whether a particular function should be performed by a third-party service provider, futures commission merchants should consider whether:

- The service would support the futures commission merchant's strategic goals and objectives.
- The same goals and objectives could be addressed through an alternative means that may not require reliance on a third-party service provider.
- The futures commission merchant has or could otherwise secure the resources, financial and otherwise, to effectively monitor the third-party service provider.
- Relevant and reputable third-party service providers are available.
- The provision of the service would implicate information and technology security concerns, including by requiring the third-party service provider to obtain access to covered information or provide covered technology.
- A disruption of the service would have a negative impact on customers or regulatory compliance.
- The relationship could be structured to reduce associated risks, such as by limiting the third-party service provider's access to covered information or covered technology.
- Lack of direct control over performance of the service would present unacceptable risk, *i.e.,* risk outside the futures commission merchant's risk tolerance limits.

As the above considerations illustrate, futures commission merchants should consider ways in which they might structure their third-party relationships to reduce the associated risks. For example, where giving a third-party service provider direct access to its technology or data may be outside a futures commission merchant's risk tolerance, structuring the relationship to provide the third-party service provider access on a read-only basis or via reports delivered by the futures commission merchants could render the relationship more acceptable. Futures commission merchants should therefore consider the availability of safer means of performing the service as part of their assessment.

Changes in technology, businesses practices, regulation, market structure, market participants (*e.g.,* new entrants to the market), or service delivery may change the risk profile of the third-party relationship over time. Accordingly, futures commission merchants should consider periodically reassessing their selection of services to be performed by third-party service providers. Futures commission merchants should stay abreast of these changes by monitoring the external environment and communicating with current and prospective service providers and other participants in industry.

B. Due Diligence in Selecting Third-Party Service Providers—Commission Regulation 1.13(e)(1)(ii)

After a futures commission merchant has determined that a service is suitable for a third-party to perform, it should conduct due diligence on prospective third-party service providers. Due diligence provides futures commission merchants with the information they need to assess and conclude, with a reasonable level of assurance, that the prospective third-party service provider is capable of effectively providing the service as expected, adhering to the futures commission merchant's policies, maintaining the futures commission merchant's compliance with Commission regulations, and protecting covered information. Appropriate due diligence should also enable futures commission merchants to evaluate whether they would be able to effectively monitor and manage the risks associated with a particular third-party relationship.

Due diligence may be conducted before or contemporaneously with contractual negotiations with prospective third-party service providers but should be concluded prior to executing any agreements. Futures commission merchants should conduct due diligence even in situations where, for a particular service, there may only be one or a small number of providers with a dominant market share whose services are used by all or most of the futures commission merchants' industry peers, and futures commission merchants should not rely solely on those providers' reputations or prior experience with them. The depth and rigor of the due diligence should be proportionate to the nature of the third-party relationship, with the required heightened due diligence for potential critical third-party service providers pursuant to Commission regulation 1.13(e)(2). Specifically, when conducting due diligence for a potential critical third-party servicer provider, futures commission merchants should expand the type and sources of information they rely on, the rigor and scrutiny they apply in reviewing the information to identify potential risks, and the level of confidence in their assessment of the third-party service provider's ability to perform.

When establishing their due diligence protocols, futures commission merchants should consider the full range of risks that reliance on the third-party service providers could introduce in light of the nature of the service they would be performing. Relevant considerations with respect to the potential third-party service provider include its:

- Financial condition, business experience and reputation, and business prospects, particularly the third-party service provider's experience providing services to financial institutions.
- Background, experience, and qualifications with respect to key personnel.
- Information and technology security practices, including incident reporting and incident management programs, and whether there are clearly documented processes for identifying and escalating incidents.
- Risk management practices, including governance, controls, testing, and issue management practices, as well as the results of any independent risk assessments.
- Regulatory environment, including the legal jurisdiction in which it is based and applicable regulatory or licensing requirements.
- History of disruptions to operations, including whether the third-party service provider has suffered incidents that would meet the standard for reporting to the Commission in Commission regulation 1.13(i).
- Violations of legal, compliance, or contractual obligations, including civil or criminal proceedings or administrative enforcement actions, including from self-regulatory organizations.
- Understanding of Commission regulatory requirements applicable to the futures commission merchant.
- Use of and reliance on subcontractors, including the volume and types of subcontracted activities, and the third-party service provider's process for identifying, assessing, managing, and monitoring associated risks.
- Business continuity and contingency plans.
- Financial protections, such as insurance coverage against losses or liabilities from intentional or negligent acts or hazards involving physical destruction and data or documentation losses.

Futures commission merchants should memorialize their assessment of these factors and identify how the review was heightened for critical third-party service providers. Futures commission merchants should not rely solely on their prior knowledge of or experience with a potential third-party. Potential sources of due diligence information include:

- Audit reports, including pooled audit plans and System and Organizational Controls (SOC) reports.
- Financial statements and projections and relevant accompanying information (*e.g.,* annual or quarterly reports, management commentary, auditors' opinions, and investor relations materials).
- Incident response plans, including the results of recent testing or assessments thereof.
- Business continuity and disaster recovery plans, as well as the result of recent testing or assessments thereof.
- Public filings.
- News reports, trade publications, and press releases.
- Reports from market intelligence providers.
- References from current or previous customers, or other parties which have had business relationships with the third-party service provider.
- Informal industry discussions.
- Information provided directly by the third-party service provider, such as internal performance metrics.

Obtaining and reviewing audit reports, including SOC reports, may be of particular value for conducting heightened due diligence of critical third-party service providers. In certain circumstances, futures commission merchants may not be able to gather all the information necessary to reach an informed conclusion that a prospective third-party service provider is an adequate provider. Examples include instances where the third-party service provider is a new entrant into the market and little information exists; where information provided by the

third-party service provider is insufficient or appears unreliable; or where the third-party service provider is reluctant to provide internal information. In such cases, the futures commission merchant should identify and document the limitations of its due diligence, the attendant risks, and any available methods for mitigating them (*e.g.,* obtaining alternate information, implementing enhanced monitoring or controls, negotiating protective contractual provisions). Ultimately, such factors could weigh against the use of the potential third-party service provider, particularly a potential critical third-party service provider. Futures commission merchants that proceed with the third-party service arrangements notwithstanding the limited due diligence should do so with caution, applying heightened scrutiny of the information they do receive, and consider the implementation of their own mitigating controls to compensate for the uncertainty.

C. Contractual Negotiations—Commission Regulation 1.13(e)(1)(iii)

After selecting a third-party service provider, futures commission merchants should proceed to finalizing the agreement, typically through entering into an enforceable written contract. Written contracts are an important tool for clarifying the scope of services to be delivered, establishing standards or performance benchmarks, allocating risks and responsibilities, and facilitating resolution of disputes. They can also reduce the risks of non-performance and assist in monitoring the third-party service provider. Because of their importance, the Commission recommends that futures commission merchants enter written agreements with third-party service providers before services are delivered, particularly with critical third-party service providers.

In negotiating a written contract, futures commission merchants should seek to negotiate contractual provisions that would support their ability to mitigate, manage, and monitor the risks associated with the relationship, as identified through their initial pre-selection and due diligence activities. The contractual provisions should be informed by the nature of the service provided and be proportionate to the criticality of the services provided. In particular, futures commission merchants should consider negotiating for the contract to include the following provisions:

- Timely notification to the futures commission merchant of any incidents suffered by third-party service providers, or of significant disruptions to the operations of the third-party service provider.
- Timely notification to the futures commission merchant of any material changes to the services provided.
- Required periodic, independent audits of the third-party service provider, the results of which would be shared with the futures commission merchant.
- Restrictions on the third-party service provider's use of the futures commission merchant's covered information, except as necessary to deliver the service or meet legal obligations.
- Security measures to protect the futures commission merchant's covered information and covered technology to which the third-party service provider has access.
- Insurance, guarantees, indemnification, and limitations on liability.
- Dispute resolution procedures.
- Performance measures or benchmarks.
- Remediation of identified performance issues.
- Dispute resolution procedures.
- Compliance with regulatory requirements, including reasonable assurances that the third-party service provider is willing and able to coordinate with the futures commission merchant for the purpose of ensuring the futures commission merchant complies with its legal and regulatory obligations.
- Use of subcontractors, including notification or approval procedures for their use, the extension of contractual rights of the futures commission merchant against the third-party service provider to its subcontractors, and contractual obligations for reporting on or oversight of subcontractors.
- Termination provisions, including rights to terminate following breaches of the third-party service provider's obligations, notice requirements, obligations of the third-party service provider to provide support for a successful transition, and the return or destruction of records or covered information, as further described in section E of this guidance.
- Information sharing necessary to facilitate other provisions of this proposed guidance (for example, reporting requirements to support ongoing monitoring, as discussed in section D of this guidance, or notice requirements for termination, as discussed in section E of this guidance).

These provisions focus on key risk factors generally associated with third-party service provider relationships. They are not exhaustive of all contractual provisions futures commission merchants should seek to include in their written contracts, including ordinary commercial contract terms (*e.g.,* choice of law provisions) and terms that may relate only to specific services, among other provisions. While third-parties may initially offer a standard contract, a futures commission merchant may seek to request modifications, additional contractual provisions, or addendums to satisfy its needs. Futures commission merchants should work to tailor the level of detail and comprehensiveness of the contractual provisions based on the risk and complexity posed by the particular third-party relationship, contracts with critical third-party service providers likely being the most tailored.

In some circumstances, a futures commission merchant may be at a bargaining power disadvantage, which prevents it from negotiating optimal contractual provisions. For example, a prospective third-party service provider may be the sole provider of a service or may have such dominant market share that it can offer its services on a ''take-it-or-leave-it'' basis. In such situations, the futures commission merchant should work to understand any resulting limitations in the contract and attendant risks and consider whether it can achieve outcomes comparable to those provided by contractual protections through non-contractual means. Examples could include the futures commission merchant implementing additional controls, augmenting its monitoring of the third-party service provider using public sources or market intelligence services, or purchasing insurance. The futures commission merchant should make an assessment, however, of whether these alternatives would provide an adequate substitute for the unobtained contractual protections and document its assessment and mitigation plan, considering its risk appetite and risk tolerance limits. Where a third-party service provider is unable or unwilling to agree to provisions necessary for the futures commission merchant to meet its obligations under Commission regulations, particularly a critical third-party service provider, the futures commission merchant should consider finding an alternative third-party service provider.

D. Ongoing Monitoring—Commission Regulation 1.13(e)(1)(iv)

After a third-party service provider has initiated performance, futures commission merchants should engage in ongoing monitoring. Ongoing monitoring is important to ensure the third-party service provider is properly carrying out its outsourced function and contractual obligations, as well as meeting quality or performance expectations. Effective monitoring can aid futures commission merchants in the early identification of performance deficits, allowing for a quicker response that may then mitigate the impact.

Ongoing monitoring should occur throughout the duration of a third-party relationship, commensurate with the level of risk and complexity of the relationship and the activity performed by the third-party. Examples of possible monitoring activities include:

- Reviewing reports on performance and effectiveness of controls, including independent audit reports and SOC reports.
- Periodic on-site visits or meetings to discuss open issues and plans for changes to the relationship.
- Reviewing updated due diligence information.
- Documenting service-level agreements with the third-party service provider to establish performance targets.
- Establishing measures for the third-party service provider to identify, record, and remediate instances of failure to meet contractual obligations or unsatisfactory performance and to report such instances to the futures commission merchant on a timely basis.
- Direct testing of the third-party service provider's control environment.

The frequency and depth of the futures commission merchant's monitoring activities should reflect the nature of the third-party relationship, including heightened monitoring for critical third-party service providers, and may change over the duration of the relationship. The futures commission merchant should dedicate sufficient staffing

resources to its monitoring activities and be particularly alert to any circumstances that could signal that a third-party service provider may not be able to perform to an acceptable standard. A futures commission merchant should be cognizant that certain events may trigger the need for it to take further action, including terminating its relationship with the third-party service provider. Such events could include cyberattacks, natural disasters, financial distress or insolvency, adverse or qualified audit opinions, or litigation or enforcement actions.

In addition to the continuous monitoring described above, futures commission merchants should periodically review and reevaluate their relationships with third-party service providers holistically. Such reviews should be more thorough than routine monitoring and may involve additional personnel, such as in-house or outside auditors, compliance and risk functions, information technology staff, or by a central function or committee whose visibility into other third-party relationships could provide valuable context for the relationship at issue. Additionally, to the extent a futures commission merchant uses enterprise risk management techniques, it should seek to integrate the information gathered from its ongoing monitoring with those practices. For example, to the extent that a futures commission merchant maintains a standardized approach across risk types to escalate concerns or issues to senior management or governance bodies (*e.g.,* through the use of predefined criteria or escalation paths), the futures commission merchant should consider using the same protocols for escalating concerns identified through its ongoing monitoring of third-party service providers. The ongoing monitoring approach itself may be subject to enterprise risk management practices, such as periodic self-assessment for effectiveness, independent testing, and quality assurance.

To the extent that monitoring activities reveal a change in their assessment of the risks associated with the third-party relationship, futures commission merchants should adjust the frequency and types of monitoring they conduct, including reports, regular testing, and on-site visits. One example of information that may change the level of monitoring is a notification that a third-party service provider has suffered or may suffer from a severe adverse event that could trigger a material change in the systems or process used to carry out an outsourced function.

E. Terminating the Third-Party Relationship—Commission Regulation 1.13(e)(1)(v)

Futures commission merchants should ensure that their third-party service provider relationship programs include advance preparation for the termination of the third-party relationship to ensure an orderly transition. Futures commission merchants should prepare for both planned terminations (*i.e.,* where one or both parties elects to end the relationship pursuant to their contract) and unplanned terminations (*e.g.,* following a sudden withdrawal of the third-party service). The plans should include both the contractual provisions for terminating the service (termination provisions), and the futures commission merchant's plan to facilitate an orderly transition of the function to an alternative provider or to bring it in-house (exit strategy). The goal of termination planning is to support an efficient transition to alternative arrangements for the provision of the service, regardless of the circumstances of the termination.

Termination provisions include all terms needed by the futures commission merchant to wind down a third-party service relationship while ensuring that the futures commission merchant can continue to serve its customers without interruption and to meet its regulatory compliance obligations. Because information, data, staff training, and knowledge may reside in the third-party service provider, there is an increased risk of disruption during the termination phase. When negotiating termination provisions, a futures commission merchant should ensure that the terms negotiated support its exit strategy. For example, a futures commission merchant should ensure that termination rights are accompanied by notice periods that leave the futures commission merchant enough time to find an alternative provider (or to provide the service itself) to ensure an orderly transition.

Similarly, the futures commission merchant should ensure that all customer data or other covered information in the third-party service provider's possession is promptly returned to the futures commission merchant or destroyed, as appropriate. The futures commission merchant should also verify that the third-party's access to its systems and covered information ceases at termination. Futures commission merchants should also consider negotiating more stringent terms for third-party service providers that breach their obligations under the agreement, other than for ''no-fault'' terminations. Such breaches may signal an inability of the third-party service provider to provide the services contracted for and thereby threaten the ability of the futures commission merchant to serve its customers and meet its regulatory obligations. (*See* section C of this guidance for examples of termination provisions.)

Futures commission merchants' exit strategies should include the steps needed to end the service provision with the third-party service provider and retain a new service provider or begin providing the service in-house. Although elements of an exit strategy may be reflected in termination provisions, not all elements of the exit strategy may be suitable for the contract. Examples include approvals, identification of alternative providers, description of the roles of staff in the futures commission merchant, and other internal matters. These elements may be memorialized in a procedure or similar document, such as the third-party relationship program. The exit strategy should contain the internal steps to be taken to ensure notification to the third-party service provider, identification of the proposed new provider, or, if bringing the function in-house, the hiring and training of personnel, development of procedures, and launch of new technology, along with the time periods and responsible personnel for each.

Futures commission merchants should be aware that, in practice, implementing an exit strategy may be complex and time-consuming and that the exercise of termination arrangements may be difficult. Futures commission merchants should also be aware that some third parties possess expertise that is not readily available and plan accordingly. Futures commission merchants should ensure that their plans are flexible enough to account for a range of plausible termination scenarios, including situations where the third-party service provider rapidly becomes unviable. Futures commission merchants may need to design backup or interim procedures sufficient to meet regulatory requirements in such situations.

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

■ 4. 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).

■ 5. Revise § 23.603 to read as follows:

§ 23.603 Operational Resilience Framework for Swap Dealers and Major Swap Participants.

(a) *Definitions.* For purposes of this section:

Affiliate means, with respect to any person, a person controlling, controlled by, or under common control with, such person.

Business continuity and disaster recovery plan means a written plan outlining the procedures to be followed in the event of an emergency or other significant disruption to the continuity of normal business operations and that meets the requirements of paragraph (f) of this section.

Consolidated program or plan means any information and technology security program, third-party relationship program, or business continuity and disaster recovery plan in which the swap entity participates with one or more affiliates and that is managed and approved at the enterprise level.

Covered information means any sensitive or confidential data or information maintained by a swap entity in connection with its business activities as a swap entity.

Covered technology means any application, device, information technology asset, network service, system, and other information-handling component, including the operating environment, that is used by a swap entity to conduct its business activities, or to meet its regulatory obligations, as a swap entity.

Critical third-party service provider means a third-party service provider, the disruption of whose performance would be reasonably likely to:

(1) Significantly disrupt a swap entity's business operations as a swap entity; or

(2) Significantly and adversely impact the swap entity's counterparties.

Information and technology security means the preservation of:

(1) The confidentiality, integrity, and availability of covered information; and

(2) The reliability, security, capacity, and resilience of covered technology.

Incident means any event, occurrence, or circumstance that could jeopardize information and technology security, including if it occurs at a third-party service provider.

Information and technology security program means a written program reasonably designed to identify, monitor, manage, and assess risks relating to information and technology security and that meets the requirements of paragraph (d) of this section.

Key controls mean controls that an appropriate risk analysis determines are either critically important for effective information and technology security or intended to address risks that evolve or change more frequently and therefore require more frequent review to ensure their continuing effectiveness in addressing such risks.

Oversight body means any board, body, or committee of a board or body of the swap entity specifically granted the authority and responsibility for making strategic decisions, setting objectives and overall direction, implementing policies and procedures, or overseeing the implementation of operations for the swap entity.

Risk appetite means the aggregate amount of risk a swap entity is willing to assume to achieve its strategic objectives.

Risk tolerance limit means the amount of risk, beyond its risk appetite, that a swap entity is prepared to tolerate through mitigating actions.

Senior officer means the chief executive officer or other equivalent officer of the swap entity.

Swap entity means a person that is registered with the Commission as a swap dealer or major swap participant pursuant to the Act.

Third-party relationship program means a written program reasonably designed to identify, monitor, manage, and assess risks relating to third-party relationships and that meets the requirements of paragraph (e) of this section.

(b) *Generally.* (1) *Purpose and scope.* Each swap entity shall establish, document, implement, and maintain an Operational Resilience Framework reasonably designed to identify, monitor, manage, and assess risks relating to:

(i) information and technology security;

(ii) third-party relationships; and

(iii) emergencies or other significant disruptions to the continuity of normal business operations as a swap entity.

(2) *Components.* The Operational Resilience Framework shall include an information and technology security program, a third-party relationship program, and a business continuity and disaster recovery plan. Each component program or plan shall be supported by written policies and procedures.

(3) *Standard.* The Operational Resilience Framework shall be appropriate and proportionate to the nature, size, scope, complexity, and risk profile of its business activities as a swap entity, following generally accepted standards and best practices.

(c) *Governance.* (1) *Approval of components.* Each component program or plan required by paragraph (b)(2) of this section shall be approved in writing, on at least an annual basis, by either the senior officer, an oversight body, or a senior-level official of the swap entity.

(2) *Risk appetite and risk tolerance limits.* (i) Each swap entity shall establish and implement appropriate risk appetite and risk tolerance limits with respect to the risk areas identified in paragraph (b)(1) of this section.

(ii) The risk appetite and risk tolerance limits established pursuant to paragraph (c)(2)(i) of this section shall be reviewed and approved in writing on at least an annual basis by either the senior officer, an oversight body, or a senior-level official of the swap entity.

(3) *Internal escalations.* The senior officer, an oversight body, or a senior-level official of the swap entity shall be notified of:

(i) circumstances that exceed risk tolerance limits established and approved pursuant to paragraph (c)(2)(i) of this section; and

(ii) incidents that require notification pursuant to paragraphs (i) or (j) of this section.

(4) *Swap entities forming part of a larger enterprise.* (i) *Generally.* A swap entity may satisfy the requirements of paragraph (b)(2) of this section through its participation in a consolidated program or plan, provided that each consolidated program or plan meets the requirements of this section.

(ii) *Attestation.* A swap entity that relies on a consolidated program or plan pursuant to paragraph (c)(4)(i) of this section may satisfy the requirements in paragraphs (c)(1) and (c)(2)(ii) of this section provided that either the senior officer, an oversight body, or a senior-level official of the swap entity attests in writing, on at least an annual basis, that the consolidated program or plan meets the requirements of this section and reflects a risk appetite and risk tolerance limits appropriate to the swap entity.

(d) *Information and technology security program.* (1) *Risk assessment.*

(i) The information and technology security program shall require the swap entity to conduct and document the results of a comprehensive risk assessment reasonably designed to identify, assess, and prioritize risks to information and technology security.

(ii) Such risk assessment shall be conducted at a frequency consistent with the standard set forth in paragraph (b)(3) of this section, but at least annually, and be conducted by personnel not responsible for the development or implementation of covered technology or related controls.

(iii) The results of the risk assessment shall be provided to the oversight body, senior officer, or other senior-level official who approves the information and technology security program upon the risk assessment's completion.

(2) *Effective controls.* The information and technology security program shall require the swap entity to establish, document, implement, and maintain controls reasonably designed to prevent, detect, and mitigate identified risks to information and technology security. Each swap entity shall consider, at a minimum, the following types of controls and adopt those consistent with the standard set forth in paragraph (b)(3) of this section:

(i) Access controls on covered technology, including controls to authenticate and permit access only by authorized individuals and controls preventing misappropriation or misuse of covered information by employees;

(ii) Access restrictions designed to permit only authorized individuals to access physical locations containing covered information, including, but not limited to, buildings, computer facilities, and records storage facilities;

(iii) Encryption of electronic covered information, including while in transit or in storage on networks or systems, to which unauthorized individuals may have access;

(iv) Dual control procedures, segregation of duties, and background checks for employees or third-party service providers with responsibilities for or access to covered information;

(v) Change management practices, including defined roles and responsibilities, logging, and monitoring practices;

(vi) Systems development and configuration management practices, including practices for initializing, changing, testing, and monitoring configurations;

(vii) Flaw remediation, including vulnerability patching practices;

(viii) Measures to protect against destruction, loss, or damage of covered information due to potential environmental hazards, such as fire and water damage or technological failures;

(ix) Monitoring systems and procedures to detect actual and attempted attacks on or intrusions into covered technology;

(x) Response programs that specify actions to be taken when the swap entity suspects or detects that unauthorized individuals have gained access to covered technology, including appropriate reports to regulatory and law enforcement agencies; and

(xi) Measures to promptly recover and secure any compromised covered information.

(3) *Incident response plan.* The information and technology security program shall include a written incident response plan that is reasonably designed to detect, assess, contain, mitigate the impact of, and recover from an incident. This incident response plan shall include, at a minimum:

(i) The roles and responsibilities of the swap entity's management, staff, and third-party service providers in responding to incidents;

(ii) Escalation protocols, including a requirement to timely inform the oversight body, senior officer, or other senior-level official that has primary responsibility for overseeing the information and technology security program; the chief compliance officer of the swap entity; and any other relevant personnel of incidents that may

significantly impact the swap entity's regulatory obligations or require notification to the Commission;

(iii) The points of contact for external coordination of incident responses as determined necessary by the swap entity based on the severity of incidents;

(iv) The required reporting of incidents, whether by internal policy, contract, or law, including as required in this section;

(v) Procedures for documenting incidents and managements' response; and

(vi) The remediation of weaknesses in information and technology security, controls, and training, if any.

(e) *Third-party relationship program.* (1) *Third-party relationship lifecycle stages.* The third-party relationship program shall describe how the swap entity addresses the risks attendant to each stage of the third-party relationship lifecycle, including:

(i) Pre-selection risk assessment;

(ii) Due diligence of prospective third-party service providers;

(iii) Contractual negotiations;

(iv) Ongoing monitoring; and

(v) Termination, including preparations for planned and unplanned terminations.

(2) *Heightened duties for critical third-party service providers.* The third-party relationship program shall establish heightened due diligence practices for potential critical third-party service providers and heightened monitoring for critical third-party service providers.

(3) *Third-party service provider inventory.* As part of its third-party relationship program, each swap entity shall create, maintain, and regularly update an inventory of third-party service providers the swap entity has engaged to support its activities as a swap entity, identifying whether each third-party service provider in the inventory is a critical third-party service provider.

(3) *Retention of responsibility.* Notwithstanding a swap entity's determination to rely on a third-party service provider, each swap entity remains responsible for meeting its obligations under the Act and Commission regulations.

(4) *Guidance on third-party relationship programs.* For guidance outlining potential risks, considerations, and strategies for developing a third-party relationship program consistent with paragraph (e), see Appendix A to Subpart J of this part.

(f) *Business continuity and disaster recovery plan.* (1) *Purpose.* The business continuity and disaster recovery plan shall be reasonably designed to enable the swap entity to:

(i) Continue or resume normal business operations with minimal disruption to counterparties and the markets; and

(ii) Recover and make use of covered information, as well as any other data, information, or documentation required to be maintained by law and regulation.

(2) *Minimum contents.* The business continuity and disaster recovery plan shall, at a minimum:

(i) Identify covered information, as well as any other data or information required to be maintained by law and regulation, and establish and implement procedures to backup or copy all such data and information with sufficient frequency to meet the requirements of this section and to store such data and information off-site in either hard-copy or electronic format;

(ii) Identify any resources, including covered technology, facilities, infrastructure, personnel, and competencies, essential to the operations of the swap entity or to fulfill the regulatory obligations of the swap entity, and establish and maintain procedures and arrangements to provide for their backup in a manner that is sufficient to meet the requirements of this section. Such arrangements must provide for backups that are located in one or more areas that are geographically separate from the swap entity's primary systems, facilities, infrastructure, and personnel, and may include the use of resources provided by third-party service providers;

(iii) Identify potential disruptions to critical third-party service providers and establish a plan to minimize the impact of such disruptions;

(iv) Identify supervisory personnel responsible for implementing each aspect of the business continuity and disaster recovery plan, including the emergency contacts required to be provided pursuant to paragraph (k) of this section; and

(v) Establish a plan for communicating with the following persons in the event of an emergency or other significant disruption, to the extent applicable: employees; counterparties; swap data repositories; execution facilities; trading facilities; clearing facilities; regulatory authorities; data, communications and infrastructure providers and other vendors; disaster recovery specialists; and other persons essential to the recovery of documentation and data, the resumption of operations, and compliance with the Act and Commission regulations.

(3) *Accessibility.* Each swap entity shall maintain copies of its business continuity and disaster recovery plan at one or more accessible off-site locations.

(g) *Training and distribution.* (1) *Training.* Each swap entity shall establish, implement, and maintain training with respect to all aspects of the Operational Resilience Framework, including, but not limited to:

(i) Cybersecurity awareness training for all personnel; and

(ii) Role-specific training for personnel involved in establishing, documenting, implementing, and maintaining the Operational Resilience Framework.

(2) *Frequency.* Each swap entity shall provide and update the training required in paragraph (g)(1) as necessary, but no less frequently than annually.

(3) *Distribution.* Each swap entity shall distribute copies of each component program or plan required by paragraph (b)(2) of this section to relevant personnel and promptly provide any significant revisions thereto.

(h) *Reviews and Testing.* Each swap entity shall establish, implement, and maintain a plan reasonably designed to assess its adherence to, and the effectiveness of, its Operational Resilience Framework through regular reviews and risk-based testing.

(1) *Reviews.* Reviews of the Operational Resilience Framework shall be conducted at least annually and in connection with any material change to the activities or operations of the swap entity that is reasonably likely to affect the risks identified in paragraph (b)(1) of this section. Reviews shall include an analysis of adherence to, and the effectiveness of, the Operational Resilience Framework and any recommendations for modifications or improvements that address root causes of any issues identified by the review.

(2) *Testing.* The frequency, nature, and scope of risk-based testing of the Operational Resilience Framework shall be determined by the swap entity, consistent with the standard in paragraph (b)(3) of this section.

(i) Testing of the information and technology security program shall include, at a minimum:

(A) Testing of key controls and the incident response plan at least annually;

(B) Vulnerability assessments, including daily or continuous automated vulnerability scans; and

(C) Penetration testing at least annually.

(ii) Testing of the business continuity and disaster recovery plan shall include, at a minimum, a walk-through or tabletop exercise designed to test the effectiveness of backup facilities and capabilities at least annually.

(3) *Independence.* The reviews and testing shall be conducted by qualified personnel who are independent of the aspect of the Operational Resilience Framework being reviewed or tested.

(4) *Documentation.* Each swap entity shall document all reviews and testing of the Operational Resilience Framework. The documentation shall, at a minimum, include:

(i) The date the review or testing was conducted;

(ii) The nature and scope of the review or testing, including methodologies employed;

(iii) The results of the review or testing, including any assessment of effectiveness;

(iv) Any identified deficiencies and recommendations for remediation; and

(v) Any corrective action(s) taken or initiated, including the date(s) such action(s) were taken.

(5) *Internal reporting.* Each swap entity shall report on the results of its reviews and testing to the swap entity's chief compliance officer and any other relevant senior-level official(s) and oversight body(ies).

(i) *Notifications to the Commission.* (1) *Incidents.*

(i) *Notification trigger.* Each swap entity shall notify the Commission of any incident that adversely impacts, or is reasonably likely to adversely impact:

(A) Information and technology security;

(B) The ability of the swap entity to continue its business activities as a swap entity; or

(C) The assets or positions of a counterparty of the swap entity.

(ii) *Contents.* The notification shall provide any information available to the swap entity at the time of notification that may assist the Commission in assessing and responding to the incident, including the date the incident was detected, possible cause(s) of the incident, its apparent or likely impacts, and any actions the swap entity has taken or is taking to mitigate or recover from the

incident, including measures to protect counterparties.

(iii) *Timing and method.* Each swap entity shall provide the incident notification as soon as possible but in any event no later than 24 hours after such incident has been detected. The notification shall be provided via email to *ORFnotices@cftc.gov.*

(2) *Business continuity and disaster recovery plan activation.* (i) *Notification trigger.* Each swap entity shall notify the Commission of any determination to activate the business continuity and disaster recovery plan.

(ii) *Contents.* The notification shall provide any information available to the swap entity at the time of notification that may assist the Commission in assessing or responding to the emergency or disruption, including the date of the emergency or disruption, a description thereof, the possible cause(s), its apparent or likely impacts, and any actions the swap entity has taken or is taking to mitigate or recover from the emergency or disruption, including measures taken or being taken to protect counterparties.

(iii) *Timing and method.* Each swap entity shall provide the business continuity and disaster recovery plan activation notification within 24 hours of determining to activate the business continuity and disaster recovery plan. The notification shall be provided via email to *ORFnotices@cftc.gov.*

(j) *Notification of incidents to affected counterparties.* (1) *Notification trigger.* Each swap entity shall notify a counterparty as soon as possible of any incident that is reasonably likely to have adversely affected the confidentiality or integrity of the counterparty's covered information, assets, or positions.

(2) *Contents.* The notification to affected counterparties shall include information necessary for the affected counterparty to understand and assess the potential impact of the incident on its information, assets, or positions, and to take any necessary action. Such notification shall include, at a minimum:

(i) A description of the incident;

(ii) The particular way in which the counterparty, or its covered information, may have been adversely impacted;

(iii) Measures being taken by the swap entity to protect against further harm; and

(iv) Contact information for the swap entity where the counterparty may learn more about the incident or ask questions.

(k) *Emergency Contacts.* (1) Each swap entity shall provide the Commission the name and contact information of:

(i) Two employees whom the Commission may contact in connection with incidents triggering notification to the Commission under paragraph (i)(1) of this section; and

(ii) Two employees whom the Commission may contact in connection with the activation of the swap entity's business continuity and disaster recovery plan triggering notification to the Commission under paragraph (i)(2) of this section.

(2) The identified employees shall be authorized to make key decisions on behalf of the swap entity and have knowledge of the swap entity's incident response plan or business continuity and disaster recovery plan, as appropriate.

(3) The swap entity shall update its emergency contacts with the Commission as necessary.

(l) *Recordkeeping.* Each swap entity shall maintain all records required to be maintained pursuant to this section in accordance with section 1.31 of this chapter and shall make them available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators, as defined in section 1a(39) of the Act.

■ 6. Add appendix A to subpart J of part 23 to read as follows:

Appendix A to Subpart J of Part 23—Guidance on Third-Party Relationship Programs

The following guidance offers factors, actions, and strategies for swap entities to consider in preparing and implementing third-party relationship programs reasonably designed to identify, monitor, manage, and assess risks relating to third-party relationships, as required by Commission regulation 23.603. The guidance is also not intended to reduce or replace the obligation of swap entities to comply with the requirements in Commission regulation 23.603, including the requirement to ensure that each swap entity's Operational Resilience Framework is appropriate and proportionate to the nature, size, scope, complexity, and risk profile of its business activities as a swap entity, following generally accepted standards and best practices. The guidance is not exhaustive and is nonbinding.

The guidance is written to be broadly relevant to all swap entities, but it may not be universally applicable. The degree to which the guidance would be applicable to a particular swap entity would depend on its unique facts and circumstances and may vary from relationship to relationship. Each swap entity should assess the relevance of the guidance as it applies to its particular risk profile and tailor its third-party relationship program accordingly.

Comparable guidance for futures commission merchants is included in Appendix A to part 1 of the Commission's regulations.

A. Pre-Selection Risk Assessment—Commission Regulation 23.603(e)(1)(i)

Before entering into a third-party relationship, swap entities should determine which services should be performed by a third-party and plan for how to manage associated risks. The Commission appreciates that reliance on third-party service providers may be unavoidable, particularly given the rapid pace of technological innovation, which may render it uneconomical or even infeasible for financial institutions to meet all of their technological needs in-house.

Nevertheless, given the risks associated with relying on third-party service providers, and that each additional third-party relationship a swap entity employs is likely to add further risk and complexity, a swap entity's third-party relationship program should include a deliberative process for affirmatively determining whether to source a particular service from a third-party service provider. In determining whether a particular function should be performed by a third-party service provider, swap entities should consider whether:

- The service would support the swap entity's strategic goals and objectives.
- The same goals and objectives could be addressed through an alternative means that may not require reliance on a third-party service provider.
- The swap entity has or could otherwise secure the resources, financial and otherwise, to effectively monitor the third-party service provider.
- Relevant and reputable third-party service providers are available.
- The provision of the service would implicate information and technology security concerns, including by requiring the third-party service provider to obtain access to covered information or provide covered technology.
- A disruption of the service would have a negative impact on counterparties or regulatory compliance.
- The relationship could be structured to reduce associated risks, such as by limiting the third-party service provider's access to covered information or covered technology.
- Lack of direct control over performance of the service would present unacceptable risk, *i.e.,* risk outside the swap entity's risk tolerance limits.

As the above considerations illustrate, swap entities should consider ways in which they might structure their third-party relationships to reduce the associated risks. For example, where giving a third-party service provider direct access to its technology or data may be outside a swap entity's risk tolerance, structuring the relationship to provide the third-party service provider access on a read-only basis or via reports delivered by the swap entity could render the relationship more acceptable. Swap entities should therefore consider the availability of safer means of performing the service as part of their assessment.

Changes in technology, businesses practices, regulation, market structure, market participants (*e.g.,* new entrants to the market), or service delivery may change the risk profile of the third-party relationship over time. Accordingly, swap entities should consider periodically reassessing their selection of services to be performed by third-party service providers. Swap entities should stay abreast of these changes by monitoring the external environment and communicating with current and prospective service providers and other participants in industry.

B. Due Diligence in Selecting Third-Party Service Providers—Commission Regulation 23.603(e)(1)(ii)

After a swap entity has determined that a service is suitable for a third-party to perform, it should conduct due diligence on prospective third-party service providers. Due diligence provides swap entities with the information they need to assess and conclude, with a reasonable level of assurance, that the prospective third-party service provider is capable of effectively

providing the service as expected, adhering to the swap entity's policies, maintaining the swap entity's compliance with Commission regulations, and protecting covered information. Appropriate due diligence should also enable swap entities to evaluate whether they would be able to effectively monitor and manage the risks associated with a particular third-party relationship.

Due diligence may be conducted before or contemporaneously with contractual negotiations with prospective third-party service providers but should be concluded prior to executing any agreements. Swap entities should conduct due diligence even in situations where, for a particular service, there may only be one or a small number of providers with a dominant market share whose services are used by all or most of the swap entities' industry peers, and swap entities should not rely solely on those providers' reputations or prior experience with them. The depth and rigor of the due diligence should be proportionate to the nature of the third-party relationship, with the required heightened due diligence required for potential critical third-party service providers pursuant to Commission regulation 23.603(e)(2). Specifically, when conducting due diligence for a potential critical third-party servicer provider, swap entities should expand the type and sources of information they rely on, the rigor and scrutiny they apply in reviewing the information to identify potential risks, and the level of confidence in their assessment of the third-party service provider's ability to perform.

When establishing their due diligence protocols, swap entities should consider the full range of risks that reliance on the third-party service providers could introduce in light of the nature of the service they would be performing. Relevant considerations with respect to the potential third-party service provider include its:

- Financial condition, business experience and reputation, and business prospects, particularly the third-party service provider's experience providing services to financial institutions.
- Background, experience, and qualifications with respect to key personnel.
- Information and technology security practices, including incident reporting and incident management programs, and whether there are clearly documented processes for identifying and escalating incidents.
- Risk management practices, including governance, controls, testing, and issue management practices, as well as the results of any independent risk assessments.
- Regulatory environment, including the legal jurisdiction in which it is based and applicable regulatory or licensing requirements.
- History of disruptions to operations, including whether the third-party service provider has suffered incidents that would meet the standard for reporting to the Commission in Commission regulation 23.603(i).
- Violations of legal, compliance, or contractual obligations, including civil or criminal proceedings or administrative enforcement actions, including from self-regulatory organizations.
- Understanding of Commission regulatory requirements applicable to the swap entity.
- Use of and reliance on subcontractors, including the volume and types of subcontracted activities, and the third-party service provider's process for identifying, assessing, managing, and monitoring associated risks.
- Business continuity and contingency plans.
- Financial protections, such as insurance coverage against losses or liabilities from intentional or negligent acts or hazards involving physical destruction and data or documentation losses.

Swap entities should memorialize their assessment of these factors and identify how the review was heightened for critical third-party service providers. Swap entities should not rely solely on their prior knowledge of or experience with a potential third-party. Potential sources of due diligence information include:

- Audit reports, including pooled audit plans, and System and Organizational Controls (SOC) reports.
- Financial statements and projections and relevant accompanying information (*e.g.,* annual or quarterly reports, management commentary, auditors' opinions, and investor relations materials).
- Incident response plans, including the results of recent testing or assessments thereof.
- Business continuity and disaster recovery plans, as well as the result of recent testing or assessments thereof.
- Public filings.
- News reports, trade publications, and press releases.
- Reports from market intelligence providers.
- References from current or previous customers, or other parties which have had business relationships with the third-party service provider.
- Informal industry discussions.
- Information provided directly by the third-party service provider, such as internal performance metrics.

Obtaining and reviewing audit reports, including SOC reports, may be of particular value for conducting heightened due diligence of critical third-party service providers. In certain circumstances, swap entities may not be able to gather all the information necessary to reach an informed conclusion that a prospective third-party service provider is an adequate provider. Examples include instances where the third-party service provider is a new entrant into the market and little information exists; where information provided by the third-party service provider is insufficient or appears unreliable; or where the third-party service provider is reluctant to provide internal information. In such cases, the swap entity should identify and document the limitations of its due diligence, the attendant risks, and any available methods for mitigating them (*e.g.,* obtaining alternate information, implementing enhanced monitoring or controls, negotiating protective contractual provisions). Ultimately, such factors could weigh against the use of the potential third-party service provider, particularly a potential critical third-party service provider. Swap entities that proceed with the third-party service arrangements notwithstanding the limited due diligence should do so with caution, applying heightened scrutiny of the information they do receive, and consider the implementation of their own mitigating controls to compensate for the uncertainty.

C. Contractual Negotiations—Commission Regulation 23.603(e)(1)(iii)

After selecting a third-party service provider, swap entities should proceed to finalizing the agreement, typically through entering into an enforceable written contract. Written contracts are an important tool for clarifying the scope of services to be delivered, establishing standards or performance benchmarks, allocating risks and responsibilities, and facilitating resolution of disputes. They can also reduce the risks of non-performance and assist in monitoring the third-party service provider. Because of their importance, the Commission recommends that swap entities enter written agreements with third-party service providers before services are delivered, particularly with critical third-party service providers.

In negotiating a written contract, swap entities should seek to negotiate contractual provisions that would support their ability to mitigate, manage, and monitor the risks associated with the relationship, as identified through their initial pre-selection and due diligence activities. The contractual provisions should be informed by the nature of the service provided and be proportionate to the criticality of the services provided. In particular, swap entities should consider negotiating for the contract to include the following provisions:

- Timely notification to the swap entity of any incidents suffered by third-party service providers, or of significant disruptions to the operations of the third-party service provider.
- Timely notification to the swap entity of any material changes to the services provided.
- Required periodic, independent audits of the third-party service provider, the results of which would be shared with the swap entity.
- Restrictions on the third-party service provider's use of the swap entity's covered information, except as necessary to deliver the service or meet legal obligations.
- Security measures to protect the swap entity's covered information and covered technology to which the third-party service provider has access.
- Insurance, guarantees, indemnification, and limitations on liability.
- Dispute resolution procedures.
- Performance measures or benchmarks.
- Remediation of identified performance issues.
- Compliance with regulatory requirements, including reasonable assurances that the third-party service provider is willing and able to coordinate with the swap entity for the purpose of ensuring the swap entity complies with its legal and regulatory obligations.
- Use of subcontractors, including notification or approval procedures for their use, the extension of contractual rights of the

swap entity against the third-party service provider to its subcontractors, and contractual obligations for reporting on or oversight of subcontractors.

- Termination provisions, including rights to terminate following breaches of the third-party service provider's obligations, notice requirements, obligations of the third-party service provider to provide support for a successful transition, and the return or destruction of records or covered information, as further described in section E of this guidance.
- Information sharing necessary to facilitate other provisions of this proposed guidance (for example, reporting requirements to support ongoing monitoring, as discussed in section D of this guidance, or notice requirements for termination, as discussed in section E of this guidance).

These provisions focus on key risk factors generally associated with third-party service provider relationships. They are not exhaustive of all contractual provisions swap entities should seek to include in their written contracts, including ordinary commercial contract terms (*e.g.,* choice of law provisions) and terms that may relate only to specific services, among other provisions. While third-parties may initially offer a standard contract, a swap entity may seek to request modifications, additional contractual provisions, or addendums to satisfy its needs. Swap entities should work to tailor the level of detail and comprehensiveness of the contractual provisions based on the risk and complexity posed by the particular third-party relationship, contracts with critical third-party service providers likely being the most tailored.

In some circumstances, a swap entity may be at a bargaining power disadvantage, which prevents it from negotiating optimal contractual provisions. For example, a prospective third-party service provider may be the sole provider of a service or may have such dominant market share that it can offer its services on a ''take-it-or-leave-it'' basis. In such situations, the swap entity should work to understand any resulting limitations in the contract and attendant risks and consider whether it can achieve outcomes comparable to those provided by contractual protections through non-contractual means. Examples could include the swap entity implementing additional controls, augmenting its monitoring of the third-party service provider using public sources or market intelligence services, or purchasing insurance. The swap entity should make an assessment, however, of whether these alternatives would provide an adequate substitute for the unobtained contractual protections and document its assessment and mitigation plan, considering its risk appetite and risk tolerance limits. Where a third-party service provider is unable or unwilling to agree to provisions necessary for the swap entity to meet its obligations under Commission regulations, particularly a critical third-party service provider, the swap entity should consider finding an alternative third-party service provider.

D. Ongoing Monitoring—Commission Regulation 23.603(e)(1)(iv)

After a third-party service provider has initiated performance, swap entities should engage in ongoing monitoring. Ongoing monitoring is important to ensure the third-party service provider is properly carrying out its outsourced function and contractual obligations, as well as meeting quality or performance expectations. Effective monitoring can aid swap entities in the early identification of performance deficits, allowing for a quicker response that may then mitigate the impact.

Ongoing monitoring should occur throughout the duration of a third-party relationship, commensurate with the level of risk and complexity of the relationship and the activity performed by the third-party. Examples of possible monitoring activities include:

- Reviewing reports on performance and effectiveness of controls, including independent audit reports and SOC reports.
- Periodic on-site visits or meetings to discuss open issues and plans for changes to the relationship.
- Reviewing updated due diligence information.
- Documenting service-level agreements with the third-party service provider to establish performance targets.
- Establishing measures for the third-party service provider to identify, record, and remediate instances of failure to meet contractual obligations or unsatisfactory performance and to report such instances to the swap entity on a timely basis.
- Direct testing of the third-party service provider's control environment.

The frequency and depth of the swap entity's monitoring activities should reflect the nature of the third-party relationship, including heightened monitoring for critical third-party service providers, and may change over the duration of the relationship. The swap entity should dedicate sufficient staffing resources to its monitoring activities and be particularly alert to any circumstances that could signal that a third-party service provider may not be able to perform to an acceptable standard. A swap entity should be cognizant that certain events may trigger the need for it to take further action, including terminating its relationship with the third-party service provider. Such events could include cyberattacks, natural disasters, financial distress or insolvency, adverse or qualified audit opinions, or litigation or enforcement actions.

In addition to the continuous monitoring described above, swap entities should periodically review and reevaluate their relationships with third-party service providers holistically. Such reviews should be more thorough than routine monitoring and may involve additional personnel, such as in-house or outside auditors, compliance and risk functions, information technology staff, or by a central function or committee whose visibility into other third-party relationships could provide valuable context for the relationship at issue. Additionally, to the extent a swap entity uses enterprise risk management techniques, it should seek to integrate the information gathered from its ongoing monitoring with those practices. For example, to the extent that a swap entity maintains a standardized approach across risk types to escalate concerns or issues to senior management or governance bodies (*e.g.,* through the use of predefined criteria or escalation paths), the swap entity should consider using the same protocols for escalating concerns identified through its ongoing monitoring of third-party service providers. The ongoing monitoring approach itself may be subject to enterprise risk management practices, such as periodic self-assessment for effectiveness, independent testing, and quality assurance.

To the extent that monitoring activities reveal a change in their assessment of the risks associated with the third-party relationship, swap entities should adjust the frequency and types of monitoring they conduct, including reports, regular testing, and on-site visits. One example of information that may change the level of monitoring is a notification that a third-party service provider has suffered or may suffer from a severe adverse event that could trigger a material change in the systems or process used to carry out an outsourced function.

E. Terminating the Third-Party Relationship—Commission Regulation 23.603(e)(1)(v)

Swap entities should ensure that their third-party service provider relationship programs include advance preparation for the termination of the third-party relationship to ensure an orderly transition. Swap entities should prepare for both planned terminations (*i.e.,* where one or both parties elects to end the relationship pursuant to their contract) and unplanned terminations (*e.g.,* following a sudden withdrawal of the third-party service). The programs should include both the contractual provisions for terminating the service (termination provisions), and the swap entity's plan to facilitate an orderly transition of the function to an alternative provider or to bring it in-house (exit strategy). The goal of termination planning is to support an efficient transition to alternative arrangements for the provision of the service, regardless of the circumstances of the termination.

Termination provisions include all terms needed by the swap entity to wind down a third-party service relationship while ensuring that the swap entity can continue to serve its counterparties without interruption and to meet its regulatory compliance obligations. Because information, data, staff training, and knowledge may reside in the third-party service provider, there is an increased risk of disruption during the termination phase. When negotiating termination provisions, a swap entity should ensure that the terms negotiated support its exit strategy. For example, a swap entity should ensure that termination rights are accompanied by notice periods that leave the swap entity enough time to find an alternative provider (or to provide the service itself) to ensure an orderly transition.

Similarly, the swap entity should ensure that all customer data or other covered information in the third-party service provider's possession is promptly returned to

the swap entity or destroyed, as appropriate. The swap entity should also verify that the third-party's access to its systems and covered information ceases at termination. Swap entities should also consider negotiating more stringent terms for third-party service providers that breach their obligations under the agreement, other than for ''no-fault'' terminations. Such breaches may signal an inability of the third-party service provider to provide the services contracted for and thereby threaten the ability of the swap entity to serve its customers and meet its regulatory obligations. (*See* section C of this guidance for examples of termination provisions.)

Swap entities' exit strategies should include the steps needed to end the service provision with the third-party service provider and retain a new service provider or begin providing the service in-house. Although elements of an exit strategy may be reflected in termination provisions, not all elements of the exit strategy may be suitable for the contract. Examples include approvals, identification of alternative providers, description of the roles of staff in the swap entity, and other internal matters. These elements may be memorialized in a procedure or similar document, such as the third-party relationship program. The exit strategy should contain the internal steps to be taken to ensure notification to the third-party service provider, identification of the proposed new provider, or, if bringing the function in-house, the hiring and training of personnel, development of procedures, and launch of new technology, along with the time periods and responsible personnel for each.

Swap entities should be aware that, in practice, implementing an exit strategy may be complex and time-consuming and that the exercise of termination arrangements may be difficult. Swap entities should also be aware that some third parties possess expertise that is not readily available and plan accordingly. Swap entities should ensure that their plans are flexible enough to account for a range of plausible termination scenarios, including situations where the third-party service provider rapidly becomes unviable. Swap entities may need to design backup or interim procedures sufficient to meet regulatory requirements in such situations.

Issued in Washington, DC, on December 22, 2023, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

NOTE: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Operational Resilience Framework for Futures Commission Merchants, Swap Dealers, and Major Swap Participants—Voting Summary and Chairman's and Commissioners' Statements

Appendix 1—Voting Summary

On this matter, Chairman Behnam, 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 Commission's approval of the notice of proposed rulemaking to require futures commission merchants (FCMs), swap dealers (SDs), and major swap participants (MSPs) to establish an operational resilience framework (ORF).

The proposal recognizes that while FCMs, SDs, and MSPs (collectively, ''covered entities'') have generally withstood challenging market conditions since the Commission promulgated its risk management program requirements over a decade ago, the Commission must bolster that foundational framework to promote operational resilience in the face of increasingly sophisticated cyberattacks and heightened technological disruptions. A strong ORF is especially important as the financial sector increasingly relies on third-party service providers; the disruption of which can lead to major interruptions in—and potential corruption of—FCM and SD operations. In addition to market impacts, events like these may impact covered entities' ability to comply with the Commission's statutory and regulatory requirements.

FCMs' customers and SDs' counterparties expect covered entities to take a 360-degree approach to identify, monitor, manage, and assess risks for potential vulnerabilities. Similarly, the Commission must identify, monitor, manage, and assess any potential gaps in its own risk management requirements that could impede sound risk management practices, expose the U.S. financial system to unmanaged risk, or weaken customer protection. Operational disruptions that place a covered entity's financial resources at risk; disrupt the segregation and protection of customer funds; hinder recordkeeping; introduce uncertainty or delay; or otherwise inject operational risk into the derivatives market must be avoided to the extent possible to ensure customers, counterparties, and market participants have confidence in the integrity of our markets.

The operational resilience framework proposal is the product of many months of in-depth research regarding operational resilience standards and guidance issued by the prudential regulators, the U.S. Securities and Exchange Commission, the National Futures Association, the International Organization of Securities Commissions, the Financial Stability Board, and other subject matter experts to avoid those operational disruptions and failures. The proposal also reflects staff's own observations and lessons learned from its own oversight activities.

The proposal is a holistic, principles-based approach that is calibrated with certain minimum requirements. Specifically, the proposed rule would require covered entities to establish, document, implement, and maintain an ORF reasonably designed to identify, monitor, manage, and assess risks relating to three key risk areas: (1) information and technology security, (2) third-party relationships, and (3) emergencies and other significant disruptions. The ORF would also include requirements related to governance, training, testing, and recordkeeping.

The proposal would require covered entities to establish risk appetite and risk tolerance limits and would allow these registrants to rely on an information and technology security program, third-party relationship program, or business continuity and disaster recovery plan in which the covered entity participates with one or more affiliates and that is managed and approved at the enterprise level. Testing would need to be risk-based and include, at a minimum, daily or continuous vulnerability assessment and annual penetration testing, among others. The proposed rule would also require certain notifications to the Commission and customers or counterparties. The Commission is also proposing non-binding guidance that FCMs and SDs could consider to identify factors, actions, and strategies as they design their third-party relationship programs.

The Commission recognizes that covered entities subject to this proposal include many different business models. As a result, the proposal is tailored to accommodate firms that vary in size and complexity, including corporate structures in which operational resilience frameworks may be managed at an enterprise level and have governance arrangements with different reporting line structures. In the same vein, the proposed ORF standard would require covered entities to implement an ORF that is appropriate and proportionate to the nature, size, scope, complexity, and risk profile of the firm's business as an FCM or SD, following generally accepted standards and best practices.

I look forward to reading the public's comments on how the proposed operational resilience framework requirements and guidance can strengthen the operational resilience of FCMs, SDs, and MSPs as well as help protect their respective customers and counterparties in the derivatives markets. The 75-day comment period will begin upon the Commission's publication of the release on its website.

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.

Appendix 3—Statement of Commissioner Kristin N. Johnson

Cyberattacks are an ever-increasing threat. The rising cost, frequency, and severity of cyber threats represent one of the most critical issues facing city, state, and federal government authorities, businesses in each sector of our economy, educational and philanthropic institutions, and significant energy and transportation infrastructure, and national security resources.

Less than a month before the White House released its National Cybersecurity Strategy in March of this year, international media headlines reported a ransomware attack that demonstrated that ''big financial firms'' are among the most attractive targets of cyber threats.[1] Even for firms that have successfully

[1] James Rundle, Wall Street Journal, Cyberattack on ION Derivatives Unit Had Ripple Effects on Financial Markets (Feb. 10, 2023), *https://www.wsj.com/articles/cyberattack-on-ion-*

developed business continuity plans to identify, assess, or mitigate cyber threats, the networked or interconnected systems that comprise our operational market infrastructure may still render sophisticated, well-resourced firms vulnerable to the knock-on effects of cyberattacks leveled against critical third-party service providers.

The ransomware attack, carried out on a critical third-party service provider, ION Cleared Derivatives,[2] disrupted trade settlement and reconciliation in derivatives markets.

ION provides trading, clearing, analytics, treasury, and risk management services for capital markets and futures and derivatives markets. A significant number of market participants, including a notable number of futures commission merchants (FCMs), rely on ION for back-office trade processing and settlement of exchange-traded derivatives.

The cyber-incident that disrupted ION's operations caused a ripple effect across markets, halting deal matching, requiring affected parties to rely on manual (old school) trade processing, and causing delays in reconciliation and information sharing and reporting.

MRAC Leads on Cyber Reform Discussions

I sponsor the Market Risk Advisory Committee (MRAC). On March 8, 2023, the MRAC held a first-of-its-kind convening focused on the interconnectedness of our markets and the potential for interconnectedness and correlation to amplify contagion in the event of successful cyberattacks against critical infrastructure resources.[3] At the March MRAC meeting, Futures Industry Association (FIA) President Walt Lukken announced the creation of a Cyber Risk Taskforce, charged with ''recommend[ing] ways to improve the ability of the exchange-traded and cleared derivatives industry to withstand the disruptive impacts of a cyberattack.''[4]

The After Action Report issued by the FIA at the conclusion of the Taskforce's work outlines the challenges that both markets and regulators faced as a result of the ION cyber-incident. Trade reconciliation for affected firms continued to lag. For weeks following the ION cyberattack, the Commission continued to work to consistently publish the Commitments of Traders (COT) report on a timely basis because ''reporting firms continu[ed] to experience . . . issues submitting timely and accurate data to the CFTC.''[5] The COT report is designed to help the public understand the dynamics of the futures and options on futures markets.[6] The COT report is a reflection of the effectiveness of the Commission's surveillance of markets; it increases transparency and aids in price discovery. Thus, indirectly, the ION incident disrupted regulatory functions even though the cyberattack was not directed at the Commission nor any of the Commission's registrants.

As a consequence, it is imperative to begin to examine the scope of our regulations governing cyber-system safeguards not only for registered market participants, but for mission-critical third-party service providers. There is increasing reliance on third parties for the provision of important services, particularly, for example, services that facilitate digital connectivity and cloud-based services.

While outsourcing may allow companies to rely on outside expertise, reduce operating costs, and enhance operational infrastructure necessary for executing business activities, reliance, may, in some instances, create vulnerability and risks that must be identified, managed, and mitigated.

Operational Resilience Proposed Rulemaking

Today, the Market Participants Division (MPD) has introduced a robust and comprehensive proposed rulemaking that addresses: business continuity and disaster planning, cybersecurity, and assessment of the risk posed by reliance on third parties. I want to commend MPD, in particular Pamela Geraghty, Elise Bruntel, Fern Simmons, and Amanda Olear.

The Commission has the authority to direct swap entities (swap dealers and major swap participants) to establish this operational resilience framework under Section 4s(j)(2) and (7) of the Commodity Exchange Act (CEA), which require swap entities to establish risk management systems over their day-to-day business and their operational risk.[7] Likewise, the Commission may require operational resilience framework of FCMs (collectively with swap entities, ''covered entities'') under Section 8a(5) of the CEA,[8] which authorizes the Commission to promulgate regulations sufficient to accomplish the purposes of the CEA, including, for example, the need to maintain records of the operational risk of affiliates,[9] and to establish safeguards to protect the confidentiality of nonpublic personal information.[10]

The proposed rulemaking sets out three major pillars of its operational resilience framework: (1) information and technology security; (2) a third-party relationship program to manage risks presented by mission-critical third-party service providers; and (3) a business continuity and disaster recovery plan.[11]

Layered on top of the of the three pillars are *corporate governance* reforms that will dictate how each covered entity will incorporate the components of the plan into existing organizational structures. Each of the components of the operational resilience framework must be reviewed by senior leadership.[12] Covered entities must also establish a risk appetite—the level of risk acceptable on an ongoing basis—and risk tolerance limits—the level of excess risk the entity is willing to accept should a particular risk materialize [13]—and the entities will be required to escalate incidents that exceed their risk tolerance limit.[14] The rule also allows for flexibility for entities that function as a division or affiliate of a larger organization; such entities will be allowed to operate under the umbrella company's operational resilience plan so long as that plan meets the rule's requirements and considers the covered entity's particular risks.[15]

The *information and technology security program* requires the covered entities to comprehensively assess, on at least an annual basis, the types of threats the entity faces, the entity's internal and external vulnerabilities, the likely impact of those threats or the exploitation of those vulnerabilities, and appropriate priorities for addressing those risks.[16] With that background, covered entities must then implement controls reasonably designed to prevent, detect, and mitigate the identified risks, threats, and vulnerabilities.[17] The program then requires the covered entities to develop a written incident response plan, reasonably designed to detect incidents where risks to information and technology are realized, and then provide for how the entity will mitigate the impact of and recover from such an incident.[18]

The *third-party relationship plan* requires covered entities to understand the risks posed by all third-party service providers at each stage of the relationship: pre-selection, diligence, contract negotiation, ongoing monitoring, and termination.[19] The proposed rule then imposes a heightened level of required diligence and monitoring for ''critical'' third parties, defined as those parties for whom disruption of performance on their service contract would either ''significantly disrupt'' the covered entity's business operations, or ''significantly and adversely impact'' the entity's counterparties or customers.[20] Covered entities will also have to maintain an inventory of their critical and non-critical third-party service providers.[21] Finally, regardless of any

derivatives-unit-had-ripple-effects-on-financial-markets-11675979210.

[2] *See* Press Release, ION Markets, Cleared Derivatives Cyber Event (Jan. 31, 2023), *https://iongroup.com/press-release/markets/cleared-derivatives-cyber-event/.*

[3] Kristin N. Johnson, Commissioner, CFTC, Opening Statement Before the Market Risk Advisory Committee Meeting (Mar. 8, 2023), *https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement030823.*

[4] Futures Industry Association, FIA Taskforce on Cyber Risk, After Action Report and Findings, at 3 (Sept. 28, 2023), *https://www.fia.org/sites/default/files/2023-09/FIA_Taskforce%20on%20Cyber%20Risk_Recommendations_SEPT2023_Final2.pdf.*

[5] Press Release No. 8662–23, CFTC, CFTC Announces Postponement of Commitments of Traders Report (Feb. 16, 2023), *https://www.cftc.gov/PressRoom/PressReleases/8662-23.*

[6] CFTC, Commitments of Traders Reports Descriptions, *https://www.cftc.gov/MarketReports/CommitmentsofTraders/index.htm.*

[7] 7 U.S.C. 6s(j)(2), (7).

[8] 7 U.S.C. 12a(5).

[9] 7 U.S.C. 6f.

[10] 7 U.S.C. 7b–2; 15 U.S.C. 6801.

[11] Proposed §§ 1.13(b)(2), 23.603(b)(2).

[12] Proposed §§ 1.13(c)(1), 23.603(c)(1).

[13] Proposed §§ 1.13(c)(1), 23.603(c)(2).

[14] Proposed §§ 1.13(c)(3), 23.603(c)(3).

[15] Proposed §§ 1.13(c)(4), 23.603(c)(4).

[16] Proposed §§ 1.13(d)(1), 23.603(d)(1).

[17] Proposed §§ 1.13(d)(2), 23.603(d)(2).

[18] Proposed §§ 1.13(d)(3), 23.603(d)(3).

[19] Proposed §§ 1.13(e)(1), 23.603(e)(1).

[20] Proposed §§ 1.13(e)(2), 23.603(e)(2).

[21] Proposed §§ 1.13(e)(3), 23.603(e)(3).

decision to rely on a third-party service provider, each covered entity remains responsible for meeting its obligations under the CEA and Commission regulations.[22]

Each entity's *business continuity and disaster recovery plan* (BCDR plan) must ''outline[ ] the procedures to be followed in the event of an emergency or other disruption of its normal business activities.'' [23] The goal of a BCDR plan will be to enable covered entities to continue or resume business operations with minimal disruption to customers, counterparties, or the markets, and recover any affected data or information.[24] At minimum, the BCDR plan must define backup plans for covered information and data; identify essential technology, facilities, infrastructure, and personnel; identify potential disruptions to critical third-party service providers; and identify supervisory personnel responsible for carrying out the plan in the event of an emergency.[25] Covered entities must also maintain the plan at one or more off-site locations.[26]

To support the pillars of the operational resilience framework, the proposed rule also lays out training,[27] review, and testing requirements to ensure the framework evolves with newly generated risks. Covered entities must review their framework annually,[28] and engage in regular independent and documented testing, including penetration testing, vulnerability assessments, and testing of the incident response and BCDR plans.[29] Results of that testing must be reported to the entity's chief compliance officer and other relevant senior personnel.[30] Finally, the proposed rule lays out the instances in which the Commission must be notified of incidents and of activation of the BCDR plan.[31]

This proposed rulemaking is both expansive and thoroughly considered. It galvanizes much of the preexisting guidance on these subjects, recognizing that the vast majority of our market participants already have programs in place to address these risks and often already are subject to other regulators' rules and obligations, both domestically and internationally. The rule also recognizes the vast range in the size of the operations of our registered market participants—from some of the world's largest financial institutions acting as swap dealers to small, independent futures commissions merchants—and consequently builds flexibility into the proposed rule to allow businesses to tailor their operational resilience frameworks to the realities of their business needs.

The Need for Operational Resilience for Other Commission Registrants

This rule is necessarily limited in scope to FCMs and the swap entities overseen by MPD. The risks that this rule intends to mitigate, however, are not similarly siloed. Designated Contract Markets (DCM), Swap Execution Facilities (SEF), and Swap Data Repositories (SDR), overseen by the Division of Market Oversight, and Derivative Clearing Organizations (DCO), overseen by the Division of Clearing and Risk, similarly rely on mission-critical third-party service providers, similarly are targeted by cyberattacks, and similarly risk business disruption caused by unforeseen disaster scenarios.

Rulemakings completed in 2016 created system safeguard testing requirements for each of these entities, currently codified in Parts 37, 38, 39, and 49 of the CFR.[32] These rules include obligations for business continuity and disaster recovery and cybersecurity. Since 2016, however, the core issues surrounding the concept of operational resilience have shifted, most importantly around the ideas of mission-critical third parties. DCOs are increasingly contracting with third parties to manage and conduct aspects of their regulatory obligations, and just like with the covered entities subject to the rule at issue today, the onboarding of these new third parties also onboards new risks. The proposed rulemaking today considers the system safeguards provisions already on the books; [33] the Commission now needs to continue to press forward by considering this proposed rule for future parallel regulations, for DCOs in particular.

The pandemic underscored the importance of business operational resilience, namely the ability of our registrants to react to and withstand unforeseen disasters. The FIA conducted its annual Disaster Recovery Exercise this fall with the stated goal of probing participants' ability to ''conduct critical business functions'' in the wake of a large-scale disaster.[34] Last year's exercise saw participation from 19 major U.S. and international futures exchanges and clearinghouses, who indicated that this type of probing helped them to: ''Exercise their business continuance/disaster resilience plans[, i]dentify internal and external single points of failure . . . [, and t]ighten up and improve the documentation of their business continuity procedures.'' [35]

In 2021, the International Organization of Securities Commissions (IOSCO) initiated a consultation examining business continuity planning.[36] IOSCO's initial recommendations to member jurisdictions stated that all regulators should require firms to have in place ''mechanisms to help ensure the resiliency, reliability and integrity (including security) of critical systems'' including an appropriate ''Business Continuity Plan.'' [37]

Every industry advisory board and oversight group to have studied cybersecurity has reached the same conclusion: risks to financial institutions from cyberattacks continue to grow. The Financial Stability Oversight Council noted in its 2022 annual report that from 2015 to 2020 the finance and insurance industries were subject to the most cyberattacks of any industry, and that the current global geopolitical climate has only increased the need for vigilance against cyber threats.[38] In April 2020, the Financial Stability Board (FSB) issued a guide on cyber incident response that explained that ''[a] significant cyber incident, if not properly contained, could seriously disrupt the financial system, including critical financial infrastructure, leading to broader financial stability implications.'' [39] Similarly, in its 2019 Cyber Task Force report, IOSCO reiterated that cyber risk is one of the top threats to financial markets today given the ''economic costs of such events can be immense . . . and could potentially undermine the integrity of global financial markets.'' [40] IOSCO went further in their recommendations to the crypto industry earlier this year that ''[r]egulators should require a [crypto-asset service provider] to put in place sufficient measures to address cyber and system resiliency.'' [41]

Next Steps for Derivatives Clearing Organizations

At the MRAC meeting this past Monday, I announced a new workstream for the CCP Risk and Governance subcommittee that will focus on third-party risk for central clearing counterparties. Work will begin imminently, with the goal of presenting a proposal for

[22] *Id.*

[23] *See* 17 CFR 23.603(a).

[24] Proposed §§ 1.13(f)(1)(i)–(ii), 23.603(f)(1)(i)–(ii).

[25] Proposed §§ 1.13(f)(2), 23.603(f)(2).

[26] Proposed §§ 1.13(f)(3), 23.603(f)(3).

[27] Proposed §§ 1.13(g), 23.603(g).

[28] Proposed §§ 1.13(h)(1), 23.603(h)(1).

[29] Proposed §§ 1.13(h)(2)–(3), 23.603(h)(2)–(3).

[30] Proposed §§ 1.13(h)(5), 23.603(h)(5).

[31] Proposed §§ 1.13(i)–(j), 23.603(i)–(j).

[32] *See* Final Rule, System Safeguards Testing Requirements, 81 FR 64272 (Sept. 19, 2016) (covering DCMs, SEFs, and SDRs); Final Rule, System Safeguards Testing Requirements for Derivatives Clearing Organizations, 81 FR 64322, 64329 (Sept. 19, 2016) (''System Safeguards for DCOs'') (describing the CFTC's approach to system safeguards for DCOs as providing DCOs with ''flexibility to design systems and testing procedures based on the best practices that are most appropriate for that DCO's risks'').

[33] *C.f., e.g.,* System Safeguards for DCOs, 81 FR 64322–23; 17 CFR 39.18(b)(3) (requiring DCOs to follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems).

[34] Presentation, Futures Industry Association, Business Continuity Disaster Recovery Test, at 4 (Aug. 23, 2023), *https://www.fia.org/sites/default/files/2023-10/FIA_DR_Test_Briefing_2023_1010_0.pptx.*

[35] Summary Report, Futures Industry Association, 2022 FIA Industry-Wide Disaster Recovery Test, at 4 (Dec. 16, 2021), *https://www.fia.org/sites/default/files/2023-05/2022_DR_Test_Results_v2.pdf.*

[36] The Board of The International Organization of Securities Commissions, Thematic Review on Business Continuity Plans with respect to Trading Venues and Intermediaries (May 21, 2021), *https://www.iosco.org/library/pubdocs/pdf/IOSCOPD675.pdf.*

[37] *Id.* at 1.

[38] Financial Stability Oversight Council, 2002 Annual Report, at 37 (Dec. 16, 2022), *https://home.treasury.gov/system/files/261/FSOC2022AnnualReport.pdf.*

[39] The Financial Stability Board, Effective Practices for Cyber Incident Response and Recovery, at 1 (Oct. 19, 2020), *https://www.fsb.org/wp-content/uploads/P191020-1.pdf.*

[40] The Board of The International Organization of Securities Commissions, Cyber Task Force: Final Report, at 3 (June 19, 2019), *https://www.iosco.org/library/pubdocs/pdf/IOSCOPD633.pdf.*

[41] The Board of The International Organization of Securities Commissions, Policy Recommendations for Crypto and Digital Asset Markets Consultation Report, at 39 (Nov. 16, 2023), *https://www.iosco.org/library/pubdocs/pdf/IOSCOPD747.pdf.*

vote by the parent committee in the first quarter of 2024. DCOs already retain responsibility for meeting regulatory requirements when entering into contractual outsourcing arrangements;[42] the question now is how DCOs should be required to assess and monitor the risks associated with doing so.

Such a rule should in my view broadly track the rule for FCMs and swap entities proposed today, but deep consideration must be given to the ways in which the core DCO business differs. For example, DCOs already occupy a quasi-oversight role with respect to their clearing members; should a rule on third-party risk require DCOs to consider not only the risk posed by their own outsourcing contracts, but also require that DCOs consider their clearing members' third-party risks, perhaps as an aspect of a DCO's assessment of its counterparty risk? How else might the rule differ given the disparity between DCOs' and FCMs' relative frequency of interaction with end users? How might these rules coordinate with prudential regulators?

A cyberattack on a third party that affected FCMs last winter was already disruptive enough, but given their status as SIFMUs some DCOs are quite literally systemically important entities. DCOs serve irreplaceable market functions, and we need update their operational resilience requirements to take into account this new conception of third-party risk. I look forward to the new MRAC workstream diving into this critical issue, and of course to what Division of Clearing and Risk staff might bring forward in an eventual proposed rulemaking.

I once again commend the staff of MPD on their tremendous effort bringing forth this proposed rule, and look forward to hearing the thoughts of my fellow Commissioners.

Appendix 4—Statement of Commissioner Christy Goldsmith Romero

Today we have before us our first proposed cyber and operational resilience rule that would apply to swap dealers (including banks) and futures commission merchants (FCMs). I'm excited to see the proposed rule up for vote today. I support the rule and thank the staff for their more than one year of hard work. I also thank all who engaged with us in an extensive collaborative effort. I also thank Chairman Behnam for entrusting me to help with this rule.

This is a critical rule for the CFTC. FBI Director Christopher Wray recently said ''that today's cyber threats are more pervasive, hit a wider array of victims, and carry the potential for greater damage than ever before'' and we face ''some of our most complex, most severe, and most rapidly evolving threats.'' [1] This rule proposes to help advance our markets from a mentality of incident response to one of cyber resilience. This would further President Biden's White House National Cybersecurity Strategy and Executive Order on Improving the Nation's Cybersecurity.[2]

Cyber resilience is one of my top priorities, and a critical issue on which I am engaged. Over the last year, the CFTC staff and I have been engaged with the White House, other financial regulators, the Department of Commerce's National Institute of Standards and Technology (NIST), the National Futures Association (NFA), swap dealers, FCMs, trade groups like the Futures Industry Association, the International Swaps and Derivatives Association, and the Securities Industry and Financial Markets Association, public interest groups, and third-party vendors. I also sponsor the Technology Advisory Committee that covers cybersecurity, and has a dedicated Cybersecurity subcommittee stacked with well-regarded cybersecurity experts.[3]

It takes this type of collective public and private engagement to thwart cybercrime, stay ahead of the continuously changing threat, and protect our nation's critical infrastructure. Director Wray has spoken about how malicious cyber actors seeking to cause destruction are working to hit us somewhere that's going to hurt—U.S. critical infrastructure sectors.[4] According to the FBI, in 2021, there were ransomware incidents against 14 of the 16 U.S. critical infrastructure sectors.[5] That includes an attack on Colonial Pipeline that led to gas shortages, and an attack on the world's largest meat supplier JBS, that led to meat shortages and spiking prices.[6]

As Director Wray has said, ''ransomware gangs love to go after things we can't do without.'' [7] Our nation cannot do without the commercial agriculture, energy, metals, and financial markets, on which derivatives markets are based.

In June, I presented five key pillars of cyber resilience, pillars that are contained in the proposed rule: [8]

1. A proportionate and appropriate approach;
2. Following generally accepted standards and best practices;
3. Elevating responsibility through governance;
4. Building resilience to third-party risk; and
5. Leveraging the important work already done in this space, including by prudential regulators and NFA.

Taking a Proportionate and Appropriate Approach

There is no one-size fits all approach. The proposed rule would require swap dealers and FCMs to ensure that their operational resilience programs are appropriate and proportionate to the nature and risk profile of their business. This follows the White House National Cybersecurity Strategy.[9] Our swap dealers include Globally Systemically Important Banks (GSIBs). Additionally, some of our swap dealers and FCMs are involved in U.S. critical infrastructure such as in the energy or agricultural sectors, or in supply chains.

FBI Director Wray testified before Congress this month that one of the most worrisome facets of state-sponsored adversaries is their focus on compromising U.S. critical infrastructure, especially during a crisis, and that there is often no bright line that separates where nation state activity ends and cybercriminal activity begins.[10] He testified about the disruptive impact of a supply chain attack in the SolarWinds attack, conducted by the Russian Foreign Intelligence Service.[11] This summer, Director Wray said that the FBI is seeing the effects of Russia's invasion of Ukraine here at home, as the FBI has seen Russia conducting reconnaissance on the U.S. energy sector.[12]

Director Wray also has said that, ''China operates on a scale Russia doesn't come close to. They've got a bigger hacking program than all other major nations combined. They've stolen more American personal and corporate data than all nations combined.'' [13] Director Wray has said that ''the Chinese government has hacked more than a dozen U.S. oil and gas pipeline operators, not just stealing their

[42] 17 CFR 39.18(d) (2022) (providing that registered entities such as DCOs retain responsibility for meeting relevant regulatory requirements when entering into contractual outsourcing arrangements).

[1] *See* FBI, *Director Wray's Remarks at the Mandiant/mWISE 2023 Cybersecurity Conference* (Sept. 18, 2023).

[2] The E.O.'s policy statement of policy is ''Protecting our Nation from malicious cyber actors requires the Federal Government to partner with the private sector. The private sector must adapt to the continuously changing threat environment, ensure its products are built and operate securely, and partner with the Federal Government to foster a more secure cyberspace. In the end, the trust we place in our digital infrastructure should be proportional to how trustworthy and transparent that infrastructure is, and to the consequences we will incur if that trust is misplaced.'' The White House, Executive Order on Improving the Nation's Cybersecurity (May 12, 2021).

[3] *See* CFTC, *Commissioner Goldsmith Romero Announces Technology Advisory Committee Subcommittee Co-Chairs and Members* (July 14, 2023); *see also* CFTC Technology Advisory Committee July 18 Meeting (July 18, 2023); CFTC Technology Advisory Committee March 22 Meeting (March 22, 2023).

[4] *See* FBI, *Director's Remarks to the Boston Conference on Cyber Security 2022* (June 1, 2022).

[5] See FBI, FBI Partnering with the Private Sector to Counter the Cyber Threat, Remarks at the Detroit Economic Club (Mar. 22, 2022).

[6] *See Id.* (discussing how an attack led to Colonial shutting down pipeline operations and a panic among people in the Southeast that led to a run on gas and how an attack on JBS resulted in a complete stoppage of meat production, leading to spiking prices and less availability of meat).

[7] See FBI, Director's Remarks to the Boston Conference on Cyber Security 2022 (June 1, 2022).

[8] Commissioner Christy Goldsmith Romero, *Advancing from Incident Response to Cyber Resilience,* (June 20, 2023).

[9] *See* The White House, *National Cybersecurity Strategy* (March 2023) (recommending that organizations ''demonstrate a principles-based approach that is sufficiently nimble to adapt to meet the challenges of the ever-evolving technological threat landscape and to fit the unique business and risk profile of each individual covered entity.''

[10] *See* FBI, Statement of Christopher A. Wray Director Federal Bureau of Investigation Before the Committee on the Judiciary United States Senate (Dec. 5, 2023).

[11] See Id.

[12] *See* FBI, *Director Wray's Remarks at the FBI Atlanta Cyber Threat Summit* (July 26, 2023).

[13] *See* FBI, Director's Remarks to the Boston Conference on Cyber Security 2022 (June 1, 2022).

information, but holding them, and all of us, at risk.'' [14] Swap dealers and FCMs involved in critical infrastructure sectors will need to build resilience for these cyber threats.

The proposal also recognizes that cyber resilience requires continuous attention. What is appropriate or proportionate may change with the changing threat vector. It may also change when a swap dealer or FCM enters a new line of business, onboards a new vendor, or takes other action that can carry cyber risk.

Following Generally Accepted Standards and Practices

The proposal, like the CFTC's rules for exchanges and clearinghouses, would require swap dealers and FCMs to follow generally accepted standards and industry best practices, like NIST or ISO (for international companies). The NIST Cybersecurity Framework creates a clear set of cybersecurity expectations that are risk-and outcome-based rather than prescriptive, and adaptable to the size and types of businesses.[15] These standards are regularly updated to reflect the evolving technology and threat landscape. The proposed rule also requires at least annual assessment, testing and updates to the operational resilience framework.

Elevating Responsibility Through Governance

The vision of the Biden Administration's National Cybersecurity Strategy is to rebalance the responsibility to defend cyberspace by shifting the burden for cybersecurity away from individuals and small businesses, and onto the organizations that are most capable and best positioned to reduce risks.[16] This strategy gets away from vulnerability caused by one person in an organization clicking on the wrong thing that leads to total disruption. The banks and commodity firms this rule would apply to are capable and best positioned to reduce cyber risk and cybercrime losses.

Building cyber resilience requires elevating responsibility to those who make strategic decisions about the business. The stakes for businesses are high. There is potential legal risk, reputational risk, risk to national security, as well as financial risk. In 2022, the FBI reported $10.3 billion in cybercrime losses, shattering the record from the prior year.[17] Tone at the top, including the C-suite's active participation in cyber resilience programs as well as making cyber resilience a top priority, can determine whether an organization will successfully be cyber resilient and operationally resilient.

The proposed rule would require operational resilience plans to be approved annually by a senior leader and for incidents to be escalated promptly. It also would require senior leaders to set and approve the firm's risk appetite and risk tolerance limit. Leaders should make strategic decisions about the risk they are willing to take on, as well as the metrics they will monitor. I am interested in hearing if the proposal's definitions of these terms set a clear expectation and align with generally accepted standards.

Building Resilience to Third-Party Risk

Swap dealers and FCMs routinely rely upon third party (as well as fourth party) service providers to access new technologies and expertise, and for efficiencies in business functions. The rule requires building resilience to third party risk, an issue brought sharply into focus with this year's cyber-attack on third-party vendor ION Markets.

Because third parties create points of entry that need to be secured from cyber criminals, the banking regulators released updated interagency guidance on third party risk management that would apply to many of the swap dealers subject to the proposed rule.[18] The staff and I met with the Federal Reserve, Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency about their guidance and their efforts to promote cyber resilience. Like that interagency guidance, the proposed rule includes an inventory of all third-party service providers, assessments of risk throughout the lifecycle of the third-party relationship, the identification of critical third-parties, and subjects those critical third parties to heightened due diligence and monitoring.

The proposed definition of who is a critical third-party service provider takes a flexible approach, asking entities to consider the impact of a disruption.[19] At his TAC presentation, Todd Conklin, Deputy Assistant Secretary of Treasury's Office of Cybersecurity and Critical Infrastructure Protection (OCCIP) and TAC member discussed how ION Markets received less scrutiny because it was not treated as a critical third-party vendor by most firms.[20] I look forward to comment.

The CFTC also proposes separate guidance on managing third-party risks. I am interested in commenters' views on this guidance, and whether we have it right for harmonization.

Leveraging the Important Work of Others, Including Prudential Regulators and the NFA

The White House's 2023 Cybersecurity Strategy recommends organizations ''harmonize where sensible and appropriate to achieve better outcomes.'' [21] The proposal recognizes that many of our regulated entities are part of a larger enterprise, with cyber and operational resilience programs managed at the enterprise level, and can use those programs under this rule. I am interested in commenters' views on whether we have achieved appropriate harmonization or whether we need greater harmonization with bank regulators' rules and guidance and NFA guidance.[22]

Stronger Together

We are stronger together. The CFTC is part of coordinated government efforts to learn about and disseminate information about emerging cyber threats. We want to work with our swap dealers and FCMs to help strengthen their operational resilience, especially prior to any disruptive event.

Should a disruptive event occur, resilience requires rapid collaboration among the CFTC and all those who are potentially affected to contain any potential damage and to keep critical market functions running. The proposed rule includes specific requirements for notifying the CFTC of an incident as soon as possible, but no later than 24 hours after detection. I support immediate notification to the CFTC because if we know, we can work with regulated entities and markets to assess and minimize damage, trigger appropriate regulatory and law enforcement action, help in recovery, and protect customers. I note that this time frame and reporting standards differs from other regulators, and look forward to comment.

A two-way flow of information can play a significant role in the ability to build resilience, which means the ability to recover quickly after an attack. According to Deputy Assistant Secretary Conklin, collaboration between the government and industry helped mitigate the impact of the ION Markets attack.[23] The proposal would also require notification to customers and counterparties as soon as possible of attacks that affect them. Early notice helps minimize the impact of an

[14] See FBI, FBI Partnering with the Private Sector to Counter the Cyber Threat, Remarks at the Detroit Economic Club (Mar. 22, 2022).

[15] *See* Presentation of Kevin Stine, Chief of the Applied Security Division at NIST Information Technology Laboratory, ''Managing Cybersecurity Risks,'' CFTC Technology Advisory Committee Meeting (March 22, 2023).

[16] *See* The White House, *National Cybersecurity Strategy* (March 2023).

[17] *FBI,* Internet Crime Report 2022 (March 22, 2023).

[18] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency, *Interagency Guidance on Third Party Relationships: Risk Management* (Jun. 6, 2023).

[19] I heard from many banks and brokers that identifying who is a critical third-party service provider is an issue they regularly grapple with, and that it often comes down to specific facts and circumstances, and not just the products and service they provide.

[20] *See* Presentation of Todd Conklin, Deputy Assistant Secretary of Treasury's Office of Cybersecurity and Critical Infrastructure Protection (OCCIP), ''The Cyber Threat Landscape for Financial Markets: Lessons Learned from ION Markets, Cloud Use in Financial Services, and Beyond,'' CFTC Technology Advisory Committee Meeting (March 22, 2023) (''many institutions didn't even classify [ION Markets] necessarily as a 'critical' third-party vendor. So many firms who onboarded ION didn't use the highest-level scrutiny that they use for their most critical third-party vendors.'').

[21] *See* The White House, *National Cybersecurity Strategy,* (March 2023).

[22] These requirements and guidance include the prudential regulator's Sound Practices to Strengthen Operational Resilience paper, the Interagency Guidelines Establishing Standards for Safeguard Customer Information, and the recently released Interagency Guidance on Third-Party Relationships: Risk Management, as well as NFA guidance on information security, third-party service provider risk management, and notification of regulators and business continuity and disaster recovery.

[23] *See* Presentation of Todd Conklin, Deputy Assistant Secretary of Treasury's Office of Cybersecurity and Critical Infrastructure Protection (OCCIP), ''The Cyber Threat Landscape for Financial Markets: Lessons Learned from ION Markets, Cloud Use in Financial Services, and Beyond,'' CFTC Technology Advisory Committee Meeting (Mar. 22, 2023).

attack by allowing them to secure their personal data, monitor affected accounts, and make alternative arrangements for accessing critical funds or markets.

If we can all work together, we can harden our defenses, thwart cyber criminals, and protect critical U.S. infrastructure and national security. Together, we can build a safer and more resilient cyberspace.

Appendix 5—Statement of Commissioner Caroline D. Pham

I support the Notice of Proposed Rulemaking on Operational Resilience Framework for Futures Commission Merchants, Swap Dealers, and Major Swap Participants (Operational Resilience Proposal)[1] because I believe this approach is largely consistent with international standards for operational resilience, as well as U.S. prudential regulations and non-U.S. regulations, which have been implemented for several years now. I thank the staff of the Market Participants Division (MPD), especially Pamela Geraghty, Elise Bruntel, and Amanda Olear, as well as Chairman Behnam and Commissioner Goldsmith Romero, for working with me over the past year to address my concerns.

Background

My discussions with MPD staff, formerly the Division of Swap Dealer and Intermediary Oversight (DSIO), in fact date back to 2016 when I was in the private sector. MPD staff have been considering many of the elements of an operational resilience framework for years, including operational risk and cybersecurity risk. I appreciate the staff's focus on all of these important issues that contribute to ensuring that our registrants have robust risk management and compliance programs, and that the CFTC is doing our job to uphold financial stability and protect against systemic risk.

I would like to mention my background and experience, as well as familiarity, with the subject areas covered by the Operational Resilience Proposal to provide context for my efforts to support the development of this Proposal and address my concerns that the CFTC's approach should not be overly prescriptive and generally takes a principles-based approach in recognition of the extensive years-long global implementation of operational resilience requirements by U.S. and non-U.S. regulators and banking organizations.

In my previous roles at a global systemically important bank (GSIB), I have been involved with operational resilience since 2019, including the oversight and coordination of global regulatory advocacy with the Financial Stability Board (FSB) and regulatory authorities such as the U.S. prudential regulators,[2] the Bank of England, and European Union (EU) authorities. I also was on the enterprise-wide operational resilience program steering committee, and I have implemented enterprise-wide programs across a global financial institution across all regions and both institutional or wholesale and consumer businesses.

Among the specific elements encompassed in the Operational Resilience Proposal, I have enhanced the swap dealer and futures commission merchant (FCM) risk management programs. I have drafted an enterprise-wide risk appetite statement. I have implemented the National Futures Association's (NFA) update to its information systems security programs requirements, which addresses cybersecurity risk. I have participated in tabletop exercises, drills, and simulations of responses to cyber attacks. I was the lead from the Compliance department on the third-party risk management program for cross-asset activities or other programmatic aspects across the global markets business. I have enhanced the business continuity and disaster recovery (BCDR) swap dealer policies and procedures and integration with the enterprise-wide continuity of business program. I have delivered training for, respectively, 9,000 and 17,000 employees across nearly 100 countries and multiple languages. I have had a compliance monitoring team that reported directly to me. I have advised on the design and implementation of the enterprise-wide Volcker Rule independent testing program. I was part of global regulatory notification protocols for cybersecurity or other incidents. And also, of course, I have been subject to regulatory examinations on each one of these areas. This practical experience has informed my engagement on this significant rulemaking initiative.

The CFTC's Approach to Operational Resilience Must Be Consistent With International Standards and Prudential Regulations

I am pleased that the CFTC is seeking an approach that is consistent with international standards and best practices for regulators in addressing operational resilience. I will reiterate my previous remarks on the many years of work by policymakers such as the FSB, the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO), and other regulatory authorities around the world to implement laws, regulations, and standards for operational resilience. Operational resilience, as noted by U.S. prudential regulators in 2020, encompasses governance, operational risk management, business continuity management, third-party risk management, scenario analysis, secure and resilient information system management, surveillance and reporting, and cyber risk management. Regulated entities, including the vast majority of our swap dealers and FCMs that are part of banking organizations, have already implemented comprehensive enterprise-wide operational resilience programs.[3]

Issuing this Proposal can be beneficial to initiate an open process to request information and stimulate dialogue with the public. That is why, although there has been some hesitation or trepidation around what the Commission might do since we are coming onto the tail end of operational resilience implementation globally, I do think it is important that we are taking this step today, because it is critical that the public has the opportunity to provide input on any amendment or expansion of our existing programmatic requirements that is informed by actual experience from risk management and compliance officers, other control functions, and practitioners who have implemented and complied with operational resilience requirements pursuant to other regulations.

Further, as I have noted previously, because the CFTC's rules are often only one part of a much broader risk governance framework for financial institutions, the Commission must ensure that it has the full picture before coming to conclusions to ensure that our rules not only address any potential regulatory gaps or changes in risk profiles, but also to avoid issuing rules that are conflicting, duplicative, or unworkable with other regulatory regimes.[4]

For example, when I last checked earlier this year, the CFTC currently has 106 provisionally registered swap dealers. Of these 106 entities, both U.S. and non-U.S., all but a handful are also registered with and supervised by another agency or authority, such as a prudential, functional, or market regulator. Most of these swap dealers are subject to three or more regulatory regimes.[5]

It is imperative that the Commission and the staff consider how our rules work in practice together with the rules of other regulators, whether foreign or domestic. This key point is easily apparent in looking at the CFTC's substituted compliance regime for non-U.S. swap dealers, where the Commission has expressly found that non-U.S. swap dealers in certain jurisdictions are subject to comparable and comprehensive regulation, and therefore, our rules permit such non-U.S. swap dealers to, for example, substitute compliance with their home jurisdiction risk management regulations to satisfy our risk management program rules under CFTC Regulation 23.600.[6]

Specific Areas for Public Comment

As a preliminary matter, regarding discussion of the CFTC's approach to system safeguards requirements for designated contract markets (DCMs) and derivatives clearing organizations (DCOs) and its impact on the development of today's Operational Resilience Proposal, I note that swap dealers

[1] Because there are no registered major swap participants, as a practical matter, this statement will refer to swap dealers and futures commission merchants (FCMs).

[2] U.S. prudential regulators refers to the Board of Governors of the Federal Reserve System (Fed), the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC).

[3] Opening Statement of Commissioner Caroline D. Pham before the Technology Advisory Committee, U.S. Commodity Futures Trading Commission (Jul. 18, 2023), *https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement071823.*

[4] Statement of Commissioner Caroline D. Pham on Risk Management Program for Swap Dealers and Futures Commission Merchants Advance Notice of Proposed Rulemaking, U.S. Commodity Futures Trading Commission (Jun. 1, 2023), *https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement060123.*

[5] Id.

[6] Id.

and FCMs are very different from exchanges and clearinghouses. The CFTC should not overly rely upon its approach to the system safeguards rulesets because it is akin to the difference between, for example, the Securities and Exchange Commission's (SEC) Regulation SCI and the U.S. prudential regulators' Heightened Standards for Risk Governance. I believe that the staff has tried to balance these considerations, and I welcome public comment on this approach.

Definitions

Words matter, and it is very important for the Commission to be precise in the words that we use for defined terms. I encourage all commenters to review the Proposal's definitions and advise whether the definitions are appropriate or need to be revised.

Third-Party Relationship Program Guidance

The Operational Resilience Proposal includes an appendix to the rule text with more prescriptive guidance on third-party relationships (third-party risk management). This is unusual because I do not believe that the CFTC has this level of prescriptiveness for any other category of risk, such as credit risk. I question whether this heralds a change to the CFTC's approach to setting forth risk management requirements, and why would the Commission issue prescriptive guidance for third-party risk, but not other risks such as operational risk or market risk.

I also question the approach of issuing Commission guidance, which would have to undergo notice-and-comment rulemaking and that could take a year or two to update, instead of issuing staff guidance, which could be updated more flexibly. I believe that any prescriptive guidance would be more appropriate as staff guidance, not Commission guidance, because staff guidance can be kept up-to-date more easily to address changes in best practices or to adapt to emerging risks. This is similar to how, for example, U.S. prudential regulators update their bank examiners handbook or circulars.

I am interested in public comment on the CFTC's requirements for third-party risk management, and whether it should be issued as Commission guidance or staff guidance.

Risk Appetite

The Operational Resilience Proposal refers to risk appetite, which is a new concept to CFTC regulations. I am interested in whether commenters believe risk appetite is workable under the CFTC's regulatory framework, which is focused on enforcement rather than ongoing supervision. Indeed, I have repeatedly noted that the CFTC lacks a swap dealer examination program. As a consequence, non-material operational or technical issues are the subject of enforcement actions, rather than addressed more appropriately through supervisory findings and exam reports like every other regulatory authority in the world. This makes the CFTC an outlier amongst U.S. and non-U.S. regulators, and therefore prudential concepts like risk appetite may not be workable.

Risk Tolerance Limits

Risk tolerance limits are a requirement under the CFTC's risk management program (RMP) rules for swap dealers and FCMs. The Operational Resilience Proposal also requires risk tolerance limits, but sets forth a different definition and does not refer to the risk tolerance limits under the RMP rules. I am interested in public comment on whether the two differing requirements may cause confusion or can be implemented without any issues.

Annual Attestation

The Operational Resilience Proposal requires an annual attestation by the senior officer, an oversight body, or a senior-level official of a swap dealer or FCM that relies on a consolidated operational resilience program. Such attestation is to the effect that the consolidated program meets CFTC requirements and reflects the risk appetite and risk tolerance limits appropriate to the swap dealer or FCM. I encourage commenters to discuss the attestation requirement and suggest appropriate attestation language.

Substituted Compliance

Under the Operational Resilience Proposal, substituted compliance would be available for non-U.S. swap dealers subject to a comparability determination issued by the Commission. I appreciate the recognition in the Proposal of the importance of a home-host regulator approach to maintaining regulatory cohesion and addressing systemic risk and financial stability. I am interested in whether commenters believe the Proposal presents any cross-border issues in implementation.

Conclusion

I believe in continuous improvement for not only our market participants, but also for the Commission and its regulations, and that is why I would like to thank the MPD staff again for being proactive in thinking about these issues. I want to particularly recognize the leadership of Commissioner Goldsmith Romero in first highlighting these risks and exploring ways to address them through the work of the CFTC's Technology Advisory Committee, which she sponsors.

As I have stated before, the benefit of the CFTC's principles-based regulatory framework is that it can quickly anticipate and adapt to changes in risk profiles or the operating environment. That is why I believe our rules must be broad and flexible enough to be forward-looking and evergreen, because it is simply not possible to prescribe every last requirement for the unknown future. Consistent with international standards, I have discussed the importance of utilizing existing risk governance frameworks and risk management disciplines to identify, measure, monitor, and control emerging risks and new technologies. Swap dealers and FCMs must be vigilant and address new and emerging risks through various risk stripes as appropriate, whether from changing market conditions, technological developments, geopolitical concerns, or any other event, and maintain operational resilience.

With that, I welcome the input from the public comments to inform the Commission and the staff regarding the application of the Operational Resilience Proposal to swap dealers and FCMs, especially those entities that are part of a banking organization and have already implemented operational resilience requirements pursuant to U.S. or non-U.S. regulations.

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Part IV

Department of Agriculture

Office of Procurement and Property Management
Rural Business-Cooperative Service

7 CFR Parts 3201, 3202, and 4270
Biobased Markets Program; Proposed Rule

DEPARTMENT OF AGRICULTURE

Office of Procurement and Property Management

7 CFR Parts 3201 and 3202

Rural Business-Cooperative Service

7 CFR Part 4270

[Docket No. RBS–22–BUSINESS–0004]

RIN 0570–AB05

Biobased Markets Program

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed rule; request for comments.

SUMMARY: The Rural Business-Cooperative Service (RBCS or the Agency), an agency of the Rural Development (RD) mission area within the U.S. Department of Agriculture (USDA), is issuing a proposed rule with request for comments to adopt changes from the Agriculture Improvement Act of 2018 (2018 Farm Bill). These proposed changes include the merger of the Guidelines for Designating Biobased Products for Federal Procurement and the Voluntary Labeling Program for Biobased Products into one streamlined regulation, Biobased Markets (BioPreferred) Program. The plain language summary of the proposal is available on *Regulations.gov* in the docket for rulemaking.

DATES: Comments are due on or before March 25, 2024.

ADDRESSES: Information regarding the BioPreferred® Program is available at *https://www.biopreferred.gov.*

Comments may be submitted on this rulemaking using the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.

All submissions must include the Agency name, Docket Number and Regulatory Information Number (RIN). Also, submissions should be identified as ''Redesignation of the BioPreferred Program.''

FOR FURTHER INFORMATION CONTACT: Vernell Thompson, Procurement Analyst, USDA RD, 1400 Independence Avenue SW, Washington, DC 20250–1522, STOP 3250; email: *vernell.thompson@usda.gov;* phone (202) 720–4145.

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

I. Authority

The USDA Biobased Markets Program, called the BioPreferred® Program, is established under the authority of section 9002 of the Farm Security and Rural Investment Act (FSRIA) of 2002 (Pub. L. 107–171) (the 2002 Farm Bill), as amended by the Food, Conservation, and Energy Act of 2008 (Pub. L. 10–246) (the 2008 Farm Bill), the Agricultural Act of 2014 (Pub. L. 113–79) (the 2014 Farm Bill), and the Agriculture Improvement Act of 2018 (Pub. L. 115–334) (the 2018 Farm Bill). Section 9002 of the 2002 Farm Bill, as amended by the 2008, 2014, and 2018 Farm Bills, is referred to in this proposed rule as section 9002 of FSRIA.

II. Background

The Agency is proposing to implement the amendments made to section 9002 of FSRIA by the 2018 Farm Bill by combining the Guidelines for Designating Biobased Products for Federal Procurement (7 CFR part 3201) and the Voluntary Labeling Program for Biobased Products (7 CFR part 3202), the legacy rules of the BioPreferred Program, into one regulation, 7 CFR part 4270, and proposing to make amendments as outlined in section IV of this proposed rule.

The legacy rules established the two core initiatives of the BioPreferred Program. part 3201 detailed the rules for the procurement of Biobased Products by Federal agencies and their contractors, established the process for designating categories of Biobased Products for preferred Federal procurement, maintained the list of Designated Product Categories, and outlined the requirements for Biobased Products to qualify for preferred Federal procurement. Part 3202 established the rules for manufacturers and vendors of Biobased Products to become certified to use the USDA Certified Biobased Product Label (Label) and provided rules for maintaining certification and utilizing the Label. With this rulemaking, the Agency is proposing to merge the legacy rules into one streamlined regulation which will facilitate the objective of the BioPreferred Program, which is to encourage the increased use of Biobased Products in all market sectors. Additionally, the Agency believes these changes will benefit BioPreferred Program Stakeholders by implementing process improvements and tying the two initiatives more closely together, making it easier to qualify for both initiatives.

III. Organization of the Rule

To help the public locate existing regulatory provisions found in the new rule, the Agency provides the following table showing sections under the new BioPreferred Program regulations and where the information and requirements were previously located in the legacy regulations.

TABLE 1—BIOPREFERRED PROGRAM CFR SECTIONS

New biopreferred program regulation section number and title	Current (legacy) regulations section numbers and titles
§ 4270.1 Purpose and Scope.	§ 3201.1 Purpose and scope. § 3202.1 Purpose and scope.
§ 4270.2 Definitions	§ 3201.2 Definitions. § 3202.2 Definitions.
§ 4270.3 Applicability	§ 3201.3 Applicability to Federal procurements. § 3202.3 Applicability.

TABLE 1—BIOPREFERRED PROGRAM CFR SECTIONS—Continued

New biopreferred program regulation section number and title	Current (legacy) regulations section numbers and titles
§ 4270.4 Criteria for Eligibility.	§ 3202.4 Criteria for product eligibility to use the certification mark. § 3201.5 Category designation.
§ 4270.5 Procurement programs.	§ 3201.4 Procurement programs.
§ 4270.6 Category designation.	§ 3201.5 Category designation. § 3202.5 Initial approval process.
§ 4270.7 Determining Biobased Content.	§ 3201.7 Determining biobased content.
§ 4270.8 [Reserved].	
§ 4270.9 Initial Approval Process.	§ 3202.5 Initial approval process. § 3202.8 Violations.
§ 4270.10 [Reserved].	
§ 4270.11 Requirements Associated with Promotional Certification Materials.	§ 3202.7 Requirements associated with the certification mark.
§ 4270.12 Violations of Program Requirements.	§ 3202.8 Violations.
§ 4270.13 Appeal Process.	§ 3202.6 Appeal processes.
§ 4270.14 Reporting and Recordkeeping.	§ 3201.6 Providing product information to Federal agencies. § 3201.8 Determining price, environmental and health benefits, and performance. § 3202.9 Recordkeeping requirements.
§ 4270.15 Oversight and Monitoring.	§ 3202.10 Oversight and monitoring.
§ 4270.99 OMB Control Number.	

IV. Summary of Proposed Changes

A. Section 4270.1 Purpose and Scope

The purpose of this proposed rule is to establish procedures and guidelines for the implementation of the BioPreferred Program by combining the purpose and scope of §§ 3201.1 and 3202.1 into one.

B. Section 4270.2 Definitions

The Agency is combining the definitions sections of §§ 3201.2 and 3202.2 into one and amending as follows:

a. *Merged Definitions Only.* The following definitions were merged from §§ 3201.2 and 3202.2 without revisions or substantial revisions: ASTM International (ASTM), Biobased Content, Biodegradability, Biological Products, Complex Assembly, Days, Federal agency, Forest Product, formulated product, FSRIA, Ingredient, ISO, ISO 9001 Conformant, Other Entity, Renewable Chemical, Secretary, and USDA. The following terms do not occur anywhere throughout the proposed rule other than in specific other definitions (term indicated in parenthesis): Forest Product (Biobased Product), Renewable Chemical (Biobased Product), and Biological Products (Biobased Product and Intermediate Ingredient or Feedstock). Defining these terms associated with these specific definitions is important to the Agency to provide context and clarity.

b. *Removal of Existing Definitions.* The Agency is removing the definitions for BEES, Biobased components, Designated Intermediate Ingredient or Feedstock category, Diluent, Engineered wood products, EPA-designated recovered content product, FCEA, Filler, Forest thinnings, Functional unit, Manufacturer, Neat product, Program manager, Relative price, Small and emerging private business enterprise, Sustainably managed forests, and Vendor because these terms are not referenced in the combined rule.

c. *Revising Existing Definitions.* The Agency is revising the following definitions:

1. *Agricultural materials.* The Agency is making minor changes to clarify this definition by including a complete list of exclusions commensurate with section 9002 of FSRIA. The Agency believes that by adding this clarification, interested parties will be able to find these exclusions more easily. This term does not occur anywhere throughout the proposed rule other than in the specific definitions for Biobased Product and Intermediate Ingredient or Feedstock. The Agency believes it is important to define this as a standalone term to provide context and clarity.

2. *Applicable minimum biobased content.* The Agency is amending this definition to note that the Applicable Minimum Biobased Content is the level set by USDA that a product must meet or exceed to qualify for both the Federal procurement preference and use of the Label. This change is necessary because the combined rule provides one set of requirements to qualify for both the Federal procurement preference and the use of the Label. Previously, the term was defined only with respect to the use of the Label.

3. *Biobased product.* The Agency is amending this definition to include Renewable Chemicals, as directed by section 9002 of FSRIA. In addition to this change, the Agency is also amending the definition of Biobased Product to clarify that, for the purposes of the BioPreferred Program, the term does not include motor vehicle fuels, heating oils, or electricity. Motor vehicle fuels, heating oils, and electricity have always been excluded from participating in the BioPreferred Program by statute, and the Agency believes that by adding this clarification to the definition of Biobased Product, interested parties will be able to find these exclusions more easily.

4. *Certification icon.* The Agency is changing the term ''Certification mark artwork'' to ''Certification Icon,'' and the definition for this term is being amended such that Certification Icon refers only to the circular logo that depicts the symbols of the sun, the soil, and the aquatic environments rather than to the complete Label. The Agency believes this change will make it easier to clarify what artwork can be used for Program participants and Other Entities wishing to promote Certified Biobased Products.

5. *Certified biobased product.* The Agency is amending the definition of Certified Biobased Product to describe that certified products are eligible for preferred Federal procurement and that they have been approved to display the Label. The Agency believes this change, in conjunction with the process changes described in this preamble, will satisfy the requirement of section 9002 of FSRIA to establish one integrated process through which products can both be determined to be eligible for preferred Federal procurement and approved to use the Label.

6. *Designated product category.* The Agency is amending this definition to include that Certified Biobased Products that meet the criteria for at least one designated category will be eligible for the procurement preference. The Agency is also amending the definition to state that these categories will be identified in the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov* and the Agency is adding the term Register of Designated Categories to refer to the list of product categories that have been designated for the procurement preference. Designated Product Categories were identified in 7 CFR part 3201, subpart B. Because of this, the process for adding and amending designated categories required the Agency to go through the rulemaking process, which made such changes time consuming. The Agency believes that by identifying Designated

Product Categories on the BioPreferred Program website at *https://www.biopreferred.gov* rather than in the CFR, the Agency will be able to make changes to Designated Product Categories more readily.

7. *Designated representative.* The Agency is amending this definition to clarify that a Designated Representative is an entity that has been authorized to act on behalf of a Participating Organization throughout the certification process, rather than only when affixing the Label to the Certified Biobased Product.

8. *Intermediate Ingredient or Feedstock.* The Agency is amending this definition to use the new term Participating Organization in place of manufacturer or vendor. The definition is otherwise unchanged.

9. *Procuring Agency.* The Agency is amending this definition to clarify that the term Procuring Agency applies to businesses contracting with any Federal agency to perform work under the contract, rather than applying to persons contracting with any Federal agency. The Agency believes this change will make it clear that the term applies to business entities and not individuals.

10. *Qualified biobased product.* The Agency is amending this definition to state that Designated Product Categories will be found on the BioPreferred Program website at *https://www.biopreferred.gov.*

11. *Stakeholder.* The Agency is changing the term Relevant Stakeholder to Stakeholder. The Agency believes it is redundant to specify Relevant Stakeholders as the term Stakeholder implies relevancy. The definition is otherwise unchanged.

12. *USDA Certified Biobased Product Label.* The Agency is amending the term Certification Mark to be referred to as USDA Certified Biobased Product Label, and the definition for this term is being amended to include figures depicting the Label. The Agency believes this change will eliminate any confusion caused by using the general term Certification Mark to refer to the Label.

d. *Adding New Definitions.* The agency is adding the definitions below. An explanation for the addition of these definitions is provided.

1. *Biobased content testing.* The Agency is defining this term because it is regularly used when the Agency discusses testing and verifying the Biobased Content of a product for the purposes of participating in the BioPreferred Program.

2. *Certified application.* The Agency is defining this term because it is regularly used when the Agency discusses participating in the BioPreferred Program with Program Stakeholders. The Agency believes defining this term will help Stakeholders understand the term in context more readily.

3. *Defined product category.* The Agency is adding this term to refer to a category that has been established for a specified grouping of Biobased Products with similar characteristics and intended uses. The Agency is adding this term to provide a distinction between the Other product category and product categories that have been established for a specified grouping of Biobased Products. Although these changes are not required by section 9002 of FSRIA, the Agency believes the added term and definition will provide clarity to the rule.

4. *Innovative criteria.* This term is regularly used when the Agency discusses participating in the BioPreferred Program with Program Stakeholders. The Agency believes defining this term will help Stakeholders understand the terms in context more readily.

5. *Parent product.* This term is regularly used when the Agency discusses participating in the BioPreferred Program with Program Stakeholders. The Agency believes defining this term will help Stakeholders understand the terms in context more readily.

6. *Participating organization.* The Agency is defining this term to replace the previously defined terms manufacturer and vendor. This new term describes entities that have completed steps to participate in the BioPreferred Program, including manufacturers and vendors of Biobased Products. The term vendor has caused some confusion in the past as it was not clear what qualified an entity as a vendor of a unique Biobased Product in contrast to a retailer that sells Other Entities' Biobased Products. The Agency believes that using the term Participating Organization will reduce this confusion for Stakeholders.

7. *Prequalification.* This term is regularly used when the Agency discusses participating in the BioPreferred Program with Program Stakeholders. The Agency believes defining this term will help Stakeholders understand the terms in context more readily.

8. Register of Designated Categories. This term is being added to refer to the list of product categories that have been designated for the procurement preference. The Agency believes defining this term will help Stakeholders readily identify and locate the list of Designated Product Categories as it will no longer be embedded in the BioPreferred Program's regulation.

C. Section 4270.3 Applicability

This proposed rule combines and consolidates the applicability sections of the BioPreferred Program's legacy rules, §§ 3201.3 and 3202.3. Additionally, the Agency is adding language to clarify who may participate respective of a given branded product. Over the years of implementing the BioPreferred Program, the Agency has received numerous questions regarding whether a given branded product could participate under multiple organizations, and the Agency believes this change will help clarify this question for Stakeholders. Otherwise, no major changes are being made.

D. Section 4270.4 Criteria for Eligibility

This proposed rule incorporates information from § 3202.4 with the revisions discussed below. Part 3201 did not have a section for criteria for product eligibility to use the Label.

a. *Biobased Product.* In this proposed rule, the Agency is clarifying that, to demonstrate that a product meets the definition of a Biobased Product, the Biobased Content of all products for which an application for certification is submitted must undergo Biobased Content Testing as described in § 4270.7 of this proposed rule. One of the goals of this proposed rule is to establish one set of rules for any Biobased Product to be qualified for the Federal procurement preference established by section 9002 of FSRIA and to be eligible to display the Label. Under part 3202, the Agency established a well-defined process through which Participating Organizations may apply to have their Biobased Products certified; this process requires the product to undergo Biobased Content Testing to demonstrate that the product meets the definition of a Biobased Product. Under § 3201.7, Participating Organizations were similarly required to undergo Biobased Content Testing to demonstrate that the product meets the minimum requirements; however, under § 3201.7, Participating Organizations would self-certify that the testing was completed and the product met the requirements. Through the years of implementing these rules, Stakeholders, including Federal purchasers, have provided feedback expressing uncertainty in this self-certification method due to the lack of oversight. The Agency believes that requiring Biobased Products to have their Biobased Contents tested and confirmed through a well-defined process will allow

Federal agencies to make more informed decisions when evaluating Biobased Products for purchase. Additionally, in recent years, the Agency has found that most organizations interested in participating in the BioPreferred Program elect to undergo Biobased Content Testing so that they may display the Label in addition to becoming qualified for the Federal procurement preference. Therefore, the Agency believes it is reasonable and fair to require that all Biobased Products undergo Biobased Content Testing to participate in the BioPreferred Program. Participation in the BioPreferred Program is voluntary; if an organization wishes to market their Biobased Product to Federal agencies without undergoing Biobased Content Testing through the BioPreferred Program, they may do so, provided the product meets the two other criteria for eligibility. It is not a requirement that a Biobased Product participates in the BioPreferred Program to be qualified for the Federal procurement preference.

1. *Products that are qualified for preferred Federal procurement but not certified as of the date of publication for this rule.* Due to this change in requirements for Biobased Content Testing, the Agency is including provisions in this proposed rule to provide a grace period for Participating Organizations with products that are qualified for preferred Federal procurement but not certified to use the Label. These Qualified Biobased Products will continue to remain eligible to participate in the BioPreferred Program for three years following [DATE OF PUBLICATION OF THIS FINAL RULE IN THE **FEDERAL REGISTER**] unless the product is reformulated or discontinued before three years have passed, whichever comes first. To remain eligible to participate in the BioPreferred Program after the three-year period, these products will be required to submit an application and complete the certification process as described in § 4270.9 of this proposed rule. The Agency believes it is necessary to implement a grace period for such Participating Organizations to conform to the updated BioPreferred Program rules as the Agency's goal is not to preclude any Participating Organization from being able to continue to participate in the BioPreferred Program.

2. *Exclusions.* The Agency is adding products that are intended to be ingested or inhaled such as pharmaceuticals or nutraceuticals to the list of types of products that are excluded from participating in the BioPreferred Program. Food and animal feed are already excluded by definition and, previously, it was unclear whether these exclusions include any type of product that is ingested, such as pharmaceuticals and nutraceuticals. The Agency believes it is reasonable to exclude products that are intended to be ingested or inhaled as an extension of excluding food and feed.

b. *Minimum Biobased Content.* The rule uses the language from § 3202.4(b) with no significant revisions.

1. *Products that fall under one or more defined product categories.* Section 3202.4(b)(1) established this section as Qualified Biobased Products. The rule defines a Qualified Biobased Product as one that meets the definition and Applicable Minimum Biobased Content criteria for one or more Designated Product Category, which may include the Other category. Section 3202.4(b)(1) was intended to refer specifically to products that fall into one or more Defined Product Category, not including the Other category. The Agency is renaming the Qualified Biobased Products section to Products that fall under one or more defined product categories to preserve the intent of § 3202.4(b)(1).

i. *Product is within a single product category.* The rule uses the language from § 3202.4(b)(1)(i) with a modification to indicate where the minimum Biobased Content for the defined project category can be found. In § 3202.4(b)(1)(i) the minimum Biobased Content specified for the item was found within the regulation, and the revised rule modifies this by having the defined project category found in the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov*.

ii. *Product is within multiple product categories.* The rule uses the language from § 3202.4(b)(1)(ii) with a modification to where the minimum Biobased Content is specified for the defined project category is found. This rulemaking modifies this by having the defined project category found in the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov*. This rulemaking also clarifies that a product that falls under more than one Defined Product Category must meet the minimum Biobased Content requirement for the category that most closely describes the product's primary intended use. The Agency believes this change from the legacy rules will help ensure that products meet the minimum Biobased Content requirements for the most appropriate category, and it will provide the Agency a regulatory basis for determining if a product that may fall under multiple defined categories is eligible to participate.

2. *Products that do not meet the definition of at least one Defined Product Category.* The rule uses some of the language from § 3202.4(b)(2) with modifications. In this proposed rule, the Agency is setting the minimum Biobased Content requirement for products that do not meet the definition of at least one Defined Product Category at 30 percent. Previously, the minimum Biobased Content requirement for products that do not meet the definition of at least one Defined Product Category was set at 25 percent. Given the technology advances that have taken place in the ten years since the previous minimum was set, the Agency believes it is reasonable to raise that minimum to 30 percent. The Agency believes this change will encourage Biobased Product manufacturers to incorporate more biobased feedstocks in products that are otherwise not biobased without setting the minimum so high that utilizing biobased feedstocks becomes unfeasible.

The Agency is proposing a process to evaluate products that do not fall under a Defined Product Category using the procedure outlined in § 4270.6 for adding new product categories to the Register of Designated Categories. The requirement that a product must be at or above its Applicable Minimum Biobased Content to participate in the BioPreferred Program is consistent with the legacy rules of the BioPreferred Program. The Agency believes this requirement is necessary so that the Label is not used to promote products with de minimis Biobased Content.

c. *Innovative Criteria.* The rule uses the language from §§ 3201.5(b)(2) and 3202.4(c) with a few modifications. The last sentence of the first paragraph was modified to add ''or revoke''. The Agency is adding this language to clarify that products must meet one or more Innovative Criteria throughout the life of the certification, and failure to do so may result in the product's certification being revoked. The Agency believes this change will help Participating Organizations better understand the requirements for maintaining product certification.

The rule uses the list of Innovative Criteria from §§ 3201.5(b)(2)(i) through (iv) and 3202.4(c)(1) though (4) with a few modifications. Since the implementation of the Innovative Criteria requirement, the Agency has learned that many manufacturers use technologies that reduce waste during the manufacturing process, which allows the manufacturing process to be more sustainable. The Agency believes these practices represent an innovative

approach to manufacturing products in a similar manner to using technologies that ensure high feedstock material recovery and use as described in §§ 3201.5(b)(2)(ii)(B) and 3202.4(c)(2)(ii), and therefore, the Agency is adding reducing waste to the previously established language.

The rule modifies the language from §§ 3201.5(b)(2)(iv)(C) and 3202.4(c)(4)(iii) to include agricultural wastes in the example for clarity. Through the years of implementing the Innovative Criteria requirement, the Agency has received multiple inquiries about whether using agricultural waste is considered a form of recycling. Since the implementation of the Innovative Criteria requirement, the Agency has found this criterion codified at § 3202.4(c)(4)(iii) to be too restrictive. The Agency believes the distinction that the raw material come from an urban environment eliminates many products from meeting this criterion even if the raw material used in the product is obtained in a manner that otherwise meets this criterion. Thus, in this proposed rule, the Agency is amending this criterion as codified at § 4270.4(c)(4)(iii).

Additionally, in this proposed rule the Agency is adding an innovative criterion at § 4270.4(c)(4)(iv) to allow more opportunities for products that are made from a variety of biobased raw materials to demonstrate that the raw material is obtained or processed in an innovative or ethical manner as prescribed by industry standards, which ultimately may make it easier for organizations to show that their Biobased Products meet the eligibility criteria. The Agency is also providing some examples of how a product could meet this new criterion. For example, a manufacturer that makes a laundry detergent formulated using surfactants derived from palm oil could meet this innovative criterion by showing that their palm oil has received certification from the Roundtable on Sustainable Palm Oil, verifying that the palm oil has been ethically and sustainably sourced. As another example, a manufacturer of biobased water bottles that are Cradle to Cradle Certified® through the Cradle to Cradle Products Innovation Institute could meet this innovative criterion. Products that are Cradle to Cradle Certified® are assessed for environmental and social performance to determine if the certification's standards are met across five performance categories: material health, material reutilization, renewable energy and carbon management, water stewardship, and social fairness.

E. Section 4270.5 Procurement Programs

a. *Integration into the Federal procurement framework.* The rule uses the language from § 3201.4(a) with no revisions.

b. *Federal agency preferred procurement programs.* The rule uses language from § 3201.4(b) with some amendments for clarification. The amendments are discussed below.

Section 3201.4(b)(1) established guidelines for implementing the procurement requirements associated with Biobased Products set forth by section 9002 of FSRIA. In this rulemaking, the Agency is clarifying that Federal agencies are required to maintain and implement procurement programs to ensure that Qualified Biobased Products are being purchased to the maximum extent practicable. Also, the Agency is clarifying the language from § 3201.4(b)(1)(ii) to state that these procurement programs must include a training program, previously referred to as a promotion program, to educate the Federal agency and its contractors on the requirements. The Agency believes the meaning of the term promotion program was unclear, which made it difficult for Federal agencies to implement the requirement. The Agency believes the term training program is more appropriate in this context, and the Agency has provided further explanation of the purpose of the training program for additional context.

The Agency is also clarifying the language from § 3201.4(b)(1)(iv), that the procurement program must include provisions for reporting quantities and types of Biobased Products purchased by the Federal agency and its contractors through the BioPreferred Program Portal in the System for Award Management (*https://sam.gov*), as specified under the requirements in 48 CFR 52.223–2 (Federal Acquisition Regulation (FAR)). While both Federal agencies and their contractors have always been required to report quantities and types of Biobased Products purchased, the Agency believes specifying that this requirement applies to Federal contractors as well as Federal agencies will lead to more accurate reporting of Biobased Product purchases. Additionally, the Agency believes that clarifying in the rule to whom Federal agencies and their contractors must report their biobased purchases will also lead to more complete reporting of Biobased Product purchases. The Agency hopes that more accurate and complete reporting on the purchasing of Biobased Products by Federal agencies and their contractors will allow the Agency to better determine the impact of the BioPreferred Program on Federal purchasing and vice versa.

This proposed rule adds a new provision as § 4270.5(b)(1)(v) that calls for Federal agencies review and elimination of specifications that prohibit the purchasing of Biobased Product. This new provision is being added to emphasize the primary goal of the procurement program to ensure that Qualified Biobased Products are purchased to the maximum extent practicable.

The Agency is modifying the language previously found in § 3201.4(b)(2)(i)(B), which stated that Federal agencies will adopt a policy of awarding contracts to the vendor offering a Qualified Biobased Product composed of the highest percentage of Biobased Content possible except when such products ''fail to meet performance standards set forth in the applicable specifications. . . .'' The Agency is rewording this language for clarity to say, ''fail to meet performance standards for the use to which they will be put. . . .''

Similarly, the Agency is modifying the language previously found in § 3201.4(b)(2)(i)(C), which states Federal agencies will adopt a policy of awarding contracts to the vendor offering a Qualified Biobased Product composed of the highest percentage of Biobased Content possible except when such products ''are available only at an unreasonable price.'' The Agency is rewording this for clarity to say, ''are not available at a reasonable price.'' The exception itself is stipulated by section 9002 of FSRIA. It is up to the discretion of the Federal agency or contractor to determine what price is reasonable.

This proposed rule adds a new provision as § 4270.5(b)(2)(iii) that calls for the preference program development by Federal agencies to include a policy of documenting and reporting cases where it is not possible to set specifications and award contracts in such a way that is consistent with section 9002 of FSRIA and the requirements in this proposed rule. Asking Federal agencies to document and report when they are unable to procure Qualified Biobased Products will help the Agency identify potential weaknesses in the requirements associated with Designated Product Categories or with the BioPreferred Program rules. The Agency believes receiving such feedback is vital to improving the effectiveness of the BioPreferred Program and the effectiveness of the preferred Federal purchasing initiative in particular.

Also, the Agency is modifying the language previously found in § 3201.4(b)(4) to clarify that Federal agencies should continue to establish annual targeted biobased-only procurement requirements. Previously, the language implied that this activity was completed once, with a deadline of June 15, 2016, when the activity is meant to be an ongoing practice to be evaluated each year.

c. *Procurement specifications.* This rulemaking is using some of the language from § 3201.4(c). This section is being modified because the Agency is making updates to the guidelines to Federal agencies for ensuring their procurement programs are updated when there are changes or additions to Designated Product Categories. The Agency is directing Federal agencies to ensure that their specifications for the use of Qualified Biobased Products are consistent with the guidelines provided in this proposed rule no later than six months after a Designated Product Category is finalized and listed on the BioPreferred Program's website (*https://www.biopreferred.gov*), as discussed in section IV.F of this preamble. Previously, under § 3201.4(c), Federal agencies were instructed to ensure their specifications require the use of Qualified Biobased Products ''within a specified timeframe.'' The specified timeframe was included under 7 CFR part 3201, subpart B for each individual Designated Product Category. Typically, the specified timeframe had been set as a period of one year. Shortening the timeframe from one year to six months helps ensure that new categories are established in a timely manner, and the Agency believes six months is a reasonable timeframe for Federal agencies to review and update specifications.

F. Section 4270.6 Category Designation

The Agency is making significant changes to the language in § 3201.5. The 2018 Farm Bill instructed the Agency to create one expedited process through which products may be determined to be eligible for a Federal procurement preference and approved to use the Label. The Agency evaluated options for satisfying those requirements, and, in developing the revised procedure, the Agency was able to accomplish the 2018 Farm Bill directives and establish a process that requires less time and fewer resources.

a. *Procedure.* The Agency will maintain a Register of Designated Categories on the BioPreferred Program website (*https://www.biopreferred.gov*) rather than in the Code of Federal Regulations (CFR) as was previously done in 7 CFR part 3201, subpart B. The Register of Designated Categories will include the category's name, description, required minimum Biobased Content, and the date the category was finalized as a designated category. The Register of Designated Categories will include a list of all Designated Product Categories, including categories of finished, consumer product categories; Intermediate Ingredient and Feedstock (including Renewable Chemicals) categories; and categories that include Complex Assembly products. There will be two types of Designated Product Categories: defined product categories, which are product categories that have been established for a specified grouping of Biobased Products with similar characteristics and intended uses, and the undefined product category that is used to categorize new types of products while the Agency evaluates the viability of designating a new Defined Product Category for those products.

Under § 3201.7, products were determined to be eligible for a Federal procurement preference if the product met the requirements for one or more Designated Product Category. Under § 3202.4, Biobased Products that did not meet the requirements for at least one Designated Product Category could participate in the voluntary labeling initiative of the BioPreferred Program under catalog categories, *i.e.,* categories that were established for the BioPreferred Program's product catalog but that were not eligible for preferred Federal procurement. After this proposed rule takes effect, it is the Agency's intention, to the extent practicable, to designate all product categories for preferred Federal procurement, including previously established catalog categories. Additionally, the Agency intends to designate another category in which products that do not meet the definition of a Defined Product Category can be placed and still be eligible for preferred Federal purchasing. With this change, all products will fall under at least one Designated Product Category, making all products eligible for preferred Federal procurement. The Agency believes this change, in combination with the changes to the initial approval process as discussed in section IV.I of this preamble, will satisfy the 2018 Farm Bill directive to establish a single process to determine eligibility for preferred Federal purchasing and approval to display the Label.

Further, the Agency believes the updates to the category designation process will facilitate the process for creating or updating Designated Product Categories in the future, so that specific product category requirements can be revised as new data is gathered. As the Designated Product Categories were imbedded in 7 CFR part 3201, subpart B, it was difficult to make timely updates and additions due to the sometimes lengthy rulemaking process. Rather than listing Designated Product Categories in the BioPreferred Program's regulation, the Agency will maintain the Register of Designated Categories on the BioPreferred Program website *https://www.biopreferred.gov*. The Agency believes this change will expedite the process to designate new product categories and amend existing Designated Product Categories. Additionally, this change will give the Agency the ability to investigate category suggestions from BioPreferred Program Stakeholders, and then use that information to create or update designated categories in a timely manner. The ability to make updates to Designated Product Categories in a timely manner is especially important because the Biobased Product industry is constantly evolving.

i. *Adding new product categories to the Register of Designated Categories.* The Agency will use the data gathered during the product application process to determine if a new defined product category should be established. This aspect of the category designation process is the same as was used for establishing new Designated Product Categories requirements under the BioPreferred Program's legacy rules, § 3201.5(a). When the Agency determines that creating a new Defined Product Category is appropriate, the Agency will create a category name, definition, and required minimum Biobased Content for the new category based on the product or products that fall within the new category, and the category will be added to the Register of Designated Categories with a provisional status. The provisional category requirements will be in place for a period of six months following the addition of the new Defined Product Category to the Register of Designated Categories. During that time, any product that falls within the category based on the category definition and has a Biobased Content of at least 30 percent or within 30 percentage points of the provisional minimum, whichever is higher, will be considered for inclusion. The Agency believes this provision will prevent products from being excluded from participation if the provisional category requirements are too restrictive initially. Under the revised category

designation procedure, there will no longer be a proposed rule with a public comment period to introduce new Designated Product Categories as described in § 3201.5(a)(3).

After the provisional period is over, the Agency will re-evaluate the provisional category name, description, and required minimum Biobased Content based on the new data gathered during the provisional period. At that time, the Agency will make final the Defined Product Category name, description, and minimum Biobased Content, and the category will no longer be considered provisional. While the Agency encourages Procuring Agencies to begin giving a procurement preference for Qualified Biobased Products that fall within provisionally designated categories, the Agency recognizes that Procuring Agencies may need time to become familiar with the requirements of provisionally designated categories. Therefore, no later than six months after a finalized product category is added to the Register of Designated Categories, Procuring Agencies will be required to give a procurement preference for Qualified Biobased Products that fall within Designated Product Categories. In total, Procuring Agencies have a period of one year from the time a provisionally designated category is added to the Register of Designated Categories to the time they are required to give procurement preference to products that fall within that category, which is consistent with the period of time allowed before a Designated Product Category became effective under § 3201.5(a)(3).

ii. *Revising defined product categories on the Register of Designated Categories.* In this proposed rule, the Agency is also establishing a process for revising Designated Product Categories. The Agency will periodically evaluate the need to update Designated Product Categories included in the Register of Designated Categories by reviewing the category names, definitions, required minimum Biobased Contents, subcategories, and the need for the category or subcategory. If the data support making updates, the Agency will amend the category and publish the updated category to the Register of Designated Categories and Procuring Agencies will be required to give a procurement preference for Qualified Biobased Products that fall within the amended Designated Product Category within six months.

2. *Public Comments.* This is a new section created using some of the language from § 3201.5(a)(3). Interested parties (such as product manufacturers or industry and Federal Stakeholders) may submit comments to the Agency through the BioPreferred Program website (*https://www.biopreferred.gov*) regarding establishing new categories or amending an existing category at any time. BioPreferred Program Stakeholders and other interested parties provide valuable insight and data during the category designation process, and as such, the Agency believes it is important to maintain a process through which interested parties can provide comments to the Agency.

3. *Continued eligibility.* The rule establishes this section as Continued eligibility. As in § 3202.5(d)(2)(iii), if the required minimum Biobased Content for a category is revised, products that fall within the category will remain certified or qualified, as applicable, as long as the product meets the new minimum Biobased Content level. In some cases, a participant may need to reformulate a product if the participant wishes to continue participating in the BioPreferred Program and the product no longer meets the applicable required minimum Biobased Content. The Agency believes it is important to allow participants with such products adequate time to be able to address potential product changes after the Agency has notified them that a change is required to remain eligible. If a product no longer meets the minimum Biobased Content after a category revision, the Agency will notify the Participating Organization in writing via email. The Participating Organization will then have 120 days to notify the Agency of their intent to reformulate their product to meet the requirements, and then the participant will be allowed another 120 days, increased from 60 days in § 3202.5(d)(2)(iii), to reapply for certification. The Agency believes this timeframe is more reasonable as a participant may need to reformulate a product.

Participating Organizations that reapply for certification as instructed will be allowed to continue using their existing Label until they receive the new notice of certification from the Agency. The Agency is clarifying in this proposed rule that that the certification for products that no longer meet the required minimum will expire if the participant does not notify the Agency of their intent to reformulate within 120 days or if the participant does not reapply for certification within an additional 120 days. The Agency believes this addition is necessary to clarify the consequences of no action when a participant is informed that their product no longer meets the required minimum Biobased Content.

b. *Considerations.* This rulemaking uses the language from § 3201.5(b)(1) and (2) with no significant revisions.

G. Section 4270.7 Determining Biobased Content

a. *Certification requirements.* In this rulemaking, the language from § 3201.7(a) was used with some modifications. As discussed in section IV.D, under part 3202 the Agency has established a well-defined process through which Participating Organizations demonstrate that their products meet the certification requirements. The process includes submitting an application for certification to the Agency so that the Agency can determine if the certification requirements are met, whereas under § 3201.7(a), Participating Organizations self-certify that the requirements are met. Based on feedback from BioPreferred Program Stakeholders, the Agency believes there is more transparency in having the Agency verify that the certification requirements are met than allowing Participating Organizations to self-certify, and therefore is adding language to indicate that an application for certification must be submitted. The Agency is also modifying the language from § 3201.7(a) to clarify that meeting the requirements for a Designated Product Category means the product must meet both the category's definition and minimum Biobased Content requirements.

b. *Minimum Biobased Content.* The language from § 3201.7(b) was used with no significant modifications.

c. *Determining Biobased Content.* The language from § 3201.7(c) was used with no significant modifications.

1. *General.* The language from § 3201.7(c)(1) was used with minimal modifications. The name of this section was ''Biobased products, Intermediate Ingredients or Feedstocks'' but is being revised to ''General.''

The Agency deliberated adopting other methods for measuring or determining Biobased Content (such as measuring organic and inorganic carbon or biomass content) other than through the ASTM D6866 test method, which has been used by the Agency to measure Biobased Content since the inception of the BioPreferred Program. The Agency believes the ASTM D6866 test method for measuring Biobased Content is still the best method for the purposes of the BioPreferred Program.

2. *Complex assemblies.* From § 3201.7(c)(3), Complex Assembly products only had one option for

manufacturers to test the Biobased Content of the product. This rule provides two options for manufacturers, which is by equation or proportional sampling.

i. *Equation.* The language from § 3201.7(c)(3) was used with no changes.

ii. *Proportional sampling.* This rulemaking is adding a second option for measuring the Biobased Content of a Complex Assembly product by using proportional sampling. For proportional sampling, the manufacturer must sub-sample (by weight) each distinct material or component within the Complex Assembly product and combine the sub-samples into a single sample that can be analyzed using the ASTM D6866 test method. This method allows for a single ASTM D6866 analysis of a composite sample that is representative of the full Complex Assembly product. For example, if a Complex Assembly product is composed of three distinct components: component A weighing 50 grams, component B weighing 30 grams, and component C weighing 20 grams. The product can be sub-sampled to obtain a single 20-gram composite sample suitable for analysis by combining 10 grams of component A, 6 grams of component B, and 4 grams of component C. The Agency added this provision to this proposed rule to mirror the options that are included in the ASTM D6866 test method, which is the method the BioPreferred Program uses to measure Biobased Content. Additionally, the Agency believes adding this option to the rule will clarify for manufacturers that this option for testing Complex Assembly products is acceptable for certification.

d. *Products and Intermediate Ingredients or Feedstocks with the same formulation.* The language from § 3201.7(d) was used but modified to clarify the situations in which products that have essentially the same formulation and Biobased Content may be eligible to share Biobased Content test data. The Agency currently allows such products to share Biobased Content test data through test exemption or through family applications, whichever is applicable as described below, and the Agency believes adding this to the BioPreferred Program's regulation will help prospective participants understand when additional Biobased Content Testing is not needed. This change simply ratifies and clarifies the Agency's existing policies for such products.

1. *Test Exemptions.* This rulemaking is adding this as a new section. In some cases, products and Intermediate Ingredients may have essentially the same formulation but are marketed under more than one brand name. In these cases, Biobased Content data may be shared between the products. In situations where a new product for an interested party is seeking certification is composed of the same Ingredients and has the same Biobased Content as a product that has already been certified and tested by a company the interested party has a direct relationship with, the interested party may apply for a test exemption by referencing the Certified Application of the certified product. This allows the interested party to certify their product without having the product tested again. For example, Company A has received certification for a hand wash product that is sold both as a consumer product and is sold to Company B, who rebrands the product to sell to consumers. Company B may apply to certify their branded product through test exemption and referencing Company A's Certified Application.

2. *Families.* This rulemaking is adding this as a new section. In situations where a Participating Organization is seeking certification for two or more products that are composed of the same Ingredients and have the same Biobased Content but are marketed under more than one brand name, the products may share testing information by being grouped in a family. Biobased Content test data must only be obtained for one of the products within the family, and test data will apply to all products within the family. For example, Company A makes a formulation that they sell as a glass cleaner under one brand name and as an all-purpose cleaner under a second brand name. Company A may group these two products in a family; either the glass cleaner or the all-purpose cleaner will undergo Biobased Content Testing, and the test results will apply to both products within the family.

H. Section 4270.8 [Reserved]

This rulemaking is adding this as a new reserved section to accommodate additional requirements that may be included in future Farm Bills.

I. Section 4270.9 Initial Approval Process

In this proposed rule, the Agency is making process improvements and updates to the initial approval process to create one expedited process through which products may be determined to be eligible for a Federal procurement preference and approved to use the Label. The approval process will be the same for all products regardless of whether the applicant wishes for the product to be eligible for a Federal procurement preference, approved to use the Label, or both. This means that organizations who wish to have their Biobased Products participate in the BioPreferred Program must submit an application for certification for each product, and each product will be required to undergo Biobased Content Testing to confirm the product's Biobased Content.

This proposed rule establishes the approval process by using the approval process that was established in § 3202.5 with some minor improvements for clarification. The Agency believes this is the best process to implement for the combined BioPreferred Program rules because Participating Organizations are already familiar with it, and the Agency has been able to simplify and streamline the process over the past several years of implementation.

a. *Application.* The proposed rule uses the language from § 3202.5(a) with some minor modifications. The Agency acknowledges that Biobased Products that meet the eligibility criteria as previously described will be considered qualified for preferred Federal procurement regardless of the product's certification status. However, products will not be listed on the BioPreferred Program website (*https://www.biopreferred.gov*) as certified or qualified products unless the product has completed the application process. The Agency believes requiring all products to undergo Biobased Content Testing is reasonable as participation in the BioPreferred Program is voluntary.

1. *General content.* The information being asked for as part of the initial approval process in this proposed rule is the same information that was previously asked for in § 3202.5(a)(1), with minimal modifications and some additional information.

In this proposed rule, the Agency added language to clarify that the contact information provided must include the name, mailing address, email address, and telephone number of the applicant. This information is already included in the current application process, and the Agency is promulgating it in the rule with this added language.

The Agency is requesting that applicants provide the biobased source(s) of the raw materials used in the product. This is due, in part, to the correction factors used by ASTM D6866 to account for the differing exposure to atmospheric carbon-14 during the biobased raw material's growth. Without the requested information, the product's Biobased Content cannot be accurately

measured. The Agency believes it is reasonable to request biobased raw material information as applicants will not be required to disclose any specific Ingredient or formulation information, and the biobased raw material information the Agency gathers will not be made available to the public. Applicants may choose not to disclose biobased raw material information if they are uncomfortable doing so; however, the Agency notes that it is in the interest of the applicant to disclose biobased raw material information so that the test results are as accurate as possible.

The Agency is also requesting that the applicants provide the estimated Biobased Content of the product, which is used to preliminarily determine whether the product meets the applicable Biobased Content requirements. This information is currently requested during the application process, and the Agency is promulgating it in the rule with this added language.

The Agency is requesting that the applicant provide a web link to their website (if available). The Agency uses web links provided by the applicant to confirm the information in their application, allowing the Agency to make more informed decisions about the appropriate product category or categories the product will fall under. This information is currently requested during the application process, and the Agency is promulgating it in the rule with this added language.

2. *Commitments.* This proposed rule combines the language from § 3202.5(a)(2) and (3) with no significant modifications to create this section.

b. *Evaluation of applications.*

1. *Initial evaluation.* This proposed rule is establishing this section as initial evaluation. As previously described under § 3202.5(b)(1), the Agency will evaluate each application to determine if it is a complete application (*i.e.,* that it contains all the required information). Applications will be evaluated on a first come first served basis. In this proposed rule, the Agency is making updates to note that the evaluation process may take up to 90 days to complete. If after evaluating the application the Agency determines the application is incomplete, it will contact the applicant via email and provide an explanation of the deficiencies in the application, as is consistent with § 3202.5(b)(1). In this proposed rule, the Agency is clarifying that if no response is received within 90 days after the Agency attempts to ask the applicant clarifying questions about their application, the Agency will inactivate the application. The Agency currently follows this procedure as a working policy, and the Agency believes codifying this practice in the BioPreferred Program's rule may encourage more applicants to respond in a timely manner.

2. *Prequalification.* This rulemaking is establishing this section as Prequalification.

i. When the Agency determines that an application is complete, it will provide a written response to inform the applicant of whether the application has been conditionally approved (*i.e.,* prequalified) to move forward to testing or has been disapproved. Depending on the responsiveness of the applicant, the Agency will provide the written response to notify the applicant of approval or disapproval within 90 days after the receipt of a complete application. If at any time after the Agency notifies the applicant that the application has been conditionally approved any of the information provided in the application changes, the applicant is required to inform the Agency of the change.

Under § 3202.5(b)(2)(i), the Agency estimated that it could take up to 60 days to complete the evaluation process. However, the Agency believes it is reasonable to increase the amount of time to 90 days for the evaluation process because the number of applications the BioPreferred Program receives has been steadily increasing over the past several years. Additionally, the Agency anticipates that the number of applications it receives may increase slightly because this proposed rule will require all interested parties to submit an application regardless of whether they are interested in preferred Federal procurement or certification to display the Label.

ii. The Agency is also making updates to the application evaluation process in the rule to clarify at what point in the process Biobased Content Testing occurs. In this proposed rule, the Agency is adding that applications that have been conditionally approved, or prequalified, may move on to Biobased Content Testing. Test results that are obtained prior to the application being conditionally approved or obtained in a manner that does not comply with the rules established by this proposed rule will not be accepted. Previously, it was not clearly stated in the rule whether applicants were permitted to test at any point during the application process, or if applicants were required to wait until a specific step. The Agency believes that by specifically listing this step in the rule, it will cut down on the number of organizations who mistakenly send in their product for Biobased Content Testing prior to being approved to do so by the Agency.

iii. As under § 3202.5(b)(2)(ii), the Agency will issue a notice of certification before the use of the USDA Certified Biobased Product Label can begin. This section was updated to clarify that if the Biobased Content Testing shows that the product meets or exceeds the Applicable Minimum Biobased Content requirements, the Agency will issue a notice of certification.

iv. This section uses the language from § 3202.5(b)(2)(iii) with no significant modifications.

c. *Notice of Certification.* The process for issuing notices of certification or denial is unchanged from the legacy rules in this proposed rule. The Agency will issue a notice of certification to the applicant after it confirms that the test results document an acceptable Biobased Content. A notice of certification must be issued before the use of the Label can begin, and at that point, the applicant may advertise that the product is a Certified Biobased Product. The notice of certification will include the date the certification was issued, name of the product or products (in the case of product families) covered by the certification, and certified Biobased Content of the product(s).

1. The Agency has clarified in this proposed rule that if at any time, during the application process or after a product has been certified, any of the information provided during the initial application process changes, the applicant must notify the Agency of the change within 30 days. This is the same as in § 3202.5(c)(5); however, in this proposed rule, the Agency is emphasizing this requirement by adding that failure to notify the Agency of any changes may be considered a violation of BioPreferred Program rules. It is vital to the credibility of the BioPreferred Program that applicants provide updates to the Agency whenever they occur. If after reviewing the test results, the Agency determines that the product does not meet the Applicable Minimum Biobased Content requirements, the Agency will issue a notice of denial of certification and will inform the applicant of each criterion not met.

2. After receiving a notice of certification, the applicant may request to display a Biobased Content percentage that is lower than the content measured by the ASTM D6866 test results, as long as the requested Biobased Content to be displayed is still at or above the applicable required minimum Biobased Content. The applicant must submit such requests to

the Agency in writing via email. The Agency will review the request, and if approved, notify the applicant in writing via email and issue a revised notice of certification that will include the requested Biobased Content. The Agency currently follows this procedure as a working policy.

3. This proposed rule uses language from § 3202.5(b)(2)(iii) with minimal modifications to clarify that a denial of certification will be issued after Biobased Content Testing has occurred if the test results show the product does not meet the Applicable Minimum Biobased Content requirement.

d. *Term of Certification.*

1. *General.* This proposed rule uses language from § 3202.5(d)(1) with modifications. This rulemaking establishes this section as General.

After evaluating the term of certification and the audit practices implemented by § 3202.10(d), the Agency determined the best way to improve the existing audit procedures was to greatly simplify them. In lieu of establishing a revised audit procedure for periodically retesting Certified Biobased Products, the Agency is updating the term of certification for products participating in the BioPreferred Program. Previously, the audit procedure called for the retesting of products that had been certified for more than five years during audits that were scheduled to take place every six years. Instead, in the proposed rule, the Agency is implementing a term of certification of five years for all Certified Biobased Products, except in special cases as discussed below, after which time, participants will be required to renew their certification. Certifications will automatically expire for participants that do not renew their certification following the newly established process. The effective (beginning) date of the product certification is the date noted in the notice of certification. Based on feedback the Agency has received from BioPreferred Program participants over the years of implementing the BioPreferred Program, the Agency believes five years is a reasonable amount of time for a term of certification. The applicant will be notified 90 days before the certification expires, at which time, the Certified Biobased Product must be retested in accordance with the procedure described in section IV.G of this preamble.

i. Because of these updates to the term of certification, this proposed rule includes new provisions for what happens if a product's certification is not renewed within the timeframe allowed. If the Certified Biobased Product is not retested and the certification is not renewed within the 90 days, the product certification will expire. Once a product's certification expires, the product will no longer be a Certified Biobased Product, and the product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*). Because certifications that are not renewed would automatically expire, it will not be necessary for the Agency to revoke certifications for products that do not participate in audits.

ii. Similarly, due to the updates to the term of certification, this proposed rule includes new provisions for what happens if a Participating Organization wishes to renew certification for a product whose certification has lapsed. If a Participating Organization whose product certification has expired wishes to renew the certification, the participant must follow the procedures required for initial certification. These provisions are consistent with the conditions for reinstating certification as described by § 3202.8(c)(2)(iii).

iii. This proposed rule uses language from § 3202.5(d)(2)(iv) with minimal modifications.

iv. This proposed rule uses language from § 3202.5(d)(2)(v) with minimal modifications.

2. *Reformulations.* This proposed rule includes provisions for the term of certification of Certified Biobased Products that are reformulated. If at any time during the term of certification a Certified Biobased Product is reformulated, the Participating Organization must notify the Agency of the change and how the change affects the Certified Biobased Product's Biobased Content. The Agency will evaluate the changes and inform the participant if retesting is required. This is very similar to § 3202.5(d)(2)(i) through (iii); however, it was previously unclear whether participants were required to inform the Agency of all formulation changes or only changes that result in the Biobased Content of the Certified Biobased Product being reduced to a level below that reported in the Certified Application. The Agency believes the proposed determination about whether a formulation change will require retesting should be made by the Agency.

i. The proposed rule uses the language from § 3202.5(d)(2)(i) with minimal modifications for this section. The original language referred to changes to the product formulation. This proposed rule refers to changes to the product formulation as well as to raw materials. This language was added to clarify that changes to the raw materials are considered changes to the product formulation.

ii. The proposed rule is using the language from § 3202.5(d)(2)(ii) with minimal modifications for this section. The original language only considered changes to the product formulation that resulted in the Biobased Content of the product increasing from the level reported in the Certified Application. The proposed rule also includes ''and the raw materials are not significantly changed'' because it was previously unclear if changes to the raw materials were considered to be a change to the product formulation. The Agency believes this added language will clarify these situations.

iii. If the applicable required minimum Biobased Content for a product to participate in the BioPreferred Program is revised by USDA, this proposed rule directs the Participating Organizations to follow the requirements specified in § 4270.6(a)(3) of the proposed rule (see section IV.Fa.3. of preamble). This is consistent with the requirements previously set forth in § 3202.5(d)(2)(iii), with minimal modifications as discussed in section IV.Fa.3. of the preamble. Because this process is described in an earlier section of the proposed rule, the Agency is referring to that section rather than repeating the language.

3. *Test Exemptions.* Because the Agency is implementing a new five-year term of certification, it was necessary to also examine the term of certification for Certified Biobased Products that are certified via test exemption. Test exempt Certified Biobased Products share the Biobased Content test results with the parent Certified Biobased Product. To avoid situations where a test exempt Certified Biobased Product remains certified after the parent Certified Biobased Product's certification has expired, the Agency is stipulating that the test exempt certification will expire at the same time as the Certified Application of the parent Certified Biobased Product. For example, if a parent Certified Biobased Product was certified on October 1, 2020, its certification will expire on October 1, 2025 unless renewed. If a test exempt application was submitted referencing this parent Certified Biobased Product on July 1, 2023, the test exempt certification will still also expire on October 1, 2025. Consequently, this means that test exempt certifications may be active for less than five years before expiring.

4. *Special Considerations.*

i. As previously discussed, the streamlined application process the

Agency is proposing to implement with this proposed rule will require participants to submit an application for certification for each product, and all products will be required to undergo Biobased Content Testing to confirm the product's Biobased Content. Under §§ 3201.7(a) and 3202.5(a), only products that are participating in the voluntary labeling initiative are required to be associated with an application for certification and undergo Biobased Content Testing. Consequently, as previously discussed in section IV.Da.1. of the preamble, under part 3201 there are products that are participating in the BioPreferred Program as products that are qualified for preferred Federal procurement but not certified to use the Label. The Agency believes these products should be allowed to continue participating in the BioPreferred Program under the legacy rules during a grace period while the Participating Organization works to conform to the updated BioPreferred Program requirements. In this proposed rule, the Agency is proposing to establish a grace period of three years, during which, participants with Biobased Products that are qualified but not certified must provide the Agency with ASTM D6866 test data that has been obtained within the past five years. Participants who provide the requested test data to the Agency will be issued a notice of certification corresponding to each product for which testing data is submitted. The normal term of certification as discussed above will then apply.

ii. Participants who do not submit the requested test data to the Agency within the specified timeframe will be required to submit an application for certification and have their products tested. If certification is not completed within three years of publication of this rule, these Biobased Products will no longer be listed as Qualified Biobased Products on the BioPreferred Program website (*https://www.biopreferred.gov*).

iii. This proposed rule also includes special considerations for Certified Biobased Products that have been certified for five or more years as of [DATE OF PUBLICATION OF THIS FINAL RULE]. For those Certified Biobased Products, the Agency is also implementing a three-year grace period for the participant to renew the certification, at which point, the normal term of certification of five years will apply. If an application for renewal is not completed within three years, the product certification will expire. At that time, the product will no longer be a Certified Biobased Product, and the product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*). The Agency's goal is not to prohibit any Participating Organization from being able to continue to participate in the BioPreferred Program, and the Agency believes a three-year grace period will prevent affected participants from not being able to adjust to the updated rules quickly enough.

J. Section 4270.10 [Reserved]

This proposed rule is adding this as a new reserved section to accommodate additional requirements that may be included in future Farm Bills.

K. Section 4270.11 Requirements Associated With Promotional Certification Materials

a. *How participation in the BioPreferred Program can be promoted.* The Agency is establishing this section as ''How participation in the BioPreferred program can be promoted.'' In addition to establishing requirements associated with using the Label, the Agency is also establishing guidelines for using other materials associated with promoting Certified Biobased Products. One of the Agency's goals in implementing the BioPreferred Program is to increase public awareness of Biobased Products. To that end, the Agency believes it is important for Participating Organizations and their Designated Representatives as well as Other Entities to utilize the Label and other promotional certification materials. The Agency also believes it is important to establish standard guidelines for Participating Organizations and Other Entities who wish to promote the BioPreferred Program and certified and Qualified Biobased Products. This is important to maintain the distinctiveness and recognizability of the Label and other promotional certification materials. The Agency maintains and regularly updates a USDA BioPreferred Program Brand and Marketing Guidelines document found on the BioPreferred Program website (*https://www.biopreferred.gov*) that is intended to be a user-friendly summary and explanation of the requirements and brand standards set forth in this proposed rule. Additional clarification on the requirements associated with promotional certification materials may be provided in the USDA BioPreferred Program Brand and Marketing Guidelines, which will be made available to Participating Organizations through the BioPreferred Program website (*https://www.biopreferred.gov*).

1. *Participating Organizations.* This proposed rule uses the language from § 3202.7(a)(1) with no significant modifications.

2. *Other Entities.* This proposed rule uses the language from § 3202.7(a)(2)(i) with some clarification. This proposed rule clarifies that Other Entities who wish to use promotional materials associated with the BioPreferred Program may do so through a partnership agreement with the Agency. This is the Agency's current practice, and this language is being added to the rule to promulgate the practice.

The language from § 3202.7(a)(2)(ii) has been split into three sections in this rule. In § 4270.11(b)(2)(i) of the proposed rule, the Agency is revising the language from § 3202.7(a)(2)(ii) to indicate that Other Entities may use the Certification Icon rather than the Label. The Label is intended to be used by Participating Organizations in relation to the specific certification product it corresponds to, whereas the Certification Icon can be used by Other Entities in their own catalogs, procurement databases, etc., to identify Certified Biobased Products. Section 4270.11(b)(2)(ii) and (iii) of the proposed rule use the remaining language from § 3202.7(a)(2)(ii) with no significant modifications.

b. *Correct usage of the USDA Certified Biobased Product Label and other promotional certification materials.*

1. This section uses the language from § 3202.7(b)(1) with no significant modifications.

2. This section uses the language from § 3202.7(b)(2) with no significant modifications.

3. This section uses the language from § 3202.7(b)(3) with minimal modifications. The Agency is modifying the language to clarify that, when educating the public about the Label, the watermarked sample version of the Label may be used without reference to a specific Biobased Product.

4. This section uses the language from § 3202.7(b)(4) with no significant modifications.

5. This section uses the language from § 3202.7(b)(5) with no significant modifications.

6. This section uses the language from § 3202.7(b)(6) with minimal modification. Over the years of implementing the BioPreferred Program, the Agency has received inquiries regarding whether the Label may be embossed or stamped onto certified products, and therefore, the Agency is adding embossing and stamping as examples to this section.

7. This section uses the language from § 3202.7(b)(7) with no significant modifications.

c. *Incorrect usage of the USDA Certified Biobased Product Label and other promotional certification materials.*

1. This section uses the language from § 3202.7(c)(1) with no significant modifications.

2. The proposed rule is adding this section to emphasize that the Label may not be used in a way that does not maintain the integrity of the Label and the BioPreferred Program.

3. This proposed rule is adding this section to clarify that the word ''BioPreferred'' must not be used as a descriptor for anything other than the BioPreferred Program, including, but not limited to, products, categories, and companies. The BioPreferred Program name, the word ''BioPreferred'', and the phrase ''USDA Certified Biobased Product'' are not interchangeable. For example, Certified Biobased Products may not be referenced as being ''BioPreferred products''. The word ''BioPreferred'' is trademarked by the Agency, and as such, its use is closely controlled. The Agency believes this addition will help reduce misuse of the word ''BioPreferred''.

4. This section uses the language from § 3202.7(c)(2) with no significant modifications.

5. This section uses the language from § 3202.7(c)(3), with additional language to clarify that the BioPreferred Program name, in addition to the Label, may not be used to imply endorsement by the Agency.

6. This section uses the language from § 3202.7(c)(4), with additional language to clarify that the BioPreferred Program name, in addition to the Label, may not be used in any form that could be misleading to the consumer.

7. This section uses the language from § 3202.7(c)(5), with additional language to clarify that the BioPreferred Program name, in addition to the Label, may not be used in a manner disparaging to the Agency or any other government body.

8. This section uses the language from § 3202.7(c)(6), with additional language to clarify that the BioPreferred Program name and the word ''BioPreferred'', in addition to the Label, may not be altered or incorporated into any other label or logo designs.

9. This section uses the language from § 3202.7(c)(7), with an additional example to clarify that the Label may not be used in email signatures.

10. This section uses the language from § 3202.7(c)(8), with additional language to clarify that the BioPreferred Program name and the word ''BioPreferred'', in addition to the Label, may not be used in any company name, logo, product name, service, or website.

11. This section uses the language from § 3202.7(c)(9), with additional language to clarify that the BioPreferred Program name and the word ''BioPreferred'', in addition to the Label, may not be used in a manner that violates any of the applicable requirements in this rule.

d. *Imported products.* This section uses the language from § 3202.7(d) with no significant modifications.

e. *Elements of the USDA Certified Biobased Product Label.* This proposed rule is establishing this section as Elements of the USDA Certified Biobased Product Label using language from § 3202.7(e) with no significant modifications.

f. *Physical aspects of the USDA Certified Biobased Product Label.* This proposed rule uses language from § 3202.7(f) with some modification. As in § 3202.7(f), the Agency does not allow the Label elements to be altered, cut, separated into components, or distorted in appearance or perspective. In this proposed rule, the Agency requires one of the two Label versions to be used, depending on the need of the Participating Organization.

1. This section uses the language from § 3202.7(f)(1) with minimal modifications. This proposed rule clarifies in this section that the Label colors to be applied will be stipulated in the USDA BioPreferred Program Brand and Marketing Guidelines located on the BioPreferred Program website (*https://www.biopreferred.gov*).

2. This section uses the language from § 3202.7(f)(3) with no significant modifications.

g. *Placement of the USDA Certified Biobased Product Label.* This proposed rule uses language from § 3202.7(g) with minimal modification. The Agency is updating language from § 3202.7(g)(3)(i) and (ii) to clarify that the Label may be used anywhere on an advertising page where all products on the page are Certified Biobased Products with the same Biobased Content; otherwise, the Label must be placed in close proximity to its corresponding Certified Biobased Product to avoid confusion.

h. *Minimum size and clear space requirements for the USDA Certified Biobased Product Label.* This proposed rule uses language § 3202.7(h) with no significant modification.

i. *Where to obtain copies of the promotional certification materials.* This proposed rule uses language from § 3202.7(i) with no significant modification.

L. Section 4270.12 Violations of Program Requirements

In this proposed rule, the Agency is simplifying the violations process that was outlined by § 3202.8. Although the decision to participate in the BioPreferred Program is voluntary, compliance with the BioPreferred Program's requirements and specifications is essential to the success of the BioPreferred Program. In this proposed rule, the Agency identifies types of violations that may occur and the actions that such violations may result in, which are the same as defined under the legacy rules. The Agency is revising and simplifying the actions taken after violations are identified in this proposed rule. Both the types of violations being identified, and any penalties associated with a violation would be applied on a per product basis. If a certification for a Certified Biobased Product is revoked following the identification of a violation, the affected organization may file an appeal as described in section IV.M of this preamble.

a. *General.* This proposed rule uses the language from § 3202.8(a) with no significant changes.

b. *Types of violations.* This proposed rule uses the language from § 3202.8(b) with no significant changes.

1. *Biobased Content violations.* This proposed rule uses the language from § 3202.8(b)(1) with some amendments. The intention of this section was to allow the Agency the ability to request that a Certified Biobased Product be re-tested at any time in the event concerns regarding the validity of the Certified Biobased Product's Biobased Content arise. The language included in § 3202.8(b)(1) used the phrase ''random testing,'' which could be understood to mean Certified Biobased Products will be chosen for re-testing at random. The Agency believes the change in language in this rulemaking will help clarify that specific Certified Biobased Products may be selected for re-testing to confirm no violations have occurred.

For § 4270.12(b)(1)(B), the proposed rule uses language from § 3202.8(b)(1)(ii)(B) with some modification. The Agency is clarifying in this proposed rule that if the Participating Organization elects to retest the product in question, the Agency reserves the right to select the sample that will be submitted for Biobased Content Testing. Because the Biobased Content Testing taking place under these circumstances would be the result of violations of BioPreferred Program rules, the Agency believes this addition will lead to increased

transparency in the sample selection process, which will allow the Agency to have greater confidence in the re-testing results.

2. *USDA Certified Biobased Product Label violations.* This proposed rule uses language from § 3202.8(b)(2)(i) through (iii) with no significant modifications.

The Agency is including an additional example of a USDA Certified Biobased Product Label violation in this proposed rule as § 4270.12(b)(2)(iv) that says using an image or icon other than the official USDA Certified Biobased Product Label in association with certification claims constitutes a violation. Over the years of implementing the BioPreferred Program, the Agency has come across instances where a manufacturer has used an icon or mark other than the Label in association with claims that the product is certified through the BioPreferred Program. Using an image other than the Label cause consumers to question the validity of the claim, and the Agency believes it is vital to the success of the BioPreferred Program that the Label is used correctly and consistently with claims of certification.

3. *Application violations.* This proposed rule uses language from § 3202.8(b)(3) with no significant modifications.

4. *BioPreferred Program website violations.* This proposed rule uses language from § 3202.8(b)(4) with no significant modifications.

c. *Noncompliance and escalation of actions.* The violations described in § 4270.12(b) of the proposed rule are in noncompliance with this proposed rule. The Agency believes it is necessary to simplify the process for handling these violations that was established by § 3202.8(c).

1. *Noncompliance.* This proposed rule is establishing this section as Noncompliance. In this proposed rule, the Agency is adding provisions that allow the Agency to work with the Participating Organization in violation of Program rules to resolve the violation. In contrast, under the § 3202.8(c) the Agency was required to issue a series of formal notices of violation over the course of several months prior to being able to take action to resolve the violation. Under this proposed rule, when a violation is identified, the Agency will notify the Participating Organization or Other Entity, in writing via email, that they are in noncompliance with the BioPreferred Program's regulations. In the written notification, the Agency will identify the violation(s) and any actions that must be taken to resolve the noncompliance. The Agency may remove the product or company information from the BioPreferred Program website (*https://www.biopreferred.gov*) until the noncompliance is corrected. Removing the product from the BioPreferred Program website (*https://www.biopreferred.gov*) without issuing a notice of violation or revoking product certification allows the Agency to reinstate the product more easily if/when the participant does make the necessary updates.

2. *Violation.* This proposed rule is establishing this section as Violation. For those violations that may be considered major, or when Participating Organizations fail to make necessary updates and the Agency wishes to escalate the consequences, the Agency is maintaining a formal violation process that ends in revocation of the product's certification if no action is taken. The Agency is simplifying the formal violations process established in § 3202.8(c) to a two-step process. In the first step, the Agency will issue a notice of violation in writing via email. Participants who receive a notice of violation must correct the violation within 30 days from receipt of the notice of violation.

3. *Suspension and Revocation.* This proposed rule is establishing this section as Suspension and Revocation. Rather than having two individual steps for suspension and revocation, as is the case in § 3202.8(c)(1) and (2), respectively, this proposed rule combines suspension and revocation activities into a single step. Through the years of implementing the BioPreferred Program, the Agency has found that having a multi-step, protracted process for suspending and revoking certification often reduces the likelihood that a participant will respond or resolve the violation because deadlines are forgotten or communications are missed. The Agency believes streamlining the suspension and revocation process into a single communication will help create a sense of urgency on the part of participants who wish to resolve the identified violation, and it will reduce the Agency's burden of completing the revocation process in cases where the participant is not incentivized to resolve the identified violation.

Similar to the process formerly described by § 3202.8(c)(1)(i), after receiving the notice of violation, if the participant fails to make the required corrections within 30 days, the Agency will take a second step by notifying the participant via email and certified mail, as appropriate, of the continuing violation, and the certification for that product will be suspended. Under § 3202.8(c)(1)(i), participants were given 90 days to respond to a notice of suspension; the Agency is shortening this to 30 days in this proposed rule because the Agency intends to use the noncompliance step (rather than the suspension and revocation step) to attempt to resolve the issue with the participant. The Agency has found that having an extended timeframe at the suspension step reduces the likelihood that the violation will be resolved because so much time passes between official communications, and the Agency believes 30 days is a more appropriate timeframe. Additionally, the Agency has updated this process to stipulate that the notice of suspension and revocation will be sent via certified mail, as appropriate, so that the Agency can be sure that the notice is received by the participant. The Agency will make every effort to send notices of suspension and revocation to valid contacts, but ultimately, it is up to the Participating Organization to update the Agency when their contact information changes.

As in § 3202.8(c)(1)(i), this proposed rule states that as of the date the participant receives the notice suspending product certification, the participant and any Designated Representatives must discontinue printing any product labels that include the Label. When the Agency suspends a product's certification, the Agency will remove the product from the BioPreferred Program website (*https://www.biopreferred.gov*).

This proposed rule uses language from § 3202.8(c)(1)(ii) with no significant modifications.

The language from § 3202.8(c)(2)(i) and (ii) are being combined in this proposed rule into § 4270.12(c)(3)(iii). For the reasons previously stated, under this proposed rule, participants will be notified of suspension and revocation through a single notice. If the participant fails to correct the violation within 30 days from receipt of the notice of suspension, the certification for that product will be revoked automatically. As of that date, the product will no longer be listed on the BioPreferred Program website (*https://www.biopreferred.gov*) as a Certified Biobased Product or as a product qualified for preferred Federal procurement, and the participant must discontinue printing any product labels that include the Label, as is the case under § 3202.8(c)(2)(ii). The participant may continue to sell any current stock of the product that already includes the Label. After that stock has been

depleted, the participant must discontinue use of the Label.

This proposed rule uses language from § 3202.8(c)(2)(iii) with no significant modification.

4. *Other remedies.* This proposed rule uses language from § 3202.8(c)(3) with no significant modification.

M. Section 4270.13 Appeal Process

This proposed rule includes provisions for appeal to the Agency by a Participating Organization that has received a notice of suspension and revocation from the Agency. Under § 3202.6, a Participating Organization could appeal to the Agency a decision made at any point in the certification process. In this proposed rule, the Agency is limiting the decisions Participating Organizations may appeal to revocations of certification only because the Agency makes every effort to resolve any issues or questions that arise during the application process up to and after product certification through direct communication with the Participating Organization. Thus, the Agency believes it is not necessary to have a formal appeal process for any decisions other than revocations of certification.

a. *Filing an appeal.* This proposed rule establishes this section as Filing an appeal.

1. This section uses the language from § 3202.6(a)(1) with modifications. Section 3202.6(a)(1) stated that the appeals go to the Program Manager, but this proposed rule modifies this by having the appeals go to the Agency The Agency is making this change so that the appeal review process is not tied to a single individual or a single job title. The Agency believes this change will allow appeals to be processed efficiently regardless of whether a specific job title is used. Section 3202.6(a)(1) also instructed appeals to be filed in writing and provided a mailing address to the Program Manager of USDA Voluntary Labeling Program for Biobased Products, but this rulemaking modifies this by requiring that appeals be made in writing via email to the BioPreferred Program's email address as noted on the BioPreferred Program website (*https://www.biopreferred.gov*). The Agency believes this change will allow for appeals to be reviewed more efficiently as physical mail may be delayed or lost.

2. This proposed rule uses the language from § 3202.6(a)(2) with no modifications.

b. *Reviewing appeals.* This rulemaking establishes this section as Reviewing appeals.

1. This section uses the language from § 3202.6(b)(3) with modifications. Modifications include revising some of the language to align with the new rule definitions for Participating Organization, participant, and USDA Certified Biobased Product Label, as well as revising references to the ''notice of suspension'' to the ''notice of suspension and revocation'' due to the changes discussed in section IV.L3.). Additionally, this proposed rule clarifies that if the appeal is sustained, the Participating Organization may immediately resume selling and distributing the Certified Biobased Product with the Label in addition to immediately resuming affixing the Label to the Certified Biobased Product. This was language added to make it clear for participants whose appeal is granted when they may resume selling the product in question.

2. If the Agency denies a participant's appeal, then the notice of suspension and revocation stands. This is the current practice when an appeal is denied, and the Agency is promulgating this practice by adding it to this proposed rule.

c. *Appeals of decisions made on appeals.* This proposed rule establishes this section as Appeals of decisions made on appeals. The proposed rule uses the language from § 3202.6(d) with modifications. The proposed rule instructs the appellant to address their appeals to the USDA Rural Business Cooperative Service Administrator instead of the Assistant Secretary for Administration. This change was made because the BioPreferred Program is now housed under the Rural Development Rural Business Cooperative Service mission area rather than under Departmental Management. Also, in this section the term Program Manager was changed to USDA so that the appeal review process is not tied to a single individual or a single job title.

N. Section 4270.14 Reporting and Recordkeeping

In this proposed rule, the Agency combines §§ 3201.6, 3201.8, and 3202.9 into one section and is making minimal modifications. The Agency recognizes that Participating Organizations may consider some of the information requested for reporting and recordkeeping to be confidential. The Agency notes that information claimed as confidential by the participant will not be released and that individual participant data will not be reported. Only summary information regarding the benefits and impacts of the entire Program will be released.

a. *Providing product information to Federal agencies.* This proposed rule establishes this section as Providing product information to Federal agencies.

1. *Informational website.* This proposed rule uses language from § 3201.6(a) with no significant modifications.

i. *Product information.* This proposed rule uses language from § 3201.6(a)(1) with no significant modifications.

ii. *Providing information on price and environmental and health benefits.* This proposed rule uses language from § 3201.8(a) with no significant modifications.

iii. *Industry standards test information.* In this proposed rule, the Agency is clarifying that relevant industry standard test information is included in the product information supplied by the participant. Otherwise, this proposed rule uses language from § 3201.8(b) with no significant modifications.

iv. *Biodegradability information.* This proposed rule uses language from § 3201.8(c). In this proposed rule, the Agency is including an additional ASTM Biodegradability standard, ASTM D5988 (Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials in Soil), to make the list of Biodegradability standards more complete.

2. *Advertising, labeling, and marketing claims.* This proposed rule uses language from § 3201.6(b) with no significant modifications.

b. *Records.* This proposed rule uses language from § 3202.9(a) with no significant modifications.

1. This proposed rule uses language from § 3202.9(a)(1) with no significant modifications.

2. This proposed rule uses language from § 3202.9(a)(2) with some modifications. The Agency is clarifying in this proposed rule that Participating Organizations must maintain record of the notice of certification for each Certified Biobased Product, not just the date of certification. Maintaining record of the notice of certification helps the Agency efficiently review and resolve any disputes that arise regarding the validity of a certification or the term of certification for a specific Certified Biobased Product.

3. This proposed rule uses language from § 3202.9(a)(3) with no significant modifications.

c. *Record retention.* This proposed rule uses language from § 3202.9(b) with no significant modifications.

O. Section 4270.15 Oversight and Monitoring

a. *General.* The proposed rule uses the language from § 3202.10(a) with no significant modifications.

b. *Biobased Content Testing.* The proposed rule uses the language from § 3202.10(b) with no significant modifications.

c. *Inspection of records.* The proposed rule uses the language from § 3202.10(c) with no significant modifications.

d. *Audits.* The Agency has determined the need to simplify the BioPreferred Program's audit procedure established under § 3202.10(d). The audit procedures in § 3202.10(d) involved three stages that were scheduled to take place every other calendar year (bi-annually). The first stage (§ 3202.10(d)(1)) required Participating Organizations to confirm that their product and company information remains unchanged. The second stage (§ 3202.10(d)(2)) involved a random sampling of Certified Biobased Products to confirm the accuracy of the Biobased Content percentages claimed. The third stage (§ 3202.10(d)(3)) required manufacturers of Certified Biobased Products that have been certified for five years or more to have their products retested at their expense to confirm that the certified Biobased Content remains valid.

In this proposed rule, the Agency has simplified the audit process by eliminating the second stage audits. Instead, the Agency will reserve the right to request that a Certified Biobased Product undergo testing to confirm the Certified Biobased Product's certified Biobased Content at any time. The Agency believes it is unnecessary to have a dedicated audit for this type of confirmation testing as the Agency does not anticipate this to occur frequently. Similarly, the Agency is eliminating the third stage audit in favor of implementing a limited term of certification for Certified Biobased Products. Finally, the Agency is updating the first stage audit (now called an annual desk audit) so that it will occur annually. During this annual desk audit, the Agency will require Participating Organizations to verify that their company, contact, and product information supplied during the application process remain valid. Audit activities will take place through the BioPreferred Program website (*https://www.biopreferred.gov*). Given that Participating Organizations are required to update the Agency of product and contact updates when they occur, annual desk audits should take very little time for Participating Organizations to complete, as Participating Organizations will simply be asked to confirm that their product and contact information is up to date. The Agency believes it is necessary to have such an audit annually for two reasons. First, it helps maintain the credibility of the BioPreferred Program by ensuring the product information included on the BioPreferred Program website (*https://www.biopreferred.gov*) is current and accurate. Second, it helps ensure that Participating Organizations keep the Agency updated when a change of contact occurs.

Participating Organizations may be asked to provide additional supplemental information during annual audits. If during an annual desk audit, a participant indicates that their product or company information needs to be updated, these updates will be incorporated into the BioPreferred Program website (*https://www.biopreferred.gov*). If it is indicated that a product is no longer manufactured, the product will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*). Participating Organizations that fail to complete an annual desk audit will be in noncompliance with the requirements set forth in this new proposed rule, and the Participating Organization and associated product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*). The Agency reserves the right to revoke product certification as a result of failing to participate in an audit.

P. Section 4270.99 OMB Control Number

The Office of Management and Budget (OMB) Control numbers for the legacy rules are as follows: 0570–0071 (part 3202) and 0570–0073 (part 3201). These existing OMB Control Numbers will be discontinued and a new OMB Control Number will be obtained for part 4270.

V. Executive Orders/Acts

A. Executive Order 12866—Classification

This rulemaking has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

B. Executive Order 12372—Intergovernmental Consultation

This program is not subject to the requirements of Executive Order 12372, Intergovernmental Review of Federal Programs, as implemented under 2 CFR part 415.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended), the Agency invites comments on this information collection for which it intends to request approval from OMB.

Comments on this document must be received by March 25, 2024.

Comments are invited on (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques on other forms of information technology.

Comments may be submitted by going to the Federal eRulemaking Portal. Go to *https://www.regulations.gov* and in the ''Search Documents'' box, enter the Docket Number or the RIN provided above in this document, and click the ''Search'' button.

Title: 7 CFR part 4270.

OMB Control Number: 0570–NEW.

Abstract: The BioPreferred Program was established by section 9002 of FSRIA. The BioPreferred Program will establish guidelines for (1) designating categories of products that are, or can be, produced with biobased Intermediate Ingredients or feedstocks and whose procurement by procuring agencies and other relevant Stakeholders will carry out the objectives of section 9002 of FSRIA; (2) establishing criteria for eligibility and the process through which Biobased Products can participate in the BioPreferred Program, be subject to preferred Federal procurement, and be eligible to display the USDA Certified Biobased Product Label; (3) establish specifications for the correct and incorrect uses of the USDA Certified Biobased Product Label and Certification Icon, which apply to Participating Organizations and Other Entities; and (4) establish actions for noncompliance.

The information required for the BioPreferred Program is similar to much of the information currently being required under the legacy rules. Under the legacy rules, the current information being collected is approved under OMB Control numbers 0570–0071 (part 3202) and 0570–0073 (part 3201). This regulation combines the legacy rules into one regulation and streamlines the requirements. The following estimates are based on the average over the first 3 years the Program is in place.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 10.3234 hours per response.

Respondents: Private entities.

Estimated Number of Respondents: 520.

Estimated Number of Responses per Respondent: 2.0096.

Estimated Total Annual Burden on Respondents: 10,788.

Copies of this information collection may be obtained from Katherine Anne Mathis, Regulatory Management Division, Rural Development Innovation Center, U.S. Department of Agriculture, 1400 Independence Ave. SW, Stop 0793, Washington, DC 20250; telephone: 202–713–7565; email: *katherine.mathis@usda.gov.* All responses to this information collection and recordkeeping notice will be summarized and included in the request for OMB approval. All comments also become a matter of public record.

D. National Environmental Policy Act

In accordance with the National Environmental Policy Act of 1969, Public Law 91–190, this proposed rule has been reviewed in accordance with 7 CFR part 1970. The Agency has determined that (i) this action meets the criteria established in 7 CFR 1970.53(f); (ii) no extraordinary circumstances exist; and (iii) the action is not ''connected'' to other actions with potentially significant impacts, is not considered a ''cumulative action'' and is not precluded by 40 CFR 1506.1. Therefore, the Agency has determined that the action does not have a significant effect on the human environment, and therefore neither an Environmental Assessment nor an Environmental Impact Statement is required.

E. Regulatory Flexibility Act

The proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). The undersigned has determined and certified by signature on this document that this rulemaking will not have a significant economic impact on a substantial number of small entities since this rulemaking action does not involve a new or expanded Program nor does it require any more action on the part of a small business than required of a large entity.

F. Executive Order 12988—Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988. In accordance with this rule: (1) unless otherwise specifically provided, all State and local laws that conflict with this rulemaking will be preempted; (2) no retroactive effect will be given to this rulemaking except as specifically prescribed in the rule; and (3) administrative proceedings of the National Appeals Division of the Department of Agriculture (7 CFR part 11) must be exhausted before bringing suit in court that challenges action taken under this rule.

G. Unfunded Mandates Reform Act (UMRA)

Title II of the UMRA, Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal Governments and on the private sector. Under section 202 of the UMRA, Federal agencies generally must prepare a written statement, including cost-benefit analysis, for proposed and Final Rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal Governments, in the aggregate, or to the private sector, of $100 million or more in any year. When such a statement is needed for a rule, section 205 of the UMRA generally requires a Federal agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This rulemaking contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal Governments or for the private sector. Therefore, this rulemaking is not subject to the requirements of sections 202 and 205 of the UMRA.

H. Executive Order 13132—Federalism

The policies contained in this rulemaking do not have any substantial direct effect on States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rulemaking impose substantial direct compliance costs on state and local governments. Therefore, consultation with the States is not required.

I. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This Executive order imposes requirements on RBCS in the development of regulatory policies that have tribal implications or preempt tribal laws. RBCS has determined that the rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and Indian tribes. Thus, this rulemaking is not subject to the requirements of Executive Order 13175. If tribal leaders are interested in consulting with RBCS on this rule, they are encouraged to contact USDA's Office of Tribal Relations or RD's Native American Coordinator at: *AIAN@usda.gov* to request such a consultation.

J. E-Government Act Compliance

RD is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

K. Civil Rights Impact Analysis

RD has reviewed this rulemaking in accordance with USDA Regulation 4300–4, Civil Rights Impact Analysis, to identify any major civil rights impacts the rule might have on Program participants on the basis of age, race, color, national origin, sex, disability, marital or familial status. Based on the review and analysis of the rule and all available data, issuance of this proposed rule is not likely to negatively impact low and moderate-income populations, minority populations, women, Indian tribes or persons with disability, by virtue of their age, race, color, national origin, sex, disability, or marital or familial status. No major civil rights impact is likely to result from this proposed rule.

L. USDA Non-Discrimination Statement

In accordance with Federal civil rights laws and USDA civil rights regulations and policies, the USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print,

audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; or the 711 Relay Service.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, USDA Program Discrimination Complaint Form, which can be obtained online at *https://www.usda.gov/sites/default/files/documents/ad-3027.pdf* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

a. *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; or

b. *Fax:* (833) 256–1665 or (202) 690–7442; or

c. *Email: program.intake@usda.gov*

List of Subjects in 7 CFR Parts 3201, 3202, and 4270

Biobased products, Business and industry, Government procurement.

For the reasons stated in the preamble, USDA is proposing to amend chapters XXXII and XLII of title 7 of the Code of Federal Regulations as follows:

CHAPTER XXXII—OFFICE OF PROCUREMENT AND PROPERTY MANAGEMENT

PART 3201 [Removed and Reserved]

■ 1. Under the authority of 5 U.S.C. 301 and 7 U.S.C. 8102, remove and reserve part 3201.

PART 3202 [Removed and Reserved]

■ 2. Under the authority of 5 U.S.C. 301 and 7 U.S.C. 8102, remove and reserve part 3202.

CHAPTER XLII—RURAL BUSINESS-COOPERATIVE SERVICE

■ 3. Add part 4270, consisting of §§ 4270.1 through 4270.99 to read as follows:

PART 4270—USDA BIOBASED MARKETS PROGRAM: FEDERAL PROCUREMENT AND VOLUNTARY LABELING

Sec.

Authority: 7 U.S.C. 8102.

§ 4270.1 Purpose and scope.

(a) This part sets forth the procedures and guidelines for the implementation of the USDA Biobased Markets Program, called the BioPreferred® Program, established by section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA) as amended by the Food, Conservation, and Energy Act of 2008, and further amended by the Agricultural Act of 2014, and the Agriculture Improvement Act of 2018 (Pub. L. 107–171, 116 Stat. 476, 7 U.S.C. 8102).

(b) The guidelines in this part establish:

(1) A process for designating categories of products that are, or can be, produced with biobased Intermediate Ingredients or feedstocks and whose procurement by procuring agencies and other relevant Stakeholders will carry out the objectives of section 9002 of FSRIA;

(2) The criteria for eligibility and the process through which Biobased Products can participate in the BioPreferred Program, be subject to preferred Federal procurement, and be eligible to display the USDA Certified Biobased Product Label;

(3) Specifications for the correct and incorrect uses of the USDA Certified Biobased Product Label and Certification Icon, which apply to Participating Organizations and Other Entities; and

(4) Actions that constitute noncompliance with this part.

§ 4270.2 Definitions.

Agricultural materials. Plant, animal, and marine matter, raw materials or residues used in the manufacturing of a commercial or industrial product excluding food, feed, motor vehicle fuel, heating oil, and electricity.

Applicable minimum biobased content. The required Biobased Content level set by USDA that a product must meet or exceed to qualify for the Federal procurement preference and use of the USDA Certified Biobased Product Label.

ASTM International (ASTM). A nonprofit organization, formerly known as American Society for Testing and Materials, that provides an international forum for the development and publication of voluntary consensus standards for materials, products, systems, and services.

Biobased content. The amount of recent, biologically derived organic carbon in the material or product expressed as a percent of weight (mass) of the total organic carbon in the material or product.

Biobased content testing. The testing that is performed to verify a product's biobased Content. For products participating in the BioPreferred Program, the Biobased Content is to be determined using ASTM Method D6866, Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis.

Biobased product(s). (1) A product determined by USDA to be a commercial or industrial product (other than food or feed) that is:

(i) Composed, in whole or in significant part, of Biological Products, including renewable domestic Agricultural Materials, Renewable Chemicals, and forestry materials; or

(ii) An Intermediate Ingredient or Feedstock.

(2) The term Biobased Product includes, with respect to forestry materials, Forest Products that meet Biobased Content requirements, notwithstanding the market share the product holds, the age of the product, or whether the market for the product is new or emerging. For the purposes of the BioPreferred Program, the term Biobased Product does not include motor vehicle fuels, heating oils, or electricity.

Biodegradability. A quantitative measure of the extent to which a material is capable of being decomposed by biological agents, especially bacteria.

Biological products. Products derived from living materials.

Certification icon. The distinctive image, as shown in Figure 1, that depicts the symbols of the sun, the soil, and the aquatic environments to be used with USDA's permission to identify Certified Biobased Products. The icon will be used in materials including, but not limited to, advertisements, catalogs, procurement databases, websites, and promotional and educational materials. The colors used in the Certification Icon can be found in the USDA BioPreferred Program Brand and Marketing Guidelines available on the BioPreferred Program website (*https://www.biopreferred.gov*).

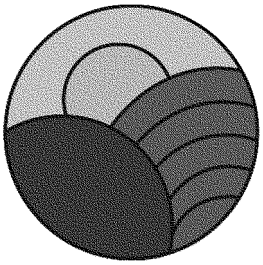

Figure 1. Certification Icon. (Note: Actual Size Will Vary Depending on Application)

Certified application. An application for a Biobased Product to participate in the BioPreferred Program that has completed all steps of the certification process, including an initial Prequalification review and Biobased Content Testing as required, and has received a notice of certification.

Certified biobased product. A Biobased Product that is eligible for preferred Federal procurement because it meets the definition and Applicable Minimum Biobased Content criteria for one or more Designated Product Categories as specified in the Register of Designated Categories, and for which the Participating Organization has received approval from USDA to utilize the USDA Certified Biobased Product Label.

Complex assembly. A system of distinct materials and components assembled to create a finished product with specific functional intent where some or all of the system components contain some amount of biobased material or feedstock.

Days. As used in this part means calendar Days.

Defined product category. Any product category that has been established for a specified grouping of Biobased Products with similar characteristics and intended uses. A Defined Product Category includes a description of the product characteristics that fall within the category. The other product category is not a Defined Product Category.

Designated product category. A grouping of Biobased Products, including finished products, Intermediate Ingredients or Feedstocks, and Complex Assemblies, identified in the Register of Designated Categories on the BioPreferred Program website (*https://www.biopreferred.gov*). Certified or Qualified Biobased Products that meet the criteria for at least one designated category are eligible for the procurement preference established under section 9002 of FSRIA.

Designated representative. An entity authorized by a Participating Organization to act on their behalf to obtain certification or to affix the USDA Certified Biobased Product Label to the Participating Organization's Certified Biobased Product or its packaging or perform other marketing functions.

Federal agency. Any executive agency or independent establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect's direction).

Forest product. A product made from materials derived from the practice of forestry or the management of growing timber. The term Forest Product includes:

(1) Pulp, paper, paperboard, pellets, lumber, and other wood products; and

(2) Any recycled products derived from forest materials.

Formulated product. A product that is prepared or mixed with other Ingredients, according to a specified formula and includes more than one Ingredient.

FSRIA. The Farm Security and Rural Investment Act of 2002, Public Law 107–171, 116 Stat. 134 (7 U.S.C. 8102).

Ingredient. A component, or a part of a compound or mixture, that may be active or inactive.

Innovative criteria. Benchmark for demonstrating new and emerging approaches in the growing, harvesting, sourcing, procuring, processing, manufacturing, or application of the Biobased Product. Biobased Products must meet one of the Innovative Criteria as defined by USDA to be eligible for preferred Federal procurement and to display the USDA Certified Biobased Product Label.

Intermediate ingredient or feedstock. A material or compound made in whole or in significant part from Biological Products, including renewable Agricultural Materials (including plant, animal, and marine materials) or forestry materials that have undergone value added processing (including thermal, chemical, biological, or a significant amount of mechanical processing), excluding harvesting operations, offered for sale by a Participating Organization and that is subsequently used to make a more complex compound or product.

ISO. The International Organization for Standardization, a network of national standards institutes working in partnership with international organizations, governments, industries, business, and consumer representatives.

ISO 9001 conformant. An entity that meets all the requirements of the ISO 9001 standard, but that is not required to be ISO 9001 certified. ISO 9001 refers to the ISO's standards and guidelines relating to quality management systems. Quality management is defined as what the manufacturer does to ensure that its products or services satisfy the customer's quality requirements and comply with any regulations applicable to those products or services.

Other entity. Any person, group, public or private organization, or business other than USDA or Participating Organizations that may wish to use the USDA Certified Biobased Product Label or Certification Icon in informational or promotional material related to a Certified Biobased Product.

Parent product. The Certified Biobased Product in a test exempt relationship that was originally tested for certification. A test exempt product references the Certified Application of its Parent Product.

Participating organization. An entity that has completed the steps required to have a Certified and/or Qualified Biobased Product under the BioPreferred Program. Participants can include entities that perform the necessary chemical and mechanical processes to make a Biobased Product, and entities that offer for sale Biobased Products that they do not manufacture but that are marketed and sold under their own brand.

Prequalification. The step during the certification process at which an application is conditionally approved pending the product undergoing Biobased Content Testing.

Procuring agency. Any Federal agency that is using Federal funds for procurement or any business contracting with any Federal agency with respect to work performed under the contract.

Qualified biobased product(s). A product that is eligible for preferred Federal procurement because it meets the definition and Applicable Minimum Biobased Content criteria for one or more Designated Product Categories as specified in the Register of Designated Categories.

Register of Designated Categories. The list of product categories that are eligible for the procurement preference established under section 9002 of FSRIA, including the category name, description, required minimum Biobased Content, and date of finalization. The Register of Designated Categories can be found on the BioPreferred Program website at *https://www.biopreferred.gov.*

Renewable chemical. A monomer, polymer, plastic, formulated product, or chemical substance produced from renewable biomass.

Secretary. The Secretary of the United States Department of Agriculture.

Stakeholder. Individuals or officers of state or local government organizations, private non-profit institutions, or organizations, and private businesses or consumers.

USDA. The United States Department of Agriculture.

USDA Certified Biobased Product label. A combination of the Certification Icon (as defined in this part); one of three statements identifying whether the USDA certification applies to the product, the package, or both the product and package; and the letters ''FP'' to indicate that the product is within a Designated Product Category and eligible for preferred Federal procurement. The distinctive image, as shown in Figures 2, 3, and 4, identifies products as USDA Certified Biobased Products. The colors used in the USDA Certified Biobased Product Label can be found in the USDA BioPreferred Program Brand and Marketing Guidelines available on the BioPreferred Program website (*https://www.biopreferred.gov*). The USDA Certified Biobased Product Label is owned and its use is managed by USDA (standard trademark law definition applies).

Figure 2: USDA Certified Biobased Product Label (Note: Actual Size Will Vary Depending on Application)

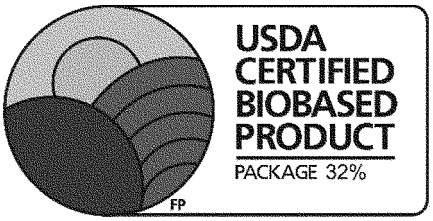

Figure 3: USDA Certified Biobased Package Label (Note: Actual Size Will Vary Depending on Application)

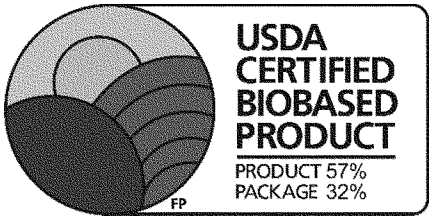

Figure 4: USDA Certified Biobased Product & Package Label (Note: Actual Size Will Vary Depending on Application)

§ 4270.3 Applicability.

(a) *Applicability to Federal procurements*—(1) *Applicability to procurement actions.* The guidelines in this part apply to all procurement actions by Procuring Agencies involving product categories designated by USDA in this part, where the Procuring Agency makes purchases of $10,000 or more of one of these products during a fiscal year, or where the quantity of such products or of functionally equivalent products purchased during the preceding fiscal year was $10,000 or more. The $10,000 threshold applies to Federal agencies as a whole rather than to agency subgroups such as regional offices or subagencies of a larger Federal department or agency.

(2) *Exception for procurements subject to Environmental Protection Agency (EPA) regulations under the Solid Waste Disposal Act.* For any procurement by any Procuring Agency that is subject to regulations of the Administrator of the EPA under section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (40 CFR part 247), these guidelines do not apply to the extent that the requirements of this part are inconsistent with such regulations.

(3) *Procuring products composed of the highest percentage of Biobased Content.* Section 9002(a)(2) of FSRIA (7 U.S.C. 8102(a)(2)) requires Procuring Agencies to procure Qualified Biobased Products composed of the highest percentage of Biobased Content practicable. Procuring agencies may decide not to procure such Qualified Biobased Products if they are not reasonably priced or readily available or do not meet specified or reasonable performance standards.

(4) *Incidental purchases.* This part does not apply to purchases of Qualified Biobased Products that are unrelated to or incidental to Federal funding (*i.e.,* purchases that are not the direct result of a contract or agreement with persons supplying products to a Procuring Agency or providing support services that include the supply or use of products).

(5) *Exemptions.* The following applications are exempt from the preferred procurement requirements of this part:

(i) Military equipment, which are products or systems designed or procured for combat or combat-related missions.

(ii) Spacecraft systems and launch support equipment.

(b) *Applicability to Participating Organizations and Other Entities*—(1) *Participating Organizations.* The requirements in this part apply to all prospective Participating Organizations who wish to participate in the BioPreferred Program. Those wishing to participate in the BioPreferred Program are required to obtain and maintain product certification. USDA will allow only one owner or Designated Representative of a branded product to participate. Participating Organizations may not obtain product certification for a product using a brand name owned by a separate organization unless they are acting on behalf of the brand owner, with their approval, as a Designated Representative.

(2) *Other Entities.* The requirements in this part apply to Other Entities who wish to use the USDA Certified Biobased Product Label or Certification Icon in promoting the sales or the public awareness of Certified Biobased Products.

§ 4270.4 Criteria for eligibility.

A product must meet each of the criteria specified in paragraphs (a) through (c) of this section to be eligible to participate in the BioPreferred Program.

(a) *Biobased Product.* The product for which certification is sought must be a Biobased Product as defined in § 4270.2. Products must undergo Biobased Content Testing as described in § 4270.7 to confirm the products meet or exceed the applicable minimums.

(1) *Products that are qualified for preferred Federal procurement but not certified as of the date of publication of this rule.* If the product is qualified for preferred Federal procurement through the BioPreferred Program as of [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], the product will remain eligible under the legacy rules, which can be found on the BioPreferred Program website (*https://www.biopreferred.gov*), until the product is reformulated, discontinued, or until [DATE THREE YEARS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], whichever comes first. These products must follow the procedures described in § 4270.9 before [DATE THREE YEARS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**] to remain eligible.

(2) *Exclusions.* Motor vehicle fuels, heating oil, and electricity are excluded by statute from this Program. For the purposes of this Program, food, animal feed, and products intended to be ingested or inhaled such as pharmaceuticals or nutraceuticals are also excluded.

(b) *Minimum Biobased Content.* The Biobased Content of the product must be equal to or greater than the Applicable Minimum Biobased Content, as described in paragraphs (b)(1) and (2) of this section.

(1) *Products that fall under one or more Defined Product Categories*—(i) *Product is within a single product category.* If the Biobased Product is within a single Defined Product Category that, at the time the application for certification is submitted, has been designated by USDA for preferred Federal procurement, the Applicable Minimum Biobased Content requirement for the product is the minimum Biobased Content specified for the Defined Product Category as found in the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov.*

(ii) *Product is within multiple product categories.* If the Biobased Product is marketed within more than one Defined Product Category identified for preferred Federal procurement at the time the application for certification is submitted and uses the same packaging for each use, the product's Biobased Content must meet or exceed the specified minimum Biobased Content for each of the applicable product categories, as found in the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov,* to become certified in each category. If the product's Biobased Content does not meet the specified minimum Biobased Content for the category that most closely matches the product's primary intended use, the product is not eligible to participate.

(2) *Products that do not meet the definition of at least one Defined Product Category.* If the Biobased Product does not meet the definition of a Defined Product Category that has been designated by USDA at the time the application for certification is submitted, the Applicable Minimum Biobased Content is 30 percent. USDA will evaluate such products as described in § 4270.6 to determine the viability of designating a new product category. If a new category is subsequently designated for preferred Federal procurement, the Applicable Minimum Biobased Content will become, as of the effective date indicated in the Register of Designated Categories, the minimum Biobased Content specified for the newly Defined Product Category.

(c) *Innovative Criteria.* In determining eligibility for certification under the BioPreferred Program, USDA will consider as eligible only those products that use innovative approaches in the growing, harvesting, sourcing, procuring, processing, manufacturing, or application of the Biobased Product. USDA will consider products that meet one or more of the criteria in paragraphs (c)(1) through (4) of this section to be eligible for certification. USDA will also consider other documentation of innovative approaches in the growing, harvesting, sourcing, procuring, processing, manufacturing, or application of Biobased Products on a case-by-case basis. USDA may deny or revoke certification for any products whose manufacturers are unable to provide USDA with the documentation necessary to verify claims that innovative approaches are used.

(1) *Product applications.* (i) The Biobased Product or material is used or applied in applications that differ from historical applications; or

(ii) The Biobased Product or material is grown, harvested, manufactured, processed, sourced, or applied in other innovative ways; or

(iii) The Biobased Content of the product or material makes its composition different from products or material used for the same historical uses or applications.

(2) *Manufacturing and processing.* (i) The Biobased Product or material is manufactured or processed using renewable, biomass energy or using technology that is demonstrated to increase energy efficiency or reduce reliance on fossil-fuel based energy sources; or

(ii) The Biobased Product or material is manufactured or processed with technologies that reduce waste and ensure high feedstock material recovery and use.

(3) *Environmental Product Declaration.* The product has a current Environmental Product Declaration as defined by International Standard ISO 14025, Environmental Labels and Declarations—Type III Environmental Declarations—Principles and Procedures.

(4) *Raw material sourcing.* (i) The raw material used in the product is sourced from a Legal Source, a Responsible Source, or a Certified Source as designated by ASTM D7612 (Standard Practice for Categorizing Wood and Wood-Based Products According to Their Fiber Sources); or

(ii) The raw material used in the product is 100% resourced or recycled (such as material obtained from building deconstruction or agricultural wastes); or

(iii) The raw material used in the product is acquired as a result of activities related to a natural disaster, debris clearing, right-of-way maintenance, tree health improvement, or public safety; or

(iv) The raw material used in the product is grown, harvested, manufactured, processed, sourced, or applied in other sustainable and ethically sourced ways as determined by USDA. Examples include but are not limited to rainforest and habitat conservation, wildlife protection, ethical workplace practices, and adherence to environmental management systems, such as ISO 14001.

§ 4270.5 Procurement programs.

(a) *Integration into the Federal procurement framework.* The Office of Federal Procurement Policy, in cooperation with USDA, has the responsibility to coordinate this policy's implementation in the Federal procurement regulations. These guidelines are not intended to address full implementation of these requirements into the Federal procurement framework. This will be accomplished through revisions to the Federal Acquisition Regulation.

(b) *Federal agency preferred procurement programs.* (1) Each Federal agency will maintain and implement a procurement program that will assure that Qualified Biobased Products are purchased to the maximum extent practicable and that is consistent with applicable provisions of Federal procurement laws. Each procurement program will contain:

(i) A preference program for purchasing Qualified Biobased Products;

(ii) A training program to educate the Federal agency and its contractors on the requirements for purchasing Qualified Biobased Products;

(iii) Provisions for the annual review and monitoring of the effectiveness of the procurement program;

(iv) Provisions for reporting quantities and types of Biobased Products purchased by the Federal agency and its contractors through the BioPreferred Program Portal in the System for Award Management (*https://sam.gov*) as required by 48 CFR 52.223–2; and

(v) Provisions for reviewing and eliminating specifications that prohibit the purchasing of Qualified Biobased Products.

(2) In developing their preference program, Federal agencies will adopt one of the following options, or a substantially equivalent alternative, as part of the procurement program:

(i) A policy of awarding contracts on a case-by-case basis to the vendor offering a Qualified Biobased Product

composed of the highest percentage of Biobased Content practicable except when such products:

(A) Are not available within a reasonable timeframe;

(B) Fail to meet performance standards for their intended use, or the reasonable performance standards of the Federal agency; or

(C) Are not available at a reasonable price.

(ii) A policy of setting minimum Biobased Content specifications in such a way as to assure that the required Biobased Content of Qualified Biobased Products is consistent with section 9002 of FSRIA and the requirements of the guidelines in this part.

(iii) A policy of documenting and reporting cases where it is not possible to award contracts and set specifications in such a way that is consistent with section 9002 of FSRIA and the requirements of this part.

(3) In implementing the preference program, Federal agencies will treat as eligible for the preference Biobased Products from designated countries, as that term is defined in 48 CFR 25.003 (Federal Acquisition Regulation), provided that those products otherwise meet all requirements for participation in the preference program.

(4) Each Federal agency will continue to establish an annual targeted biobased-only procurement requirement under which the Procuring Agency will issue a certain number of biobased-only contracts when the Procuring Agency is purchasing products, or purchasing services that include the use of products, that are included in a Biobased Product category designated by the Secretary.

(c) *Procurement specifications.* Federal agencies that have the responsibility for drafting or reviewing specifications for products procured by Federal agencies will ensure that their specifications require the use of Qualified Biobased Products, consistent with the guidelines in this part. These specifications must be put in place no later than six months after a designated category of products is finalized and added to the Register of Designated Categories. USDA will identify the allowable time frame for specifications to be put in place in the Register of Designated Categories found on the BioPreferred Program website at *https://www.biopreferred.gov.* The Biobased Content of Qualified Biobased Products within a Designated Product Category may vary considerably from product to product based on the mix of Ingredients used in its manufacture. In procuring Qualified Biobased Products, the percentage of Biobased Content should be maximized, consistent with achieving the desired performance for the product.

§ 4270.6 Category designation.

(a) *Procedure.* Designated Product Categories are found in the Register of Designated Categories on the BioPreferred Program website (*https://www.biopreferred.gov*).

(1) *General.* In designating product categories, USDA will designate categories composed of generic groupings of specific products, Intermediate Ingredients or Feedstocks, or Complex Assemblies and will identify the minimum Biobased Content for each listed category or subcategory. As product categories are designated for procurement preference, they will be added to the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov.*

(i) *Adding new product categories to the Register of Designated Categories.* If a product does not fall within a Defined Product Category that has been designated by USDA at the time the application for certification is submitted, the Applicable Minimum Biobased Content is 30 percent, and it will be listed in the other product category. USDA will evaluate the viability of designating new product categories to categorize products in the other product category more appropriately, following the procedure described in paragraphs (a)(1)(i)(A) through (D) of this section.

(A) New Defined Product Categories that are identified during the category evaluation process will be added to the Register of Designated Categories on the BioPreferred Program website (*https://www.biopreferred.gov*). Using the data gathered during the certification process, USDA will establish a provisional category name, definition, and minimum Biobased Content for each new product category based on the product(s) that fall within the new category.

(B) The provisional minimum will be in place for a period of six months following the addition of the new Defined Product Category to the Register of Designated Categories. During that time, any product that falls within the category based on the category definition and has a Biobased Content that is either at least 30 percent or within 30 percentage points of the provisional minimum, whichever is higher, will be considered for inclusion.

(C) After a period of six months following the addition of the new product category to the Register of Designated Categories, USDA will re-evaluate the provisional category name, description, and minimum Biobased Content based on the data gathered during the year. At that time, USDA will make final the product category name, description, and minimum Biobased Content, and the category will no longer be considered provisional.

(D) Procuring agencies, in accordance with this part, are encouraged to give a procurement preference for Qualified Biobased Products that fall within provisionally designated categories and are required to give a procurement preference for Qualified Biobased Products that fall within designated categories no later than six months after the finalized product category is added to the Register of Designated Categories. By that date, Federal agencies responsible for products to be procured will ensure that the relevant specifications require the use of Biobased Products that fall within the designated categories.

(ii) *Revising Defined Product Categories on the Register of Designated Categories.* USDA will periodically evaluate the need to update the product categories included in the Register of Designated Categories by reviewing items including, but not limited to, the category names, definitions, minimum Biobased Contents, subcategories, and the need for the category or subcategory. If the data support making updates, USDA will amend the category and publish the updated category to the Register of Designated Categories. No later than six months after the amended category is published to the Register of Designated Categories, procuring agencies, in accordance with this part, will give a procurement preference for Qualified Biobased Products that fall within the amended designated category. By that date, Federal agencies responsible for products to be procured will ensure that the relevant specifications require the use of Biobased Products that fall within the designated categories.

(2) *Public comments.* Interested parties, including manufacturers, vendors, groups of manufacturers and/or vendors, and trade associations may propose an alternative Applicable Minimum Biobased Content for a new, provisional, defined, or Designated Product Category by, in consultation with USDA, developing and conducting an analysis to support the proposed alternative Applicable Minimum Biobased Content. If approved by USDA, the proposed alternative Applicable Minimum Biobased Content would become the Applicable Minimum Biobased Content for products that fall within that category to be certified.

(3) *Continued eligibility.* If the applicable required minimum Biobased Content for a product to be eligible to participate in the BioPreferred Program is revised by USDA, the product will remain certified or qualified, as applicable, only if it meets the new minimum Biobased Content level. In those cases where the Biobased Content of a certified or qualified product fails to meet the new minimum Biobased Content level, USDA will notify the Participating Organization that their certification is no longer valid. Such Participating Organizations must notify USDA of their intent to increase the Biobased Content of their product to a level at or above the new minimum Biobased Content level within 120 Days and must re-apply for certification within an additional 120 Days if they wish to continue to participate in the Program. The affected product's certification will expire if the Participating Organization does not notify USDA of the intent to reformulate within 120 Days or if the Participating Organization does not re-apply within the additional 120 Days. Participating Organizations who have re-applied for certification may continue using the existing USDA Certified Biobased Product Label until they receive notification from USDA on the results of their re-application for certification.

(b) *Considerations.* (1) In designating product categories, USDA will consider the availability of Qualified Biobased Products and the economic and technological feasibility of using such products, including price. USDA will gather information on individual Qualified Biobased Products within a category and extrapolate that information to the category level for consideration in designating categories.

(2) In designating product categories for the BioPreferred Program, USDA will consider as eligible only those products that use innovative approaches in growing, harvesting, sourcing, procuring, processing, manufacturing, or application of the Biobased Product. USDA will consider products that meet one or more of the criteria in § 4270.4(b)(1) and (2) to be eligible for the BioPreferred Program. USDA will also consider other documentation of innovative approaches in growing, harvesting, sourcing, procuring, processing, manufacturing, or application of Biobased Products on a case-by-case basis.

§ 4270.7 Determining Biobased Content.

(a) *Certification requirements.* For any Biobased Product seeking to participate in the BioPreferred Program, prospective Participating Organizations must submit an application as specified in § 4270.9 and confirm that the product meets the Applicable Minimum Biobased Content requirements and the definition for the Defined Product Category within which the Biobased Product falls. Paragraph (c) of this section addresses how to determine Biobased Content.

(b) *Minimum Biobased Content.* Unless specified otherwise in the designation of a particular product category, the minimum Biobased Content requirements in a specific category designation refer to the organic carbon portion of the product, and not the entire product.

(c) *Determining Biobased Content.* Verification of Biobased Content must be based on third party ASTM/ISO compliant test facility testing using the ASTM Standard Method D6866 (Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis). ASTM Standard Method D6866 determines Biobased Content based on the amount of biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the product.

(1) *General.* Biobased Content will be based on the amount of biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the product.

(2) *Complex Assemblies*—(i) *Equation.* The Biobased Content of a Complex Assembly product, where the product has n components whose Biobased Content and organic carbon content can be experimentally determined, may be calculated using the following equation:

$$Biobased\ Content\ of\ Product = \frac{\sum_{i=1}^{n} M_i * BBC_i * OCC_i}{\sum_{i=1}^{n} M_i * OCC_i}$$

Where:

M_i = mass of the nth component
BCC_i = biobased carbon content of the nth component (%)
OCC_i = organic carbon content of the nth component (%)

(ii) *Proportional sampling.* The Biobased Content of a Complex Assembly product may be determined by sub-sampling (by weight) each organic constituent in a proportion representative of its content within the assembly and combining the sub-samples into a measurable quantity so that a single ASTM D6866 analysis of the combined sub-samples is representative of the assembly.

(d) *Products and Intermediate Ingredients or Feedstocks with the same formulation.* In the case of products and Intermediate Ingredients or Feedstocks that are essentially the same formulation but marketed under more than one brand name, Biobased Content test data may be shared as specified in paragraphs (d)(1) and (2) of this section.

(1) *Test exemptions.* In situations where a new product for which certification is sought is composed of the same Ingredients and has the same Biobased Content as a product that has already been certified and tested by a company that the interested party has a direct relationship with, the interested party may apply for a test exemption by referencing the Certified Application of the certified Parent Product in lieu of having the new product undergo Biobased Content Testing using ASTM D6866.

(2) *Families.* In situations where a Participating Organization is seeking certification for two or more products that are composed of the same Ingredients and have the same Biobased Content but are marketed for different uses or under more than one brand name, the products may be grouped in a family. Biobased Content test data must only be obtained for one of the products in the family, and the test data will apply to all products within the family.

§ 4270.8 [Reserved]

§ 4270.9 Initial approval process.

(a) *Application.* Prospective Participating Organizations seeking USDA approval to use the USDA Certified Biobased Product Label and to become qualified for preferred Federal procurement for an eligible Biobased Product must submit an application for each Biobased Product or product family. USDA has developed a standardized application form that must be used. The standardized application form and instructions are available on the BioPreferred Program website (*https://www.biopreferred.gov*). The contents of an acceptable application are as specified in paragraphs (a)(1) and (2) of this section.

(1) *General content.* The applicant must provide the information as specified in paragraphs (a)(1)(i) though (viii) of this section.

(i) Contact information, including the name, mailing address, email address, and telephone number of the applicant.

(ii) The product's brand name(s) or other identifying information.

(iii) Intended uses of the product.

(iv) The biobased source(s) of the raw materials used in the product.

(v) Information to document that one or more of the Innovative Criteria specified in § 4270.4(c) has been met.

(vi) The corresponding Designated Product Category classification for preferred Federal procurement.

(vii) The estimated Biobased Content of the product.

(viii) A web link directly to the applicant's website (if available).

(2) *Commitments.* The applicant must verify in the application that the product for which use of the USDA Certified Biobased Product Label is sought is a Biobased Product as defined in § 4270.2. The applicant must also agree to statements in the application that commit the applicant to submitting to USDA the information specified in paragraph (a)(1)(i) through (viii) of this section, some of which USDA will post to the BioPreferred Program website (*https://www.biopreferred.gov*), and to providing USDA with up-to-date information on this website.

(b) *Evaluation of applications*—(1) *Initial evaluation.* USDA will evaluate each application to determine if it contains the information specified in paragraph (a) of this section and to determine compliance with the criteria specified in § 4270.4. If USDA determines that the application is incomplete, USDA will contact the applicant via email with an explanation of the application's deficiencies. Once the deficiencies have been addressed, the applicant may respond to USDA with an explanation of how the application's deficiencies were addressed for re-evaluation by USDA, and USDA will update the application as needed. If the applicant does not provide a response within 90 Days, USDA will make the application inactive.

(2) *Prequalification.* (i) USDA will provide a written response to each applicant as quickly as practicable, no later than 90 Days after the receipt of a complete application, depending on the responsiveness of the applicant. The written response will inform the applicant of whether the application has been conditionally approved, or prequalified, to move forward to Biobased Content Testing or has been disapproved. After notification that the application has been conditionally approved, if any of the information specified in paragraphs (a)(1)(i) through (viii) of this section has changed, the applicant must provide updates to USDA (for posting by USDA on the BioPreferred Program website).

(ii) For those applications that are conditionally approved to move forward, Biobased Content Testing must be completed as described in § 4270.7. Test results obtained prior to the application being conditionally accepted or obtained in a manner that does not comply with this part cannot be accepted.

(iii) After Biobased Content Testing has been completed, USDA will evaluate the results and determine if the product meets the criteria described in § 4270.4(b). For those applications that meet the criteria described in § 4270.4(b), USDA will issue a notice of certification, as specified in paragraph (c) of this section. A notice of certification must be issued before the use of the USDA Certified Biobased Product Label can begin.

(iv) For those applications that are disapproved, USDA will inform the applicant in writing of each criterion not met.

(c) *Notice of certification.* Once USDA confirms that the test results document an acceptable Biobased Content, USDA will issue a notice of certification to the applicant that includes the date of certification, name of the product(s) covered by the certification, and certified Biobased Content of the product(s). Upon receipt of a notice of certification, the applicant may begin using the USDA Certified Biobased Product Label on the Certified Biobased Product and may advertise that the product is a Certified Biobased Product. Paragraph (c)(1) of this section presents the procedures for revising the information provided under paragraphs (a)(1)(i) through (viii) of this section after a notice of certification has been issued.

(1) If at any time, during the application process or after a product has been certified, any of the information specified in paragraphs (a)(1)(i) through (viii) of this section changes, the applicant must notify USDA of the change within 30 Days. Such notification must be provided in writing via email to USDA. Failure to notify USDA of any change made to a Certified Biobased Product may result in the violation actions described in § 4270.12.

(2) After receiving the notice of certification, the Participating Organization may request to display a Biobased Content percentage that is lower than the content measured by the ASTM D6866 test results but is greater than or equal to the applicable category minimums. Such requests must be sent in writing via email to USDA and must be approved by USDA.

(3) If, after reviewing the test results, USDA determines that the product does not meet the Applicable Minimum Biobased Content, USDA will issue a notice of denial of certification and will inform the applicant in writing via email of each criterion not met.

(d) *Term of certification*—(1) *General.* The effective date of certification is included in the notice of certification from USDA. Except as specified in paragraphs (d)(1)(iii) and (iv) and (d)(2) through (4) of this section, certifications will remain in effect for five years. The applicant will be notified 90 Days before the certification expires, at which time, the product must be re-tested in accordance with the procedure as specified in § 4270.7.

(i) If the certification is not renewed within the 90 Days, the product certification will expire, the product will no longer be a Certified Biobased Product, and the product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*).

(ii) If a Participating Organization whose product certification has expired wishes to renew the certification, the participant must follow the procedures required for original certification.

(iii) All certifications are subject to periodic USDA auditing activities, as described in § 4270.15. If a Participating Organization fails to participate in such audit activities or if such audit activities reveal Biobased Content violations, as specified in § 4270.12, the certification will be subject to suspension and revocation according to the procedures specified in § 4270.12(c)(3).

(iv) If USDA discovers that a certification has been issued for an ineligible product as a result of errors on the part of USDA during the approval process, USDA will notify the Participating Organization in writing that the certification is revoked effective 30 Days from the date of the notice.

(2) *Reformulations.* If at any time during the term of certification a Certified Biobased Product is reformulated, the participant must notify USDA of the change. USDA will consider the changes and inform the participant if re-testing is required as specified in paragraphs (d)(2)(i) through (iii) of this section.

(i) If the product formulation or raw materials of a Certified Biobased Product are changed such that the

Biobased Content of the product is reduced to a level below that reported in the Certified Application, the existing certification will no longer be valid for the product under these revised conditions and the Participating Organization and its Designated Representatives must discontinue affixing the USDA Certified Biobased Product Label to the product and must not initiate any further advertising of the product using the USDA Certified Biobased Product Label. USDA will consider a product under such revised conditions to be a reformulated product, and the Participating Organization must submit a new application for certification using the procedures specified in paragraph (a) of this section.

(ii) If the product formulation of a Certified Biobased Product is changed such that the Biobased Content of the product is increased from the level reported in the Certified Application, and the raw materials are not significantly changed, the existing certification will continue to be valid for the product.

(iii) If the applicable required minimum Biobased Content for a product to participate in the BioPreferred Program is revised by USDA, Participating Organizations must follow the requirements specified in § 4270.6(a)(3).

(3) *Test exemptions.* For those products that are exempt from Biobased Content Testing as described in § 4270.7, the test exempt certification will expire at the same time as the Certified Application of the Parent Product.

(4) *Special considerations.* (i) For those Participating Organizations who have Qualified Biobased Products that are not certified as of the date of publication of this rule, USDA will solicit Biobased Content test data obtained using the ASTM D6866 test method. Participants who provide USDA with ASTM D6866 test data that has been obtained within the past five years from the date of publication of this rule and whose products meet the requirements as described in § 4270.4 will receive certification for their products covered by the test data. The term of certification as described in paragraph (d)(1) of this section will then apply.

(ii) Participants who have Qualified Biobased Products that are not certified as of [DATE OF PUBLICATION OF THIS FINAL RULE IN THE **FEDERAL REGISTER**] and do not provide recent ASTM D6866 test results within three years of the publication of this rule will be required to have their products tested and certified as described in § 4270.7. If certification is not completed within three years of the publication of this rule, these Biobased Products will no longer be listed as Qualified Biobased Products on the BioPreferred Program's website (*https://www.biopreferred.gov*) and will be removed from the BioPreferred Program's website (*https://www.biopreferred.gov*).

(iii) For those participants who have Certified Biobased Products that have been certified for more than five years as of the date of publication of this rule, USDA will require that the certification be renewed as described in paragraph (d)(1) of this section within three years of [DATE OF PUBLICATION OF THIS FINAL RULE IN THE **FEDERAL REGISTER**]. If an application for renewal is not completed within three years, the product certification will expire, the product will no longer be a Certified Biobased Product, and the product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*).

§ 4270.10 [Reserved]

§ 4270.11 Requirements associated with promotional certification materials.

(a) *How participation in the BioPreferred Program can be promoted.* Guidance on promoting participation in the BioPreferred Program is provided in paragraphs (a)(1) and (2) of this section. USDA will evaluate additional requests for uses of promotional materials or references to the Program and will offer guidance on the BioPreferred Program website (*https://www.biopreferred.gov*).

(1) *Participating Organizations.* Only Participating Organizations that have received a notice of certification, or Designated Representatives of the Participating Organization, may utilize certification materials provided by the BioPreferred Program. A Participating Organization who has received a notice of certification for a product under this part:

(i) May use the USDA Certified Biobased Product Label (in one of the approved variations, as applicable) on the product, its packaging, and other related materials including, but not limited to, advertisements, catalogs, specification sheets, procurement sheets, procurement databases, promotional material, websites, or user manuals for that product, according to the requirements set forth in this section.

(ii) Is responsible for the manner in which the USDA Certified Biobased Product Label is used by its companies, as well as its Designated Representatives, including advertising agencies, marketing and public relations firms, and subcontractors.

(2) *Other Entities.* Other Entities who have entered into a partnership agreement with USDA may use the BioPreferred Program's promotional certification materials to advertise or promote Certified Biobased Products in materials including, but not limited to, advertisements, catalogs, procurement databases, websites, and promotional and educational materials. Other Entities may use:

(i) The Certification Icon;

(ii) The phrase ''USDA Certified Biobased Product/Package/Product & Package,'' as applicable; and

(iii) The BioPreferred Program name in general statements as described in paragraph (b) of this section, as long as the statements do not imply that a non-certified product is certified or endorsed by USDA.

(b) *Correct usage of the USDA Certified Biobased Product Label and other promotional certification materials.* (1) The USDA Certified Biobased Product Label can be affixed only to Certified Biobased Products and their associated packaging.

(2) The USDA Certified Biobased Product Label may be used in material including, but not limited to, advertisements, catalogs, procurement databases, websites, and promotional and educational materials to distinguish certified products from those that are not certified. The USDA Certified Biobased Product Label may be used in advertisements for both Certified Biobased Products and non-certified/labeled products if the advertisement clearly indicates which products are certified/labeled. Care must be taken to avoid implying that any non-certified products are certified.

(3) When educating the public about the USDA Certified Biobased Product Label, the watermarked sample version of the USDA Certified Biobased Product Label may be used without reference to a specific Biobased Product. For example, the following or similar claims are acceptable: ''Look for the 'USDA Certified Biobased Product Label.' It means that the product meets USDA standards for the minimum amount of Biobased Content and the manufacturer or vendor has provided relevant information on the product to be posted on the BioPreferred Program website (*https://www.biopreferred.gov*).'' This exception allows Participating Organizations or Other Entities to use a sample USDA Certified Biobased Product Label in documents such as corporate reports, but only in an informative manner, not as a statement of product certification.

(4) The USDA Certified Biobased Product Label may appear next to a picture of the Certified Biobased Product(s) or text describing it.

(5) The USDA Certified Biobased Product Label must stand alone and not be incorporated into any other certification mark or logo designs.

(6) The USDA Certified Biobased Product Label may be embossed, stamped, or used as a watermark provided the use does not violate any BioPreferred Program brand standards or usage restrictions specified in this part.

(7) The text portion of the USDA Certified Biobased Product Label must be written in English and may not be translated, even when the certification mark is used outside of the United States.

(c) *Incorrect usage of the USDA Certified Biobased Product Label and other promotional certification materials.* (1) The USDA Certified Biobased Product Label will not be used on any product that has not been certified by USDA as a ''USDA Certified Biobased Product.''

(2) The USDA Certified Biobased Product Label will not be used in a way that does not maintain the integrity of the label and the BioPreferred Program.

(3) The word ''BioPreferred'' will not be used as a descriptor for anything other than the Program, including but not limited to products, categories, and companies. The BioPreferred Program name, the word ''BioPreferred,'' and the phrase USDA Certified Biobased Product are not interchangeable. For example, certified products may not be referenced as being ''BioPreferred products.''

(4) The USDA Certified Biobased Product Label will not be used on any advertisements or informal materials where both Certified Biobased Products and non-certified products are shown unless it is clear that the USDA Certified Biobased Product Label applies to only the Certified Biobased Product(s).

(5) The BioPreferred Program name and the USDA Certified Biobased Product Label will not be used to imply endorsement by USDA or the BioPreferred Program of any particular product, service, or company.

(6) The BioPreferred Program name and the USDA Certified Biobased Product Label will not be used in any form that could be misleading to the consumer.

(7) The BioPreferred Program name and the USDA Certified Biobased Product Label will not be used by manufacturers or vendors of Certified Biobased Products in a manner disparaging to USDA or any other government body.

(8) The BioPreferred Program name, the word ''BioPreferred,'' the USDA Certified Biobased Product Label, and the Certification Icon will not be altered or incorporated into other label or logo designs.

(9) The USDA Certified Biobased Product Label will not be used on business cards, company letterhead, company stationary, or email signatures.

(10) The BioPreferred Program name, the word ''BioPreferred,'' the USDA Certified Biobased Product Label, and the Certification Icon will not be used in, or as part of, any company name, logo, product name, service, or website, except as may be provided for in this part.

(11) The BioPreferred Program name, the word ''BioPreferred,'' the USDA Certified Biobased Product Label, and the Certification Icon will not be used in a manner that violates any of the applicable requirements contained in this part.

(d) *Imported products.* The USDA Certified Biobased Product Label can be used only with a product that is certified by USDA under this part. The USDA Certified Biobased Product Label cannot be used to imply that a product meets or exceeds the requirements of biobased programs in other countries. Products imported for sale in the U.S. must adhere to the same guidelines as U.S. sourced Biobased Products. Any product sold in the U.S. as a ''USDA Certified Biobased Product/Package/Product & Package'' must have received certification from USDA.

(e) *Elements of the USDA Certified Biobased Product Label.* The USDA Certified Biobased Product Label will consist of the Certification Icon, the Biobased Content percentage, the letters ''FP'' to indicate that the product is qualified for preferred Federal procurement, and one of the three variations of text specified in paragraphs (e)(1) through (3) of this section, as applicable.

(1) USDA Certified Biobased Product: Product.

(2) USDA Certified Biobased Product: Package.

(3) USDA Certified Biobased Product: Product & Package.

(f) *Physical aspects of the USDA Certified Biobased Product Label.* The USDA Certified Biobased Product Label elements may not be altered, cut, separated into components, or distorted in appearance or perspective. The USDA Certified Biobased Product Label must appear only in the colors specified in paragraphs (f)(1) and (2) of this section unless approval is given by USDA for an exception.

(1) A multi-color version of the USDA Certified Biobased Product Label is preferred. The USDA Certified Biobased Product Label colors to be applied will be stipulated in the ''USDA BioPreferred Program Brand and Marketing Guidelines'' document available on the BioPreferred Program website (*https://www.biopreferred.gov*).

(2) Black or white outline versions of the USDA Certified Biobased Product Label are acceptable.

(g) *Placement of the USDA Certified Biobased Product Label.* (1) The USDA Certified Biobased Product Label can appear directly on a product, its associated packaging, in user manuals, and in other materials including, but not limited to, advertisements, catalogs, procurement databases, and promotional and educational materials.

(2) The USDA Certified Biobased Product Label will not be placed in a manner that is ambiguous about which product is a Certified Biobased Product or that could indicate certification of a non-certified product.

(3) When used to distinguish a Certified Biobased Product in material including, but not limited to, advertisements, catalogs, procurement databases, websites, and promotional and educational materials, the USDA Certified Biobased Product Label must appear near a picture of the product or text describing it.

(i) If all products on a page are Certified Biobased Products with the same Biobased Content percentage, the USDA Certified Biobased Product Label may be placed anywhere on that page.

(ii) If a page contains a mix of Certified Biobased Products and non-certified Biobased Products, the USDA Certified Biobased Product Label will be placed in close proximity to the Certified Biobased Products. An individual USDA Certified Biobased Product Label near each Certified Biobased Product may be necessary to avoid confusion.

(h) *Minimum size and clear space requirements for the USDA Certified Biobased Product Label.* (1) The USDA Certified Biobased Product Label may be sized to fit the individual application as long as the correct proportions are maintained, and all elements of the USDA Certified Biobased Product Label remain legible.

(2) The USDA Certified Biobased Product Label must be surrounded by a border of clear space that must be of sufficient width to offset it from surrounding images and text to avoid confusion. If a one-color outline version of the USDA Certified Biobased Product

Label is used, the USDA Certified Biobased Product Label must appear on a solid background that is a contrasting color.

(i) *Where to obtain copies of the promotional certification materials.* The USDA Certified Biobased Product Label and other associated promotional materials including the USDA BioPreferred Program Brand and Marketing Guidelines are available at the BioPreferred Program website (*https://www.biopreferred.gov*).

(ii) [Reserved]

§ 4270.12 Violations of program requirements.

This section identifies the types of actions that USDA considers violations under this part and the penalties (*e.g.,* the suspension or revocation of certification) associated with such violations.

(a) *General.* Violations under this section occur on a per product basis and the penalties are to be applied on a per product basis. Entities cited for a violation under this section may appeal using the provisions in § 4270.13. If certification for a product is revoked, the Participating Organization whose certification has been revoked may seek re-certification for the product specified under the provisions in § 4270.9.

(b) *Types of violations.* Actions that will be considered violations of this part include, but are not limited to, the examples as described in paragraphs (b)(1) through (4) of this section:

(1) *Biobased Content violations.* USDA reserves the right to request occasional testing of Certified Biobased Products without notice to compare the Biobased Content of the tested product with the product's Applicable Minimum Biobased Content and the Biobased content reported in its Certified Application. Such testing will be conducted using ASTM Method D6866 in accordance with the procedures discussed in § 4270.7.

(i) If the testing shows that the Biobased Content of a Certified Biobased Product is less than its Applicable Minimum Biobased Content, then a violation of this part will have occurred.

(ii) If the testing shows that the Biobased Content is less than that reported in the product's Certified Application but is still equal to or greater than its Applicable Minimum Biobased Content(s), USDA will provide written notification to the Participating Organization. The participant must submit, within 90 Days from receipt of USDA written notification, a new application for the lower Biobased Content. Failure to submit a new application within 90 Days will be considered a violation of this part.

(A) The participant can submit a new application to use the Biobased Content reported to it by USDA in the written notification.

(B) Alternatively, the participant may submit a new application and elect to retest the product in question. If the participant elects to retest the product, it must test a sample of the current product, and the procedures in § 4270.9 must be followed. USDA reserves the right to select the sample that will be submitted for retesting.

(2) *USDA Certified Biobased Product Label violations.* (i) Any usage or display of the USDA Certified Biobased Product Label that does not conform to the requirements specified in § 4270.10.

(ii) Affixing the USDA Certified Biobased Product Label to any product prior to issuance of a notice of certification from USDA.

(iii) Affixing the USDA Certified Biobased Product Label to a Certified Biobased Product during periods when certification has been suspended or revoked.

(iv) Using an image or icon other than the official USDA Certified Biobased Product Label in association with certification claims.

(3) *Application violations.* Knowingly providing false or misleading information in any application for certification of a Biobased Product.

(4) *BioPreferred Program website violations.* Failure to provide USDA with updated information when the information for a Certified Biobased Product becomes outdated or when new information for a Certified Biobased Product becomes available.

(c) *Noncompliance and escalation of actions.* Any identified violations as described in paragraphs (b)(1) through (4) are considered noncompliance with this part. USDA will respond to noncompliance though actions that include, but are not limited to, the examples as described in paragraphs (c)(1) through (4).

(1) *Noncompliance.* USDA will provide the applicable Participating Organization and any Other Entity involved, as known to USDA, written notification of any noncompliance identified by USDA, as well as actions that should be taken to resolve the noncompliance. USDA may remove the product or company information from the BioPreferred Program website (*https://www.biopreferred.gov*) until the noncompliance is corrected. If satisfactory resolution of the noncompliance is not reached, USDA will consider the noncompliance to be a violation of this part and may pursue further action as discussed in paragraphs (c)(2) through (4) of this section.

(2) *Violation.* USDA will first issue a notice of violation. Entities who receive a notice of violation for any violation must correct the violation(s) within 30 Days from receipt of the notice of violation. If the entity receiving a notice of violation is a Participating Organization, USDA will also issue notices of suspensions and revocations, as discussed in paragraph (c)(3) of this section. USDA reserves the right to further pursue action against these entities as provided in paragraph (c)(4) of this section. If the entity receiving a notice of violation is an Other Entity (*i.e.,* not a Participating Organization), then USDA may pursue action according to paragraph (c)(4) of this section.

(3) *Suspension and revocation.* (i) If a violation is applicable to a Participating Organization and the participant fails to make the required corrections within 30 Days of receipt of a notice of violation, USDA will notify the participant, via email and certified mail as appropriate, of the continuing violation, and the certification for that product will be suspended. As of the date that the participant receives a notice of suspension, the participant and their Designated Representatives must not affix the USDA Certified Biobased Product Label to any of that product or associated packaging not already labeled and must not distribute any additional products bearing the USDA Certified Biobased Product Label. USDA will both remove the product information from the BioPreferred Program website (*https://www.biopreferred.gov*) and actively communicate the product suspension to buyers in a timely and overt manner.

(ii) If, within 30 Days from receipt of the notice of suspension, the participant whose USDA product certification has been suspended makes the required corrections and notifies the USDA that the corrections have been made, the participant and their Designated Representatives may, upon receipt of USDA approval of the corrections, resume use of the USDA Certified Biobased Product Label. USDA will also restore the product information to the BioPreferred Program website (*https://www.biopreferred.gov*).

(iii) If, following the 30-Day period, the participant does not make the required corrections, the certification for that product will be revoked. As of that date, the participant must not affix the USDA Certified Biobased Product Label to any of that product not already labeled. In addition, the participant and

their Designated Representatives are prohibited from further sales of the product to which the USDA Certified Biobased Product Label is affixed, and the product will no longer be listed on the BioPreferred Program website (*https://www.biopreferred.gov*) as a product qualified for preferred Federal procurement.

(iv) If a participant whose product certification has been revoked wishes to participate in the BioPreferred Program again, the participant must follow the procedures required for the original certification specified in § 4270.9.

(4) *Other remedies.* In addition to the suspension or revocation of the product certification, depending on the nature of the violation, USDA may pursue suspension or debarment of the entities involved in accordance with 2 CFR part 417 and 48 CFR subpart 9.4. USDA further reserves the right to pursue any other remedies available by law, including any civil or criminal remedies, against any entity that violates the provisions of this part.

§ 4270.13 Appeal process.

Participating Organizations whose product certification has been revoked may appeal to USDA.

(a) *Filing an appeal.* (1) Appeals to the Agency must be filed within 30 Days of receipt by the appellant of a notice of suspension and revocation. Appeals must be filed in writing via email to the BioPreferred Program's email address as noted on the BioPreferred Program website (*https://www.biopreferred.gov*).

(2) All appeals must include a copy of the adverse decision and a statement of the appellant's reasons for believing that the decision was not made in accordance with the applicable Program regulations, policies, or procedures, or otherwise was not proper.

(b) *Reviewing appeals.* (1) If USDA sustains a Participating Organization's appeal of a notice of suspension and revocation, the participant and its Designated Representative(s) may immediately resume affixing the USDA Certified Biobased Product Label to the Certified Biobased Product and sell and distribute the Certified Biobased Product with the USDA Certified Biobased Product Label. In addition, USDA will reinstate the product's information to the BioPreferred Program website (*https://www.biopreferred.gov*).

(2) If USDA denies a participant's appeal of a notice of suspension and revocation, then the notice of suspension and revocation stands.

(c) *Appeals of decisions made on appeals.* Appeals of any of the BioPreferred Program's decisions may be made to the Rural Business Cooperative Service Administrator. Appeals must be made, in writing, within 30 Days of receipt of USDA's decision and addressed to: Rural Business Cooperative Service Administrator, 1400 Independence Avenue SW, Washington, DC 20250–1522 STOP 3250. If the Rural Business Cooperative Service Administrator sustains an appeal, the provisions of paragraph (b) of this section will apply.

§ 4270.14 Reporting and recordkeeping.

(a) *Providing product information to Federal agencies*—(1) *Informational website.* An informational USDA website implementing section 9002 of FSRIA can be found at: *https://www.biopreferred.gov*. USDA will maintain a web-based information site for participating originations with Certified Biobased Products and Federal agencies to exchange information, as described in paragraphs (a)(1)(i) through (iv) of this section as applicable.

(i) *Product information.* The website will, as determined to be necessary by the Secretary based on the availability of data, provide the information specified in § 4270.9. USDA encourages Federal agencies to utilize this website to obtain current information on designated categories, contact information for Participating Organizations, and access to information on product characteristics relevant to procurement decisions. In addition to any information provided on the website, participants are expected to provide relevant information to Federal agencies, subject to the limitations specified in paragraph (a)(1)(ii) of this section, with respect to product characteristics, including verification of such characteristics if requested.

(ii) *Providing information on price and environmental and health benefits.* Federal agencies may not require Participating Organizations with Certified Biobased Products to provide procuring agencies with more data than would be required of other manufacturers or vendors offering products for sale to a Procuring Agency (aside from data confirming the Biobased Contents of the products) as a condition of the purchase of Biobased Products from the participant. USDA encourages industry Stakeholders to provide information on environmental and public health benefits based on industry accepted analytical approaches including, but not limited to, material carbon footprint analysis, the International Standards Organization (ISO) 14040, the ASTM International life-cycle cost method (E917) and multi-attribute decision analysis (E1765), and the British Standard Institution PAS 2050. USDA will make such Stakeholder-supplied information available on the BioPreferred Program website (*https://www.biopreferred.gov*).

(iii) *Industry standards test information.* The product information will include any relevant industry standard test information as supplied by the participant. In assessing performance of a Certified Biobased Product, USDA requires that procuring agencies rely on results of performance tests using applicable ASTM, ISO, Federal or military specifications, or other similarly authoritative industry test standards. Such testing may be conducted by a laboratory compliant with the requirements of the standards body. The procuring official will decide whether performance data must be brand-name specific in the case of products that are essentially of the same formulation.

(iv) *Biodegradability information.* If Biodegradability is claimed by a participant with a Certified Biobased Product as a characteristic of that product, USDA requires that, if requested by procuring agencies, these claims be verified using the appropriate, product-specific ASTM Biodegradability standard(s). Such testing must be conducted by an ASTM/ISO-compliant laboratory. The procuring official will decide whether Biodegradability data must be brand-name specific in the case of products that are essentially of the same formulation. ASTM Biodegradability standards include:

(A) D5338 (Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials Under Controlled Composting Conditions);

(B) D5864 (Standard Test Method for Determining the Aerobic Aquatic Biodegradation of Lubricants or Their Components);

(C) D5988 (Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials in Soil);

(D) D6006 (Standard Guide for Assessing Biodegradability of Hydraulic Fluids);

(E) D6400 (Standard Specification for Compostable Plastics) and the standards cited therein;

(F) D6139 (Standard Test Method for Determining the Aerobic Aquatic Biodegradation of Lubricants of Their Components Using the Gledhill Shake Flask);

(G) D6868 (Standard Specification for Biodegradable Plastics Used as Coatings on Paper and Other Compostable Substrates); and

(H) D7081 (Standard Specification for Non-Floating Biodegradable Plastics in the Marine Environment).

(2) *Advertising, labeling, and marketing claims.* Participating Organizations are reminded that their advertising, labeling, and other marketing claims, including claims regarding health and environmental benefits of the product, must conform to the 16 CFR part 260 (Federal Trade Commission Guides for the Use of Environmental Marketing Claims). For further requirements on marketing claims associated with the BioPreferred Program, refer to the ''USDA BioPreferred Program Brand and Marketing Guidelines'' found on the BioPreferred Program website (*https://www.biopreferred.gov*).

(b) *Records.* Participating Organizations will maintain records documenting compliance with this part for each product that has received a notice of certification, as specified in paragraphs (b)(1) through (3) of this section.

(1) The results of all tests, and any associated calculations, performed to determine the Biobased Content of the product.

(2) The notice of certification from USDA, the dates of changes in formulation that affect the Biobased Content of Certified Biobased Products, and the dates when the Biobased Content of Certified Biobased Products were tested.

(3) Documentation of analyses performed by participants to support claims of environmental or human health benefits, life cycle cost, sustainability benefits, and product performance made by the participant.

(c) *Record retention.* For each Certified Biobased Product, records kept under paragraphs (a) and (b) of this section must be maintained for at least three years beyond the end of the certification period (*i.e.,* three years beyond the date the product's term of certification expires). Records may be kept in either electronic format or hard copy format. All records kept in electronic format must be readily accessible and/or provided by request.

§ 4270.15 Oversight and monitoring.

(a) *General.* USDA will conduct oversight and monitoring of Participating Organizations, Designated Representatives, and Other Entities involved with the BioPreferred Program to ensure compliance with this part. This oversight may include, but not be limited to, conducting facility visits to Participating Organizations that have Certified Biobased Products and their Designated Representatives. Participating Organizations are required to cooperate fully with all USDA audit efforts for the enforcement of the BioPreferred Program requirements.

(b) *Biobased Content Testing.* USDA will conduct Biobased Content Testing of Certified Biobased Products as described in § 4270.12(b)(1) to ensure compliance with this part.

(c) *Inspection of records.* Participating Organizations must allow Federal representatives access to the records required under § 4270.14 for inspection and copying during normal business hours.

(d) *Audits.* USDA will conduct an annual desk audit on an ongoing basis to verify that the product and company information supplied by Participating Organizations remain valid. Through the BioPreferred Program website (*https://www.biopreferred.gov*), Participating Organizations will be asked to confirm that they still manufacture the product, that the formulation remains the same, and that the information described under § 4270.9(a)(1) remains valid. Participants may also be asked for additional supplemental information.

(1) If a Participating Organization indicates that their product or company information needs to be updated during an annual desk audit, these updates will be incorporated into the BioPreferred Program website (*https://www.biopreferred.gov*). If it is indicated that a product is no longer manufactured, the product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*).

(2) If a Participating Organization fails to complete an annual desk audit, the participant will be considered to be in noncompliance with this part, and the Participating Organization and associated product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*). USDA reserves the right to revoke product certification for failure to participate in an audit.

§§ 4270.16—4270.98 [Reserved]

§ 4270.99 OMB control number.

The information collection requirements in this part are approved by the Office of Management and Budget (OMB) and assigned OMB control number 0570–NEW.

Xochitl Torres Small,

Deputy Secretary, United States Department of Agriculture.

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